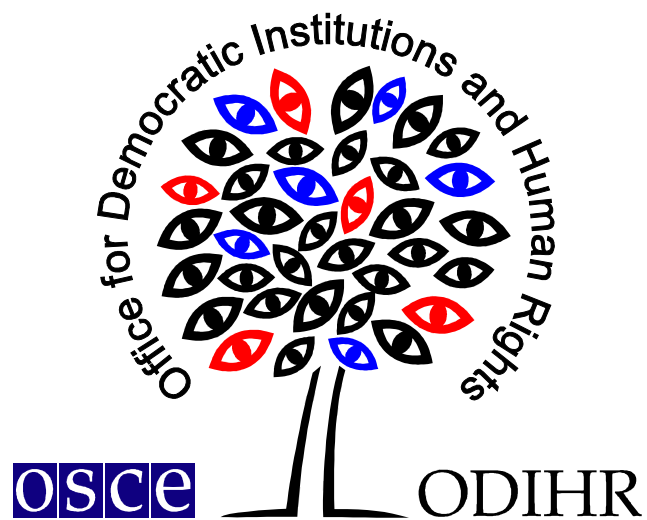


OSCE
Office for Democratic Institutions and Human Rights

Report
Human Rights Situation of Detainees at Guantánamo



Warsaw
2015

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LIST OF ABBREVIATIONS AND ACRONYMS

ACHR	American Convention on Human Rights
ADDRDM	American Declaration of the Rights and Duties of Man
APA	American Psychological Association
API	Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts
APII	Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts
ARB	Administrative Review Board
ATS	Alien Tort Statute
AUMF	Authorization for Use of Military Force
BSCT	Behavioural Science Consultants
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCTV	Closed-Circuit Television
CIA	Central Intelligence Agency
CIPA	Classified Information Procedures Act
CMCR	Court of Military Commission Review
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act
DoD	Department of Defense
ECtHR	European Court of Human Rights
FCA	Foreign Claims Act
FTCA	Federal Tort Claims Act
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IRF	Initial Reaction Forces
JTF-GTMO	Joint Task Force Guantánamo
MCA	Military Commissions Act
MCRE	Military Commission Rules of Evidence
MEJA	Military Extraterritorial Jurisdiction Act
MON	Memorandum of Notification
NATO	North Atlantic Treaty Organization
NDAA	National Defense Authorization Act
NGO	Non-Governmental Organization

ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PRB	Periodic Review Board
RDI	Rendition, Detention and Interrogation
RFRA	Religious Freedom Restoration Act
RMC	Rules for Military Commissions
RTMC	Regulation for Trial by Military Commission
SERE	Survival, Evasion, Resistance and Escape
SOUTHCOM	United States Southern Command
TVPA	Torture Victim Protection Act
UCMJ	Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN CAT	United Nations Committee against Torture
UN HRC	United Nations Human Rights Committee

EXECUTIVE SUMMARY

1. This report presents the findings of the comprehensive human rights assessment of the situation of detainees at the Guantánamo Bay detention facility, conducted by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) from 2012 to 2015. This assessment was carried out in line with ODIHR's mandate to support the OSCE participating States in developing and implementing human rights-compliant measures to prevent and counter terrorism and to monitor the implementation of their human dimension commitments.
2. The human rights assessment carried out by ODIHR consisted of in-depth research, two fact-finding missions to the United States in February and September 2014, and a series of interviews with a broad range of stakeholders. In September 2014, ODIHR held eight interviews with relevant US officials from the Departments of State, Defense and Justice and the Presidential Administration, including senior officials involved in the proceedings before the military commissions. ODIHR also met with 14 representatives of non-governmental organizations, 25 military and civilian lawyers representing Guantánamo detainees in past and current cases before the military commissions, *habeas corpus* proceedings or before the Periodic Review Board (PRB), five former detainees as well as medical and legal experts working on Guantánamo.
3. ODIHR appreciates the constructive and result-oriented co-operation with all US officials involved throughout the whole process of producing this report. However, ODIHR's experts had not been granted private meetings with detainees currently held at Guantánamo. As an alternative method of obtaining the views of current detainees, the Office submitted written questions to several of them. ODIHR received one response included in this report, the contents of which, apart from the heading, had been entirely redacted by the authorities before being shared with ODIHR.
4. The report analyses the compliance with international human rights standards of the detention, conditions of confinement and treatment of detainees at Guantánamo (Part 1) and the proceedings before the military commissions (Part 2). It also explores the challenges related to the closure of the detention facility, accountability for alleged human rights violations both at Guantánamo and in the Central Intelligence Agency (CIA) Rendition, Detention and Interrogation (RDI) programme as well as the right to redress in cases of victims of arbitrary detention, torture and/or ill-treatment, addressing in that respect the human rights obligations of not only the United States but also other concerned OSCE participating States (Part 3). The report covers relevant developments up until 31 August 2015.
5. The analysis and recommendations formulated in this report rely on relevant OSCE commitments, international human rights law and standards and, as applicable, international humanitarian law. It focuses primarily on international treaties that have either been signed or ratified by the United States as well as on customary international law. It also refers to soft law principles and opinions of authoritative bodies providing guidance on the interpretation of international law. Domestic standards are also mentioned

to the extent that they are relevant to the situation of detainees at Guantánamo and the proceedings before the military commissions.

6. The announcement made by the White House in July 2015 that the Obama administration is in the final stages of drafting a plan to safely and responsibly close the detention facility at Guantánamo Bay is a welcome commitment, which now needs to materialize. In a positive step, underlining the willingness of the Obama administration to actually close down the facility, the US government has accelerated the pace of transfers to third countries, with 23 transfers in 2014 and 11 between January and 31 August 2015.

BACKGROUND AND APPLICABLE STANDARDS

7. The United States has abandoned the Bush administration's concept of the "war on terror" and now considers itself in an armed conflict without geographical boundaries against al Qaeda, the Taliban and associated forces (hereinafter, "the global war against terrorism"). The United States also views international humanitarian law as the controlling body of law with regard to the conduct of hostilities and the protection of war victims. Determined by the United States to be "unlawful enemy combatants" or "unprivileged enemy belligerents", the Guantánamo detainees were initially not entitled to protections under international humanitarian law. Since then, the United States has recognized that Common Article 3 of the Geneva Conventions of 12 August 1949 (Common Article 3) governs the treatment, including the conditions of detention and interrogation of individuals held at Guantánamo. It has also announced its support to the principles set forth in Article 75 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (API). The United States considers that the International Covenant on Civil and Political Rights (ICCPR) does not apply extraterritorially.
8. ODIHR is of the view that the "global war against terrorism", as such, does not constitute an armed conflict for the purpose of the applicability of international humanitarian law. International and non-international armed conflicts are the two categories of armed conflict recognized under international humanitarian law. The situation in Afghanistan from 7 October 2001 to June 2002 warrant characterization as an international armed conflict whereas after this date, the armed conflict that continued was non-international in nature, despite the involvement of international armed forces.
9. In the context of an armed conflict, international humanitarian law and international human rights law "are complementary, not mutually exclusive", and states have a duty to apply both bodies of law to achieve the greatest possible protection. International human rights law does not cease to apply in armed conflicts, except in cases of derogations which are to be exceptional, temporary and non-discriminatory, as spelled out, for instance, in the ICCPR. A *lex specialis* construction (whereby international humanitarian law applies at the exclusion of international human rights law) may only be resorted to where there is an irreconcilable conflict between these two bodies of law. Additionally, international human rights law has defined certain rights considered as non-derogable, such as the prohibition of torture, cruel, inhuman or degrading treatment or punishment, among others.

10. Both the International Court of Justice (ICJ) and the UN Human Rights Committee have clarified that international human rights obligations contained in the ICCPR do apply to anyone who is under the power or effective control of a State party, even if situated outside its territory. This applies to the situation at Guantánamo and the United States has therefore the same obligations to respect, protect and fulfil human rights in Guantánamo as in its own territory. In addition, United States did not notify any derogation from the ICCPR. Similarly, the United States' obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) apply to any territory under its jurisdiction.
11. The Guantánamo detainees captured in the context of the international armed conflict in Afghanistan were therefore entitled, until the end of the conflict, to protections under both international human rights law and international humanitarian law. International human rights standards alone should govern the arrest and detention of the many Guantánamo detainees apprehended outside and/or unconnected to any armed conflict.
12. ODIHR has not sought to carry out an individual analysis of the status of the detainees. The US concepts of “unlawful enemy combatant” and “unprivileged enemy belligerent” appear to encompass individuals that never directly participated in hostilities. ODIHR underlines that such concepts do not create a separate status that justifies placing the Guantánamo detainees outside the protections of international humanitarian law. Both combatants and civilians are entitled to the protections provided for in the Geneva Conventions. With regard to the rights, status and protections of detainees, the definition of civilian includes all detainees who do not fall within the definition of combatant (applicable to international armed conflict only and under strict criteria under international humanitarian law) as well as detainees who were not arrested in the context of an armed conflict. The “global war against terrorism” is not capable of conferring the status of combatant on persons detained for conduct outside of an armed conflict. Therefore, detainees at Guantánamo, including those charged before the military commissions, do include civilians.

HUMAN RIGHTS ISSUES IN THE DETENTION OF INDIVIDUALS AT GUANTÁNAMO

Prohibition of arbitrary detention

13. **Detention at Guantánamo.** While the United States likely had authority to detain some of the Guantánamo detainees based on their direct participation in hostilities, a significant proportion of the detainees were apprehended outside any armed conflict involving the United States at the time of their arrest. The prohibition of arbitrary arrest and detention as guaranteed under international human rights law should have unquestionably and fully applied to these individuals throughout their detention. Acts of terrorism committed outside an armed conflict are to be treated as criminal, requiring law enforcement responses in line with international human rights standards and OSCE commitments.
14. The detention of individuals directly involved and apprehended in the context of the international armed conflict in Afghanistan (7 October 2001-19 June 2002) was to be

governed by the Third and Fourth Geneva Conventions, customary international law, including Article 75 of API and international human rights law, from the date of apprehension to the end of the international armed conflict. For those apprehended in connection with the subsequent non-international armed conflict in Afghanistan, detention is regulated by Common Article 3, customary international law, international human rights law, domestic law and other relevant bodies of law.

15. Detainees captured in connection with the international conflict in Afghanistan should have been charged or released once the active hostilities in that conflict ceased. To date, only 30 Guantánamo detainees have been charged, and the charges against 15 of them were dropped without prejudice. Hundreds of detainees held in Guantánamo were apprehended after the end of that conflict in June 2002. Of the 116 persons still held at Guantánamo, only 26 were captured in Afghanistan before this date. Reports also indicate that over 90 per cent of all detainees were not captured by US or coalition forces but in exchange of bounties, thus raising numerous questions about the basis for their capture and subsequent detention.
16. The continued detention of all individuals apprehended prior to July 2002 amounts to more than 13 years of detention following the end of the international armed conflict in Afghanistan. This delay of 13 years after the end of the conflict is “unjustifiable” and the continued detention without charge of individuals arrested in this international armed conflict violates the prohibition of arbitrary detention.
17. **Reasons for detention.** Based on credible reports and interviews with former detainees, it appears that the United States may have violated international standards by detaining individuals for the sole purpose of gathering intelligence and by failing to inform detainees about the reasons for their detention.
18. **Continued and indefinite detention at Guantánamo.** Thirty detainees are currently recommended for “continued detention under the Authorization for Use of Military Force”. Moreover, 54 out of 116 individuals detained at Guantánamo as of 31 August 2015 have been cleared for transfer or release. The majority of them have been cleared for transfer or release for over five years. In other words, US authorities determined that these individuals no longer pose a threat to US national security that cannot be mitigated, yet they remain in indefinite detention, uncertain as to whether they will ever be released. Indefinite detention is a *per se* violation of the CAT, even more so when it adversely impacted the health of the detainees.
19. **Judicial review of lawfulness of detention.** From 2002 to 2008, the United States did not provide the Guantánamo detainees with an effective access to an independent court to challenge the legality of their detention, in contravention of international human rights law. While administrative reviews of the lawfulness of the detention have existed, they have not offered the necessary guarantees of independence and impartiality required in the context of armed conflicts, thus placing the United States in violation with international humanitarian law. In 2008, the US Supreme Court ruled in *Boumediene v. Bush* that Guantánamo detainees had a constitutional right to writs of *habeas corpus*. In recent years,

questions have however been raised as to whether this right can be effectively exercised, considering the low standard of proof for the government, the deference given by US districts courts to the US government's reasons for detention, the judges' reluctance to order the release of individuals viewed as associated with terrorism and the classification of information.

20. Delays encountered in *habeas corpus* cases, including of more than two years, are in violation with the prohibition of arbitrary detention under international law which stipulates that such challenges must be determined without delay, usually within several weeks.
21. Contrary to international standards, US courts have not ordered the immediate release of detainees following successful *habeas corpus* petitions. Though some delays in transferring detainees out of Guantánamo following a judicial finding of unlawful detention may occur due to the complexities of such transfers, continued detention following such ruling, particularly in excess of several months, violates international standards on the prohibition of arbitrary detention.
22. Until the Supreme Court decision in *Rasul v. Bush* in 2004, Guantánamo detainees were denied access to counsel for up to two years of their detention whereas international human rights standards provides for "prompt and regular access" to counsel. When detainees were arrested outside of any armed conflict or after the end of the international armed conflict in Afghanistan, a delay of several months to two years before receiving any legal assistance violates the ICCPR.
23. While detainees now have the right to counsel as a matter of law, logistical constraints and policies of the Joint Task Force Guantánamo continue to hinder, even sometimes to prevent, regular access to lawyers. In particular, the full-body search applied to detainees, including for meetings and phone calls with attorneys, appears excessively invasive and has resulted in some cases in denial of access to counsel. Under international human rights law, restrictions to access to counsel should be exceptional, temporary, decided on a case-by-case basis, justified and necessary for security and safety reasons, and should not result in the full denial of the right of access to counsel.

Conditions of, and Treatment in, Detention

24. **The prohibition of torture and cruel, inhuman or degrading treatment or punishment** is absolute and non-derogable. No exceptional circumstances whatsoever, including threats of terrorist acts or armed conflict, may justify acts of torture. The torture prohibition is part of customary international law and a peremptory norm of international law. The prohibition of torture and ill-treatment is also guaranteed under international humanitarian law and is a norm of customary international humanitarian law.
25. The definition of torture under US legislation is narrower than the definition provided in the CAT and may therefore allow for conduct otherwise prohibited under international law. The United States has a different understanding of the intent element and the concept of

“acquiescence” than the Committee against Torture, thus narrowing the scope of the domestic prohibition of torture. Additionally, US law may not cover degrading treatment or punishment to the same extent as the CAT.

26. The Bush administration interpreted provisions against torture and ill-treatment in ways that defied and greatly weakened the prohibition of torture, drastically restricting the range of acts that would constitute torture as per the international definition. It appears that the Bush Administration interpreted international standards on torture in a way that aimed at institutionalizing a system effectively authorizing and perpetuating torture in violation of international law.
27. The Obama administration undertook a number of positive steps, stressing the US commitment to Common Article 3 as a minimum baseline for treatment in detention, including detention conditions and the interrogation of detainees arrested in the context of any armed conflict. It has also reaffirmed the prohibition of torture and cruel, inhuman or degrading treatment or punishment of individuals detained in one of the facilities it operates, controls or owns, and asserted that the prohibition applies to all areas that it “controls as a governmental authority” outside of its territory, such as Guantánamo. However, while explicitly prohibiting abusive techniques, the revised Army Field Manual, which serves as guidance for interrogations, may still result in some practices amounting to torture or cruel, inhuman or degrading treatment or punishment. ODIHR also encourages the United States to clearly acknowledge that the torture and ill-treatment prohibition applies to all areas over which it exercises “effective control”, including detention facilities abroad.
28. **Detention and interrogation practices at Guantánamo.** A wide variety of sources, including leaked ICRC reports and official reports have pointed to numerous instances of abuse at Guantánamo under the Bush administration. Interviews with former Guantánamo detainees have provided ODIHR with further information on the severity of abuses inflicted upon them during their detention and interrogations. Practices were reportedly designed to break detainees’ will, cause stress and make them co-operate with and wholly dependent on their interrogators who had total control over their level of isolation, access to comfort items and basic needs such as access to food, drinkable water, sunlight or fresh air. The lack of co-operation with interrogators and non-compliance with constantly-changing prison rules were punished, including by the removal of basic items and prolonged isolation. Documented cases corroborated by ODIHR interviews of former detainees indicate the routine use of excessive force against detainees by the Initial Reaction Forces and during the force-feeding of hunger strikers.
29. These practices contravened the prohibition of torture as defined under international law. They appear to have been inflicted intentionally by government officials in order to extract a confession, obtain information or punish detainees. They have been a source of severe pain or suffering as reported by detainees, leading to the deterioration of their mental health and to physical injuries, including with long-term consequences in some cases.

30. Restrictive and punitive conditions of detention included, for instance, depriving detainees of access to their basic rights and needs over a prolonged period of time. These practices, combined with the use of prolonged solitary confinement, reportedly caused severe psychological or physical pain or suffering to the detainees, and amounted to cruel or inhuman treatment.
31. While the commitment of the Obama administration to respect the prohibition of torture and ill-treatment is welcome, concurring testimonies and reports point to a deterioration of the conditions of confinement in 2011 and even further in 2013 following a mass hunger strike, thus calling into serious question the US statement on the compliance of such conditions with Common Article 3.
32. Physical isolation remains the norm for a number of detainees kept in segregated cells with access to two to four hours of recreation per day, alone or with one other detainee. At a minimum, all detainees who spend 22 hours a day in segregated cells are undoubtedly held in solitary confinement. While US officials maintain that single-cell confinement does not amount to solitary confinement, these conditions of detention cannot be considered as allowing meaningful contact with other detainees.
33. Solitary confinement can lead to severe impact on detainees' health and its effect can be even more pronounced in cases of individuals suffering mental distress from past abuses. Solitary confinement has to remain exceptional and can amount to torture or ill-treatment, depending on the circumstances of a particular case. To ODIHR's knowledge, solitary confinement at Guantánamo has been used, among others, to gather intelligence or punish detainees. When used to extract information or a confession, or when it is imposed as punishment for breaching prison rules and leads to severe pain or suffering, solitary confinement violates the prohibition of torture and ill-treatment. Moreover, ODIHR considers that solitary confinement combined with the prospect of indefinite detention is even more likely to amount to torture or ill-treatment.
34. **Hunger strikes and force feeding at Guantánamo.** The reportedly substantial deterioration of confinement conditions during hunger strikes, including the most recent mass hunger strike of 2013 seems to constitute a system of punishment or reward implemented to break the hunger strike and discourage detainees from continuing to protest. Should gathered information be true, such practices would be unjustifiable and would violate a number of international human rights standards, including prison standards and the right of detainees to peacefully protest. It may also violate the prohibition of torture or ill-treatment.
35. The decision of the administration to force-feed detainees is of particular concern. Force-feeding mentally competent hunger strikers who voluntarily take part in a hunger strike and refuse treatment contradicts rules of ethics and the right to health, *inter alia*, irrespective of the danger caused to their life or health. It should never be used to pressure detainees to put an end to their protest, and other avenues should be explored, such as discussing detainees' grievances in good faith. In the Guantánamo context, force-feeding mentally competent detainees on hunger strike amounts to ill-treatment.

36. Several sources indicate that the force-feeding process may inflict gratuitous pain and suffering on hunger strikers. Should these allegations be accurate, the force-feeding process in itself would amount to cruel and inhuman treatment and potentially to torture. For this reason, it is crucial for the US government to be more transparent on the force-feeding process.
37. **Involvement of medical staff in the treatment of detainees.** Medical staff has contributed to the development and use of the CIA enhanced interrogation techniques under the RDI programme and in abusive interrogation methods at Guantánamo. They have allegedly also provided advice on detention conditions that would foster the detainees' dependence on their interrogators, participated or have been present in interrogations at Guantánamo, among others. Such practices contradict standards forbidding medical personnel from taking part in torture, directly or indirectly.
38. **Involvement of other OSCE participating States in acts of torture and ill-treatment.** If the allegations formulated by various and concurring sources prove to be true, the participation or mere presence of interrogators, sent from several OSCE participating States to Guantánamo, when they "knew or ought to have known" that the detainees under interrogations faced a real risk of torture, ill-treatment or arbitrary detention, could be understood as condoning such practices and would violate international law.
39. **Freedom of religion or belief.** Reported past and present violations of the right to freedom of religion or belief are of concern. This right is protected under the ICCPR and relevant OSCE commitments and is a norm of customary international humanitarian law. Such violations have included cases of desecration of religious items, the use of discriminatory detention and interrogation techniques intended to offend detainees' religious sensitivities, and the explicit or implicit association of Islam and terrorism by US authorities. Although the United States has taken positive measures to allow for the free exercise of detainees' religion "consistent with the requirements of detention", individuals held at Guantánamo continue to face hindrances to pray communally, in particular when held in segregated cells and/or when participating in hunger strikes. High-value detainees' access to religious materials and a Muslim chaplain has been allegedly restricted without further explanation. International standards on freedom of religion or belief provide for the absolute nature of the right to have or adopt a religion or belief of one's choice, and foresee potential limitations to the right to manifest such religion or belief, but under strict conditions only. National security does not constitute a legitimate ground for restrictions.
40. **Right to health and obligation to secure medical attention.** OSCE commitments and international human rights and humanitarian law require states to provide detainees with healthy living conditions and quality medical care, including treatment as needed. Medical examinations should be guided by the principles of clinical independence, medical ethics, autonomy of patients and informed consent. Medical care should not be conditioned on detainees' compliance or co-operation with prison authorities and interrogators. Medical personnel have a duty to document and report signs of abuse or neglect as well as to report when the conditions of detention affect the physical and mental health of detainees.

41. Medical care, in particular prior to 2008, has been described as not only “inadequate and negligent, but also abusive”. Reported past practices included, for instance, long delays or denial of medical treatment, inadequate care, treatment conditioned on detainees’ cooperation with interrogators, humiliating treatment, forced drugging, forced medication for mental illness, prolonged solitary confinement in punitive conditions of detainees with mental health issues, force-feeding of hunger strikers, among others. Such practices run contrary to the right of detainees to receive adequate medical care. Additionally, subjecting detainees with mental health issues to prolonged solitary confinement in punitive conditions would not only amount to a violation of this right but could also constitute ill-treatment.
42. Other concerns included deficient mechanisms for medical personnel to report abuse and their failure to do so, in contravention of international standards on effective investigation and documentation of torture and other forms of ill-treatment.
43. Medical care has improved over the years and for certain medical conditions, it has been presented to ODIHR as equivalent as or higher than in other detention facilities in the United States.
44. Adequate medical care may not be provided to military commission defendants. In addition, the limited access of attorneys and defendants to their (said to be incomplete) medical records, including documentation of acts of torture and ill-treatment, may have an impact on the outcome of their case. This would contravene international standards providing for detainees’ right to access their medical records.
45. The legislative ban on detainee transfer to the United States may prevent the aging Guantánamo population, presenting increasingly complex medical problems, from receiving timely and appropriate healthcare, especially in emergency situations. The possibility of treating detainees in the Naval Base Hospital may not present a quality alternative to ensure adequate care of detainees as it lacks certain specialty medical capabilities.

CIA Rendition, Detention and Interrogation Programme

46. Under its RDI programme, the CIA secretly captured, detained and interrogated individuals in secret locations (including reportedly at Guantánamo) and transferred individuals to third countries to be secretly detained and interrogated on behalf of the United States. The report focuses primarily on the situation of those detainees who were subsequently transferred to Guantánamo under military custody, and, to a certain extent, under CIA detention.
47. Reportedly going beyond its authority to detain individuals given in the executive Memorandum of Notification (MON) of 2001, the CIA allowed the detention of not only “high-value targets” who “pose a continuing threat of violence” or who were “planning terrorist activities” but also individuals who could provide information on the high-value targets. The CIA detained at least 119 individuals as part of this programme, at least 26 of

them did not meet the MON standard for detention. “High-value detainees” were held in incommunicado detention under the RDI programme from periods of 16 months up to almost four and half years, placed in solitary confinement, outside any judicial control and the protections afforded under both international humanitarian and human rights law, including the right to challenge the lawfulness of their detention, to have access to a counsel or notify their relatives and to exercise other applicable rights. Accordingly, the CIA RDI programme violated both international humanitarian law and human rights law that prohibit the use of enforced disappearances and unacknowledged detention as well as arbitrary arrest and detention.

48. Detainees were also subjected to “varying degrees” of interrogation techniques (including techniques that had not yet been legally sanctioned or went beyond what was authorized) approved by the Bush administration. Most of those techniques, whether inflicted individually or in combination, undoubtedly amounted to torture or ill-treatment. While some of the techniques, taken individually, may not have reached the threshold of torture, their use in combination and over prolonged periods of time to create discomfort and to “break” the detainees has constituted ill-treatment or even torture. President Obama’s Executive Order to close any remaining CIA detention facility and prohibit any such detention facility in the future is a positive development, though it may still allow the CIA to detain individuals on short-term basis before transferring them to third countries for interrogation or trial.
49. **Involvement of other OSCE participating States in the CIA RDI programme.** Fifty-four countries, including 27 OSCE participating States, reportedly participated in various forms in the CIA RDI programme. They “knew or ought to have known” that the detainees faced a real risk of torture, ill-treatment or arbitrary detention when transferring individuals into US custody, at least from 2002-2003 when information on that programme became publicly available. Their responsibility as accomplice under international law is engaged in that regard.

HUMAN RIGHTS ISSUES IN THE PROSECUTION OF INDIVIDUALS BEFORE MILITARY COMMISSIONS

Jurisdiction of the Military Commissions

50. Some detainees have been charged with violations of the laws of war for conduct that likely occurred outside any armed conflict. Therefore, such detainees are civilians and could not be classified as either a combatant or even a civilian directly participating in hostilities.
51. The trials of civilians by the Guantánamo military commissions, including civilians who did not directly participate in hostilities, are neither “exceptional” nor “necessary and justified by objective and serious reasons”, as interpreted by international human rights bodies. On the contrary, US ordinary federal courts are and have been considered as appropriate venues to conduct trials for alleged violations of the law of war, able to protect classified information as well as the safety and security of all participants in trials. The

trials of civilians by the military commissions raise concerns regarding the equitable, impartial and independent administration of justice.

52. The military commissions' jurisdiction over several offences that are not recognized as or defined in accordance with existing law of war offences at the time of the conduct violates the principle of legality which is protected under both international human rights law and international humanitarian law. Furthermore, the plea agreements and convictions by the military commissions of seven detainees for providing material support for terrorism, an offence that was neither a violation of the laws of war recognized at the international level nor an established offence under domestic law, violate international standards on the prohibition of retroactive offences.
53. **Equality before the law and courts, equal protection of the law and non-discrimination.** The military commissions are a separate system of justice expressly designed to prosecute only certain non-citizens. No objective and reasonable criteria seem to justify that US citizens accused of terrorism-related offences are tried before ordinary courts whereas non-citizens are facing proceedings before the military commissions. While significantly improved, the current iteration of the military commissions continues to offer lower safeguards than ordinary courts. The legislative provision limiting military commission jurisdiction to non-US citizens and the differentiation in treatment appear to violate the prohibition of discrimination and the principle of equal protection of the law. Such principles are protected under international human rights law, and discrimination is prohibited as a norm of customary international humanitarian law applicable to both international and non-international armed conflicts.
54. The military commissions' jurisdiction is not expressly limited on the basis of gender or religion. However, in practice, only Muslim men have been prosecuted, thus giving rise to concern that the treatment of the defendants may be discriminatory.

Fair Trial Guarantees in Proceedings Before Military Commissions

55. **Right to a public hearing before an independent and impartial tribunal established by law.** Military commissions do not present sufficient guarantees of structural independence and of impartiality as required under the ICCPR, OSCE commitments and international humanitarian law. They remain an *ad hoc* system which has denied Guantánamo detainees the right to be tried by well-established legal procedures of ordinary federal courts or courts-martial. The broad powers of the Department of Defense Convening Authority, compounded by its proximity with the executive branch and its potential influence in the proceedings; the insecurity of tenure of judges who are selected directly or indirectly by the Convening Authority; the appointment of on active duty military officers as jurors, including potentially from the same chain of command, as well as prejudicial public statements by US high officials and elected politicians asserting the defendants' guilt cast doubts on the independence and impartiality of the military commissions, or appearance thereof. Recent rulings in the military commissions have alleviated some of these concerns.

56. The remote location of the courtroom presents a serious obstacle to the public character of the military commissions. The prohibition of the public to observe the proceedings from the actual courtroom, coupled with entirely closed sessions and a 40-second delay of the audio-feed of the proceedings are further serious constraints to the public nature of the proceedings. The broadcasting of the proceedings in various locations in the US, offered to a limited number of observers with the same 40-second delay, is a positive development but cannot, by itself, sufficiently meet the requirement of trials' publicity as defined under the ICCPR, OSCE commitments and international humanitarian law.
57. The 40-second delay of the audio-feed has in practice not always been necessary and strictly proportionate to protect national security. Such delay may in fact have been used to render the proceedings "presumptively closed" and withhold information on the alleged mistreatment of detainees from the public, thus giving rise to concern over violations of the right to a public trial.
58. **Presumption of innocence.** The presumption of innocence until proven guilty by a court is a fundamental element of fair trial standards and is protected under international human rights law, OSCE commitments and international humanitarian law. Several safeguards protect the presumption of innocence in the military commissions proceedings, such as the dismissal requirement for potentially biased jurors. However, the length of pre-trial detention and the status of alien "unprivileged enemy belligerent" conferred to detainees before the proceedings likely violate international standards on the right to be presumed innocent. Senior government officials' public statements inferring the defendants' guilt, including in favour of the imposition of the death penalty in some cases, also violate this right.
59. **Right to be tried without undue delay.** Notwithstanding the complexity of the cases before the military commissions, the right to be tried without undue delay has likely been violated in a number of cases, including the Al-Nashiri and Mohammad *et al.* cases. This right, as recognized under international human rights and humanitarian law and contained in OSCE commitments, applies from the first official charges until the final judgment on appeal. ODIHR is gravely concerned that the US government has intentionally deprived the Guantánamo detainees of this right by excluding the applicability of certain speedy trial rights to cases before the military commissions. The lack of longstanding established procedures and precedent of the military commissions and the hindrances to holding regular hearings due to the remote location of Guantánamo are examples of US government actions that have contributed to the slow path of the proceedings. ODIHR is not aware of particular conduct of the defendants that had led to significant delays. Moreover, lengthy detention, including of 12-13 years in some cases, is likely a violation of the right to liberty and security which applies to pre-trial detention and provides individuals arrested or detained for criminal charges with the right to be tried within a reasonable time or released.
60. **Right to legal counsel of one's choice, to adequate time and facilities for the preparation of a defence, and to call, examine and cross-examine witnesses.** The right to prompt access of accused persons to counsel of their choice before and during their trial

protected under international human rights law, and reaffirmed in OSCE commitments, has been violated in the Guantánamo context as all seven detainees currently facing military commissions proceedings were denied such access from at least several months to several years. Where such delay in legal representation also hindered the ability of the accused to prepare his defence, it also violates international humanitarian law.

61. While the Military Commissions Act (MCA) of 2009 provides for the defendant's right to choose military defence counsel, in practice this choice is very limited. Existing limitations to the right to choose a civilian lawyer appear to be based on reasonable and objective criteria, such as the requirement for national security clearance. Defendants facing capital military commissions can also be assisted by at least one additional learned counsel.
62. Alleged violations of the privileged attorney-client relationship, such as limitations placed on lawyers' ability to meet frequently with their clients or violations of defendants' right to privately and confidentially communicate with their counsel, impair their right to adequately prepare their defence.
63. Equality of arms requires that defence counsel be granted access to documents and other evidence that the prosecution intends to use in court, including exculpatory material, in order to adequately prepare their case. While the "presumptive classification" of all statements of the accused is not applied anymore, the classification rules, policies and practices continue to have a significant impact on the attorney-client communication and defence investigations, in particular related to the treatment of "high-value detainees" in the CIA RDI programme. Classification restrictions have reportedly prevented the disclosure of mitigating evidence. Progress has been made following the release of the Senate Select Committee on Intelligence's Study on the CIA RDI Programme (hereinafter "the Senate Study on the CIA RDI Programme"). It has allowed for the declassification of information on the application of "enhanced interrogation techniques" to some defendants in CIA secret detention, and the description of some of their conditions of confinement until their transfer to Guantánamo in September 2006.
64. Classification restrictions raise grave concerns, as they have prevented the accused from complaining about human rights violations and seeking redress, but have also affected the ability of the attorneys to investigate and have adequate facilities to prepare a defence. The lack of clarity of classification rules and the fear of criminal prosecution against defence counsels in case classified information is revealed are other examples influencing the ability of counsels to provide as effective a representation as possible. The reportedly very high number of *ex parte* submission by the prosecution where evidence is completely unavailable to the defence, and the obligation for the defence to share with the judge and prosecution a brief description of the information that it is requesting to disclose adversely impact the preparation of a defence and undermine the right of an accused to communicate in full confidentiality with his lawyer.
65. As to the right to examine and cross-examine witnesses and to subpoena witnesses, the defence does not have the same legal powers of compelling the attendance of witnesses, examining and cross-examining them as are available to the prosecution, in violation of the

ICCPR. While some efforts have been undertaken by the US government to secure testimonies of material witnesses in one of the military commissions cases, the possibility for the military judge to discretionarily decide that a witness, including key witness for the defence, is deemed unavailable, is of concern and may violate the defendant's right to a fair trial. The fact that the defence may be significantly under-resourced compared to the prosecution is also of grave concern. The admissibility of hearsay evidence and hearsay within hearsay is another limitation to the right of the accused to cross-examine witnesses.

66. In light of the above, the proceedings before the military commissions do not guarantee equality of arms between the defence and the prosecution and therefore violate the ICCPR and OSCE commitments.
67. **Exclusion of evidence obtained by torture or ill-treatment and the privilege against self-incrimination.** The non-derogable rule excluding all forms of evidence, including but not limited to statements and confessions made by the accused and third parties, obtained through or derived from torture or ill-treatment, is a key protection against torture and other forms of ill-treatment under international human rights law, in particular the CAT. OSCE participating States, including the United States, have strongly affirmed their commitments to the CAT. This rule is also applicable under international humanitarian law.
68. The MCA 2009, contrary to MCA 2006, does exclude all statements in military commissions, by both the accused and third parties, that are obtained through torture or ill-treatment. However, the narrow definition of torture and ill-treatment under US laws may lead to the admissibility of evidence obtained by conduct otherwise prohibited under the CAT.
69. In addition, evidence derived from statements obtained by torture or ill-treatment may be admissible when the judge determines that it is "in the interests of justice". Admitting such evidence can never be "in the interests of justice" and undermines the absolute prohibition of torture and ill-treatment under international law.
70. The privilege against self-incrimination applies only to statements made during the proceedings before the military commissions, not to those statements made prior to trial. While provisions of the MCA 2009 may mitigate the risk of admission of involuntary incriminating statements made prior to trial, they allow for exceptions when the statement would serve the interests of justice or was incidentally made at the point of capture or during closely related active combat engagement. Admitting compelled confessions of guilt that were obtained by investigating authorities prior to trial is a violation of the ICCPR.
71. Some statements elicited through torture, ill-treatment or coercion have been excluded from evidence in both military commissions and in federal courts, and have resulted in decisions not to refer charges. However, in a number of cases, evidence allegedly obtained through or derived from torture or ill-treatment, as well as self-incriminating statements obtained under torture, have been admitted as decisive evidence in contravention of

relevant international human rights standards. Past torture and other prohibited acts may also impact on the admissibility of subsequent statements, as future statements may be tainted by past abuse. Failure of states' authorities to investigate the circumstances under which such evidence has been gathered as well as to ascertain the veracity of allegations of torture and ill-treatment may also amount to a violation of the CAT.

72. Plea agreement must be entered into voluntarily. The privilege of self-incrimination is also of relevance in that regard. The indefinite detention of individuals at Guantánamo with no or limited prospect of release, the risk of an unfair trial before the military commissions and the impact of past and present treatment are all incentives for detainees to plead guilty. It is questionable whether any of the plea agreements have been entered into voluntarily and whether the privilege against self-incrimination has been violated in these agreements.

Fair trial guarantees and the death penalty

73. International law requires the full and strict compliance with fair trial standards of any trial leading to the imposition of the death penalty. The charges against the five 9/11 suspects and Al-Nashiri may lead to the imposition of the death penalty. As military commissions are not in full compliance with all essential judicial guarantees, carrying out a death sentence following a conviction by such military commissions would be a violation of the right to a fair trial, the right to life and would contradict OSCE commitments. Should international humanitarian law be applicable to any of these capital cases, carrying out the death penalty would amount to a war crime.

TOWARDS THE CLOSURE OF THE GUANTÁNAMO BAY DETENTION FACILITY

Release of Individuals Detained at Guantanamo

74. **Challenges to the closure of Guantánamo.** President Obama committed to close Guantánamo when he took office in 2009 and, subsequently, on a number of occasions. However, 116 detainees are still held in Guantánamo as of 31 August 2015.
75. The US Congress has played a significant role in preventing the closure of Guantánamo, by repeatedly adopting restrictive National Defense Authorization Acts (NDAA) since 2010 which have denied funding for transferring detainees to the United States and for constructing or modifying facilities in the United States to house Guantánamo detainees, and have made it difficult to transfer detainees to third countries. However, the restrictions on transfers to third countries have gradually eased since 2011. In particular, the current legislative provisions do provide reasonable opportunities for transfers that the US government has not taken full advantage of. Ongoing discussions on the NDAA 2016 give rise to serious concerns as its current version – not yet adopted by the Congress – foresees to extend the existing restrictions and impose additional ones on the transfer of detainees from Guantánamo, unless the Congress approves a “comprehensive plan on the disposition of detainees” held at Guantánamo, to be submitted by the US government.

76. The US government has however accelerated the pace of transfers to third countries with 23 transfers in 2014 and 11 between January and 31 August 2015, and has reportedly secured commitments from a dozen countries to accept nearly half of the remaining detainees designated for transfer.
77. Nevertheless, six years after President Obama's first commitment to close the detention facility, 116 detainees remain detained, 106 of them are detained without charge and 54 of them have been designated for transfer. The United States will continue to be acting in violation of international standards by holding these detainees in arbitrary detention, unless significant changes are promptly made to US transfer practices.
78. The PRB creates a greater opportunity for release by circumventing existing legislative restrictions. It determines whether the continued detention of detainees is necessary to "protect against a continuing significant threat" to US national security, and designates those detainees who can be transferred. While the accelerated pace of PRB reviews in 2015 is welcome, it will not suffice to significantly progress toward the closure of Guantánamo at this rate. Only two detainees have been released following a favourable review. ODIHR is worried that the PRB is primarily shifting detainees to another detention classification and, in some instances, can be used to detain indefinitely and without trial individuals who are determined to pose a significant threat to national security.
79. Delays in the ongoing cases before military commissions, with no scheduled starting dates of trial, further complicate the closure of Guantánamo as the detainees cannot currently be transferred to the US for detention or trial.
80. The situation of Yemeni detainees, 38 of whom have been designated for transfer for years, remains one of the primary challenges to closing Guantánamo. Restrictions on their repatriation based on their nationality and the political situation in their country may constitute a violation of the principle of non-discrimination. Despite the lifting in 2013 of President Obama's moratorium preventing any transfer to Yemen, no detainees have been subsequently transferred there. Finding solutions to the repatriation of Yemeni detainees or their resettlement elsewhere, as a matter of extreme urgency, is key for the US government to demonstrate its commitment to the closure of the detention facility.
81. The resettlement of the Yemeni detainees, but also of detainees who may face a risk of torture or ill-treatment if repatriated, is critical to the closure of Guantánamo. ODIHR commends the 15 OSCE participating States which have resettled Guantánamo detainees, while calling on all OSCE participating States to contribute to these efforts.
82. **Human Rights safeguards related to the closure of Guantánamo: non-refoulement.** Under both international human rights and international humanitarian law, the principle of non-refoulement prohibits expelling, returning or extraditing an individual to another state where there are substantial grounds for believing that the person would be subjected to torture or ill-treatment.

83. The United States' narrow definition of torture and its exclusion of ill-treatment in its application of the principle of non-refoulement may increase the likelihood that Guantánamo detainees will be transferred to a state where they will be tortured or ill-treated. The United States maintains that it would not transfer a detainee in violation of this principle, and has taken actions to resettle some detainees in third countries rather than transferring them to their home country, due to unstable conditions or risks of torture or persecution.
84. Information gathered by ODIHR suggest that the US government relies heavily on diplomatic assurances, which are surrounded by lack of transparency and secrecy, and the absence of an independent, impartial and effective review of these assurances by a competent judicial authority. Additionally, the United States typically does not provide information on the safeguards and monitoring procedures agreed to in diplomatic assurances. The United States likely violated its international legal obligations on non-refoulement by forcibly transferring some detainees to states allegedly practicing torture and ill-treatment. The lack of an effective, transparent and impartial review of the decisions to transfer detainees also violates the United States legal obligations under this principle.

Accountability And Redress

85. **Accountability for torture and ill-treatment.** At the time of this report, impunity continues for human rights violations committed in the CIA RDI programme and in the detention and treatment of detainees at the Guantánamo Bay detention facility. The US government has thus far failed to hold perpetrators accountable and to comply with its obligations under the ICCPR and CAT to conduct prompt, independent, impartial, thorough and effective investigations and subsequent prosecutions.
86. Particular areas of concerns in contradiction with international law include the limited scope of acts that may be prosecuted as torture and ill-treatment offences, the reliance on statutes of limitations which now likely bar investigations into cases of torture and ill-treatment allegedly perpetrated before 2006, and certain legislative provisions that may still be used to negate criminal liability for subordinates involved in acts of torture.
87. Although the US government guarantees that all allegations of abuse, including allegations of historical abuse, are now investigated immediately, the majority of US investigations into such abuses at Guantánamo were not prompt, independent, impartial, thorough and effective. This may amount to a violation of the duty to conduct investigations as prescribed under international law. Only one US official was prosecuted before a court-martial and none at the federal level, which raises serious concerns about perpetrators of acts of torture not being held accountable and not given penalties reflecting the grave nature of their acts as required under international law.
88. Despite US government admissions that US officials committed acts of torture and ill-treatment as part of the CIA RDI programme, numerous allegations of torture, well-documented cases and international court decisions, the United States has not yet undertaken prompt, independent, impartial, thorough and effective investigations or

subsequent prosecutions regarding the conduct undertaken in the CIA RDI programme. In spite of having access to the full version of the Senate Study on the CIA RDI Programme, the US government has decided not to mount criminal charges. No US official has ever been prosecuted for their involvement in this programme or for concealment (destruction of torture evidence). No military, intelligence or civilian health professional or contractor has ever been held accountable for their involvement in acts of torture and ill-treatment at both Guantánamo and in the CIA RDI programme. The US therefore violated the ICCPR, the CAT and failed to meet its OSCE commitments.

89. Twenty-seven OSCE participating States have had knowledge of or have participated in the CIA RDI Programme in different ways. Yet, all of them have so far failed to conduct prompt, effective, impartial, independent, thorough and effective investigations and to hold those responsible accountable. Such failure amount to a violation of their obligations under international law.
90. The recognition of universal jurisdiction in some OSCE participating States has led to complaints against and convictions of high-level US officials. ODIHR welcomes such development and urges OSCE participating States to seriously investigate complaints regarding the US treatment of detainees in Guantánamo and at CIA secret detention facilities, with a view to hold those responsible to account.
91. **Right to redress.** International human rights law, in particular the CAT and ICCPR imposes on states an obligation to provide redress for arbitrary detention, torture and ill-treatment. OSCE commitments refer to the provision of redress. Without prejudice to rights arising from any duty on states to provide reparation for damage suffered during armed conflict, ODIHR considers that the obligation of states to provide redress for gross human rights abuses also governs situations where such abuses have taken place in the context of an armed conflict, irrespective of its nature.
92. While a number of US legislative provisions appear to provide detainees with access to redress, no detainee has received redress and no court has ever considered a lawsuit seeking redress on the merits, despite numerous and substantiated allegations of arbitrary detention (including in cases of successful *habeas corpus* claim), torture and ill-treatment. The state secret doctrine and national security are not legitimate reasons to deny victims' right to redress. Immunity of officials has led to dismissal of claims whereas immunity is incompatible with the right to redress for torture and ill-treatment. The disclosure of the Senate Study on the CIA RDI Programme is a positive step in providing satisfaction to victims of gross human rights violations but it must be accompanied by investigations and criminal prosecutions. This denial of redress for arbitrary detention, torture and ill-treatment is a violation of the CAT and of the ICCPR.
93. ODIHR commends those OSCE participating States that provided redress to victims of gross human rights violations in the CIA RDI programme and at Guantánamo, and urges all participating States complicit in arbitrary detention, torture and ill-treatment under the CIA RDI programme and at Guantánamo to provide all victims not yet compensated with an adequate, effective and prompt redress.

CONSOLIDATED RECOMMENDATIONS TO THE UNITED STATES

ON THE CONTINUED AND INDEFINITE DETENTION OF GUANTÁNAMO DETAINEES

On the closure of Guantánamo

- To promptly release the remaining detainees or prosecute them before ordinary courts, in compliance with international fair trial standards;
- To remove all obstacles preventing the closure of the Guantánamo Bay detention facility, and swiftly close it;
- To amend legislation in order to allow for the possibility of transferring detainees to the United States for any purpose, including for detention, resettlement and for trials before ordinary courts;
- To take all available measures to ensure that legislation which bars the possibility of transferring detainees to the United States for any purpose, including for detention, resettlement and for trials before ordinary courts, is amended and not readopted in the future;
- To immediately repatriate or resettle detainees designated for transfer or release;
- To urgently review and address all practical and policy issues relating to the transfer of Yemeni detainees, with a view to ensuring their prompt release;
- To charge, without delay, detainees suspected of a criminal offence and transfer them to the United States for trial by ordinary courts;
- To take urgent measures to increase the effectiveness and speed of the Periodic Review Board process while still providing adequate time and facilities for the preparation of the detainees' cases. Detainees should be promptly released following a favourable decision.

On the prohibition of arbitrary detention

- To promptly end the ongoing arbitrary detention of detainees;
- To promptly release any detainee who has not been charged with, or convicted of, a criminal offence;
- To promptly charge those detainees against whom there is credible and lawfully obtained evidence of criminal conduct in a court or tribunal which meets international fair trial standards;
- To ensure that federal courts decide on *habeas corpus* petitions without delay, acting as an independent fact finder in *habeas corpus* cases;
- To ensure that any detainee is immediately released following a successful *habeas corpus* petition without the need for further approvals, including for any internal administrative procedures;
- To ensure that detainees have regular access to counsel and that any obstacles to access to counsel are strictly necessary and proportionate to achieving a legitimate aim; in particular to ensure that search procedures do not have the effect of significantly disrupting the attorney-client relationship;

- To provide prompt and effective redress to victims of arbitrary detention, particularly in cases of prolonged arbitrary detention, on account of the physical and mental suffering, stress, fear, depression, anxiety and physical symptoms suffered by them.

On the principle of non-refoulement

- To ensure that no detainee is expelled, extradited or returned to a state where there are substantial grounds for believing that the detainee will be in danger of being subjected to torture or ill-treatment;
- To ensure that detainees have access to an effective, independent, impartial and individualized review in order to challenge government determination that they will not be subjected to torture or ill-treatment;
- To amend legislation to ensure that the definition of torture in US law complies with Article 1 of the CAT;
- To revisit the United States' view that substantial grounds for believing that a person will be subjected to cruel, inhuman or degrading treatment or punishment if transferred to a state does not fall within the principle of non-refoulement.

ON THE TREATMENT IN, AND CONDITIONS OF, DETENTION OF GUANTÁNAMO DETAINEES

- Pending the closure of the Guantánamo Bay detention facility, to ensure that conditions of detention meet international human rights standards.

On the prohibition of torture and ill-treatment

- To review US reservations and understandings concerning the definition of torture and other forms of ill-treatment made upon ratification of international treaties, with a view to promptly withdrawing them;
- To clearly acknowledge that the prohibition of torture and ill-treatment provided for in the CAT and the ICCPR applies to all areas over which the United States exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control including, where applicable, detention facilities and military bases outside its sovereign territory;
- To take steps necessary to prevent the recurrence of acts of torture and ill-treatment, including by strengthening existing prohibitions in domestic law. All elements of the definitions of torture and ill-treatment set out in the CAT and clarified by the Committee against Torture should be reflected in domestic law;
- To ensure that the practice of extraordinary rendition of terrorist suspects to third countries for the purpose of interrogation and detention is immediately and expressly terminated, including on any short-term or transitory basis. Any such matters should be forbidden by law;
- To amend the provisions of the Army Field Manual on interrogation in order to clarify that stress positions, sleep deprivation and improper use of restraints are forbidden techniques. The Manual should, in this regard, clearly stipulate that only enumerated techniques are allowed. Appendix M should be reviewed to ensure its compliance with the international prohibition against torture and ill-treatment;

- Concerning the detention of any Guantánamo detainee, to promptly abolish and immediately terminate the use of solitary confinement to punish breaches of discipline, to extract information or a confession, and in respect of detainees with mental health issues; to immediately terminate the use of prolonged and indefinite solitary confinement for any purpose. Solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. Safeguards should be put in place to ensure that solitary confinement is immediately interrupted where it results in severe pain or suffering. Human contact between detainees should be increased and maximized to the extent possible for detainees held in segregated cells, in particular in Camp 7. Alternative disciplinary sanctions to avoid the use of solitary confinement should be developed;
- To strictly limit the use of restraints during the transportation of Guantánamo detainees, including within the detention facility, to what is necessary and proportionate;
- To abandon the policy of force-feeding mentally competent detainees who do not wish to be force-fed, irrespective of whether their life is in danger. Alternative solutions should be sought, and detainees' grievances should be discussed with them in good faith;
- To publicly disclose the videotape recordings of Dhiab's forcible cell extractions and subsequent force-feedings.

On the right to freedom of religion or belief

- To allow for detainees' free exercise of religion or belief to the maximum extent possible, insofar as it remains compatible with necessary and proportionate security restrictions;
- To provide all Guantánamo detainees with unhindered access to a qualified representative of the Muslim faith;
- To ensure that all official personnel do not engage in conduct that offends the religious beliefs or practices of detainees;
- To ensure that detainees have access to religious items, including the Koran, and that these religious items are handled in a respectful manner by official personnel;
- To review the practice of segregated prayer in Camps 5 and 7 so as to ensure that the grounds for any interference with the freedom to manifest one's religion are fully met and, if they are not met, to amend this practice accordingly.

On the right to health and obligation to secure medical attention

- Concerning the detention of any Guantánamo detainee, to ensure that timely and appropriate medical, psychological and dental care is provided;
- To ensure that only medical personnel are involved in decisions regarding the medical care of detainees;
- To ensure that detainees suffering from mental health issues are not treated as non-compliant detainees or held in solitary confinement in punitive conditions;
- To ensure that detainees' medical records are complete and accurate; to allow detainees and their attorney(s) direct access to the detainees' complete medical records;
- To ensure that allegations by detainees and suspicions by official personnel of torture or ill-treatment are documented and reported to the competent authorities and/or international bodies; to ensure that medical investigations into allegations of torture or ill-treatment

- include a medical assessment as to the probable relationship between the physical or psychological injury or symptom and the possible torture or ill-treatment;
- Pending the closure of the Guantánamo Bay detention facility, to allow for the transfer of detainees to US territory if necessary medical resources or equipment cannot reasonably be made available at the Guantánamo Naval Base;
 - To allow detainees immediate access to independent medical and psychological professionals with specific relevant expertise, and increase their involvement in the care of detainees.

ON THE PROSECUTION OF GUANTÁNAMO DETAINEES

On the forum for their prosecution

- To disestablish the Guantánamo military commissions;
- To ensure that Guantánamo detainees suspected of a criminal offence are prosecuted before ordinary civilian courts which are established and operate in accordance with international fair trial standards.

On the respect of fair trial standards

- To immediately vacate all convictions (whether by guilty verdicts following a trial by a military commission or the result of a plea agreement) for providing material support for terrorism, solicitation, and inchoate conspiracy;
- To ensure that all other past convictions before the military commissions (whether by guilty verdicts following a trial by military commission or the result of a plea agreement) are vacated in respect of other offences that did not exist at the time of the alleged conduct;
- Regardless of the status of Guantánamo detainees under international law, to ensure that those suspected of a criminal offence are prosecuted before an ordinary court in proceedings that guarantee full respect of the principles of equality before the law and courts, equal protection of the law and non-discrimination;
- Regardless of the status of Guantánamo detainees under international law, to ensure that those suspected of a criminal offence are prosecuted before ordinary courts providing sufficient guarantees of independence, impartiality and publicity;
- To ensure that restrictions to the publicity of any criminal proceeding against Guantánamo detainees are decided on a case-by-case basis and remain proportionate to the need to protect national security or public order;
- To ensure that any proceedings against Guantánamo detainees meet international standards on the presumption of innocence, including regarding the length of pre-trial detention which should not be indicative of guilt;
- To take effective steps to ensure that all public officials refrain from making any statements that prejudge or otherwise prejudice the outcome of any trials of Guantánamo detainees;
- To provide an effective remedy where a defendant's right to be presumed innocent has been violated;
- To ensure that any proceedings against Guantánamo detainees meet international fair trial standards on the right to be tried without undue delay;

- To ensure that any legislation applicable to the trial of any Guantánamo detainee guarantees the right to be tried without undue delay;
- To provide an effective remedy to any defendant whose right to trial without undue delay has been violated;
- To ensure that, in any proceedings against Guantánamo detainees, the principle of equality of arms is fully respected in line with international fair trial standards;
- To ensure that any Guantánamo detainee suspected of a criminal offence is provided with adequate time and facilities to meet and otherwise communicate with his counsel;
- To ensure that oral communications between a defendant and his counsel are not subjected to audio-monitoring, audio-recording or other monitoring or recording that would allow authorities to discern the content of confidential attorney-client communications; to ensure confidential written communications between a defendant and his counsel are not intercepted, seized or read;
- To ensure that there is no undue interference with defence counsel's ability to carry out their duties, and that attorneys do not suffer or are not threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;
- To ensure that any Guantánamo detainee suspected of a criminal offence has access to all exculpatory material as well as other material evidence that the prosecution intends to offer in any proceedings against him;
- To ensure that, in any proceedings against Guantánamo detainees, classification rules and policies are strictly proportionate to the need to protect national security; to ensure that the appropriateness of non-disclosure is reassessed throughout the proceedings, and that all measures to restrict access to classified information are accompanied by compensatory safeguards so that the defence is able to answer all aspects of the case;
- To ensure that, in any proceedings against Guantánamo detainees, the defence has full access to relevant portions of the entire Senate Study on the CIA RDI Programme;
- To ensure that any Guantánamo detainee charged with a criminal offence has the right to call and examine defence witnesses under the same conditions as prosecution witnesses, and to cross-examine witnesses against him;
- To ensure that all evidence obtained by or derived from torture, ill-treatment or in violation of the privilege against self-incrimination is not admitted in any proceedings;
- To review all relevant factors concerning all plea agreements already made in order to ensure that their terms are fully compliant with international human rights obligations and were agreed to voluntarily. In the absence of such finding, to set aside convictions entered into pursuant to such plea agreements;
- To ensure that the terms of any future plea agreement are fully compliant with international human rights standards and are agreed to voluntarily;
- In the event that the death penalty is sought in any proceedings against Guantánamo detainees before any court or tribunal, to ensure that international fair trial standards are stringently and rigidly met;
- In case there is any doubt as to the full compliance of these proceedings with international fair trial standards, the death penalty should not be sought.

ON ACCOUNTABILITY FOR TORTURE AND/OR ILL-TREATMENT

- To review and amend domestic legislation to ensure full compliance and consistency with the CAT and other relevant international standards and OSCE commitments. In particular, penalties for acts amounting to torture and ill-treatment, as defined under international law, should be amended to ensure that they reflect the gravity of the crime and deter future acts of torture and ill-treatment;
- To review and amend domestic legislation, including Section 1004 of the Detainee Treatment Act (DTA), in order to remove all grants of immunity for acts of torture or ill-treatment;
- To review and amend domestic legislation in order to remove all statutes of limitation for acts of torture and ill-treatment;
- To ensure that independent, impartial, thorough and effective investigations into all allegations of torture and ill-treatment are promptly carried out;
- To ensure that, wherever possible, perpetrators of torture are prosecuted under the Torture Convention Implementation Act rather than other legislation in which acts of torture or ill-treatment are defined as less grave offences;
- To prosecute superior officials for their approval and authorization of interrogation techniques amounting to torture and ill-treatment. This includes any official who perpetrated, ordered, condoned, tolerated or failed to intervene despite knowing that acts of torture were being committed;
- To reopen investigations, with a view to prosecuting alleged perpetrators, into the CIA RDI programme following the release of the executive summary, findings and conclusions of the Senate Select Committee on Intelligence's Study on the programme;
- To regularly inform the public of the steps taken to investigate and prosecute all cases of abuse in Guantánamo and in the CIA RDI programme;
- To set up a public inquiry into the allegations of abuse at the Guantánamo Bay detention facility for the purpose of investigating, documenting the abuses committed and to issue a public report of the findings of that inquiry;
- Pending the closure of the Guantánamo Bay detention facility, to establish an independent oversight mechanism to receive complaints and review all allegations of torture and ill-treatment at Guantánamo.

ON REDRESS FOR VICTIMS OF ARBITRARY DETENTION, TORTURE AND/OR ILL-TREATMENT

- To ensure that former and current detainees, including those previously detained in secret detention, have access to full redress, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for violations of the freedom from arbitrary detention and the prohibition of torture and ill-treatment;
- To amend domestic legislation so as to repeal or amend Section 2241(e)(2) so that detainees can access US courts to seek redress; to repeal or amend Section 2000dd-1 of Title 42 so that there can be no justification for acts of torture; to repeal or amend legislative provisions imposing statutes of limitations and immunity for gross human rights violations; and to enact legislation to expressly provide detainees with an opportunity to seek redress in federal courts or through other mechanisms for violations of human rights and fundamental freedoms;

- To promptly release from detention those detainees whose *habeas corpus* petitions have been successful;
- To refrain from invoking the state secrets privilege and thereby preventing detainees from seeking redress. The privilege should never be invoked to avoid embarrassment, to conceal violations of law or to avoid liability;
- To provide full information on available remedies to former and current Guantánamo detainees or other persons subject to the CIA RDI programme;
- To establish an independent and effective mechanism to review claims and provide compensation for any abuses committed in the CIA RDI programme and at Guantánamo;
- To issue an official apology and commit to full disclosure of the truth regarding the CIA RDI programme and the situation at Guantánamo;
- To publicly and promptly release the full Senate Select Intelligence Committee's Study on the CIA RDI Programme.

CONSOLIDATED RECOMMENDATIONS TO OTHER OSCE PARTICIPATING STATES

- OSCE participating States should, whenever possible, resettle detainees in their own territory.
- Other OSCE participating States must conduct prompt, independent, impartial, thorough and effective investigations and prosecutions where appropriate of those individuals believed to have facilitated the CIA RDI programme or who were otherwise complicit in the torture or ill-treatment of detainees.
- Other OSCE participating States must provide redress to former and current Guantánamo detainees where they have been complicit in their arbitrary detention, torture and ill-treatment.

INTRODUCTION

BACKGROUND TO THE REPORT

94. The 57 participating States of the Organization for Security and Co-operation in Europe (OSCE) have committed themselves to a comprehensive catalogue of human rights and democracy norms. These form the basis of the *human dimension*, that part of the OSCE's comprehensive approach to security, which regards security as being anchored in respect for human rights and fundamental freedoms, democracy and the rule of law and relates the maintenance of peace to the protection of human rights and fundamental freedoms. OSCE human dimension commitments¹ are reflective of universal human rights norms and concepts as enshrined in international human rights treaties and declarations and express the OSCE participating States' political promise to comply with these standards.²
95. The OSCE Office for Democratic Institutions and Human Rights (ODIHR), the principal OSCE institution in the human dimension, is tasked with both monitoring the implementation of human dimension commitments and assisting the OSCE participating States in meeting such commitments.³ In particular, ODIHR has been mandated to support the OSCE participating States in developing and implementing human rights-compliant measures to prevent and counter terrorism.⁴
96. ODIHR has followed closely the situation of detainees at the Guantánamo Bay detention facility and engaged in dialogue with US authorities.⁵ Subsequent co-operation between the US authorities and ODIHR on this matter led to an ODIHR visit to the United States and to the Naval Base at Guantánamo Bay from 29 July to 9 August 2013 to assess the feasibility of a potential trial monitoring exercise. Following the completion of the needs assessment mission, ODIHR concluded that a trial monitoring exercise was not feasible at the time, and proposed to carry out a comprehensive human rights assessment of the situation of detainees at Guantánamo instead. The present report is the outcome of this assessment.

¹ A compilation of key relevant OSCE human dimension commitments is provided in Annex 1.

² "Background Paper on Preventing and Combating Terrorism: The Human Dimension", OSCE/ODIHR, 29 June - 1 July 2011, p. 2, <<http://www.osce.org/odihr/80473>>.

³ OSCE Conference on Security and Co-operation in Europe, "The Challenges of Change", Helsinki, 9-10 July 1992, Section VI, <<http://www.osce.org/mc/39530?download=true>>; OSCE Conference on Security and Co-operation in Europe, Decision No. VIII, "The Human Dimension", Budapest, 5-6 December 1994, (hereinafter, "OSCE Budapest Document"), <<http://www.osce.org/mc/39554?download=true>>; OSCE Document of the Eleventh Meeting of the OSCE Ministerial Council, Maastricht, 2 December 2003, <<http://www.osce.org/mc/40533?download=true>>.

⁴ OSCE Ministerial Council, Annex to Ministerial Council Decision No. 1, "The Bucharest Plan of Action for Combating Terrorism", Bucharest, 3-4 December 2001, <<http://www.osce.org/mc/40515>>; OSCE Ministerial Council, "OSCE Charter on Preventing and Combating Terrorism", Porto, 7 December 2002, <<http://www.osce.org/odihr/16609>>; OSCE Permanent Council, Decision No. 1063, "OSCE Consolidated Framework for the Fight against Terrorism", Dublin, 7 December 2012, para. 23, <<http://www.osce.org/pc/98008>>.

⁵ See, for instance, "OSCE human rights chief again urges United States to close Guantanamo Detention Facility", OSCE website, 10 January 2014, <<http://www.osce.org/odihr/110266>>; "OSCE human rights chief dismayed at continued practice of detention without trial at Guantánamo", OSCE website, 10 January 2012, <<http://www.osce.org/odihr/86927>>.

METHODOLOGY

97. Findings contained in this report are based on information gathered not only through desk research but also a series of interviews. ODIHR systematically followed the developments related to Guantánamo from 2012 to 2015, in addition to conducting two fact-finding missions to the United States in February and September 2014. The added-value of the report resides in the interviews conducted by ODIHR with diverse interlocutors to gather information. ODIHR held eight interviews in September 2014 with relevant US officials from the Departments of State, Defense and Justice and the Presidential Administration, including with senior officials involved in the proceedings before the military commissions.⁶ In addition, ODIHR met with non-governmental organizations (NGOs) as well as military and civilian lawyers representing Guantánamo detainees. Interviews were conducted with a broad range of stakeholders which includes, but is not limited to, 14 representatives of NGOs monitoring developments related to Guantánamo, 25 lawyers involved in the representation of Guantánamo detainees in past and ongoing military commission proceedings, *habeas corpus* proceedings or before the Periodic Review Board (PRB), along with six other national or international legal experts as well as medical staff working on medical care and ethics at Guantánamo. A list of interlocutors is included in Annex 2 to this report.
98. In order to collect the relevant facts, ODIHR requested private meetings with detainees currently held at the Guantánamo Bay detention facility who were willing to speak with ODIHR officials. ODIHR regrets that this request was not granted by the US authorities. As an alternative method of obtaining the views of current detainees, ODIHR submitted written questions to several current detainees through their appointed counsel. To date, ODIHR has received one response, the contents of which, apart from the heading, had been entirely redacted by the authorities before being made available to ODIHR.⁷
99. ODIHR interviewed five former Guantánamo detainees to gather first-hand information on their experiences while being transferred to and/or detained at Guantánamo. ODIHR met with former detainees who are nationals or residents of one of the OSCE participating States or Partners for Co-operation and/or have been relocated to, or resettled in, one of these States. ODIHR did not approach former detainees who have publicly indicated their refusal to share information on their experience at Guantánamo.
100. Meetings with all interlocutors were on the record and with the understanding that the information collected could be included in a public report. Former detainees who took part in the interviews did so voluntarily. They were fully informed that their testimonies would be used for the purpose of drafting the report and they consented to the publication and

⁶ Specifically, ODIHR met with representatives from the Office of the Legal Adviser and the Office on European Security and Political Affairs within the Department of State. ODIHR also conducted interviews of US officials from the Department of Defense Office of Military Commissions (including the Office of the Chief Prosecutor and the Office of the Convening Authority) as well as from the Office of the General Counsel and the Office of the Under Secretary of Defense for Policy, Office of Detainee Policy. ODIHR had meetings with representatives from the Offices of the Special Envoys for Guantánamo Closure within both the US Department of State and the Department of Defense. ODIHR held also consultations with representatives from the US Department of Justice, National Security Division and the National Security Council within the Presidential Administration.

⁷ See Annex 3, "Response from Current Detainee to Questions Submitted By ODIHR".

attribution to them of the information they provided. Direct references to specific information collected during ODIHR interviews with various interlocutors will be made throughout the report, where applicable.

101. As per established practice, the draft of the report was shared with the US government for comments, prior to its publication. The US government submitted its comments to ODIHR on 6 August 2015. ODIHR has analysed US observations while retaining final editorial control over the scope and content of the report.

SCOPE AND STRUCTURE OF THE REPORT

102. The report looks into the compliance of the detention, conditions of confinement and treatment of detainees at Guantánamo with international human rights standards, as well as the compliance with international fair trial standards of the proceedings before the military commissions. It also explores issues related to the closure of the Guantánamo Bay detention facility, accountability for alleged human rights violations both at Guantánamo and in the Central Intelligence Agency (CIA) Rendition, Detention and Interrogation (RDI) programme, as well as the right to redress in cases of arbitrary detention, torture and/or ill-treatment. In relation to the CIA RDI programme specifically, the report focuses primarily on the situation of detainees who were subsequently transferred to military custody in Guantánamo. The report includes recent developments on these issues up until 31 August 2015.
103. The report is structured in three main parts. The first two parts take stock of the situation with a particular focus on detention at Guantánamo and related rights, as well as proceedings before the military commissions, whereas the third part explores the challenges related to the closure of the detention facility and analyses states' obligations to guarantee accountability for human rights violations in the Guantánamo context. While the report is primarily focused on Guantánamo and the human rights obligations of the United States in that respect, it also touches upon the human rights obligations of other OSCE participating States when looking at cases of complicity in violations that occurred in the framework of the CIA RDI programme.

APPLICABLE INTERNATIONAL STANDARDS

104. In its analysis, findings and recommendations, this report relies on relevant OSCE commitments, international human rights law and standards and, as applicable, international humanitarian law. Each part of the report will point to the relevant standards under international law and will analyse the compliance of the situation at Guantánamo with these standards. The implementation of the relevant OSCE commitments in that context will also be assessed throughout the report. The report will focus primarily on the international treaties that have either been signed⁸ or ratified by the United States, as well

⁸ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Art. 18, <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty". "Vienna Convention on the Law of Treaties", United States Department of State website,

as on customary international law. It will also refer to soft law providing authoritative interpretations of the relevant treaty provisions. While soft law principles are not binding *per se*, they have generally been accepted by the international community and reflect a general consensus on the correct interpretation of the relevant norms. In the same vein, opinions of authoritative bodies which provide guidance on the interpretation of international law will also be used in the report. References will be made to domestic standards, as relevant to the situation of detainees at Guantánamo and the proceedings before the military commissions.

105. Four cross-cutting issues concern the applicability of international standards: (a) when and to what extent international humanitarian law applies; (b) the dual application and inter-relationship between international humanitarian law and international human rights law; (c) the legal terminology concerning the classification of detainees as this affects the application of law; and (d) the extraterritorial application of international human rights law.

War Paradigm: When and to What Extent Does International Humanitarian Law Apply?

106. In the aftermath of 11 September 2001 (9/11), the United States developed a “war on terror” paradigm, proclaiming itself in a global war without geographical boundaries against al Qaeda, the Taliban and associated forces.⁹ According to this paradigm, detainees were not entitled to protection under international human rights law. Indeed, the US government maintained that its obligations under that body of law did not apply extraterritorially, and that international humanitarian law is the applicable law and is the *lex specialis* (at the exclusion of international human rights law) that should apply in cases of armed conflict, including the “war on terror”.¹⁰ Further, the US government originally maintained that detainees were not entitled to the protection of the Geneva Conventions, including Article 3 common to the Geneva Conventions of 12 August 1949 (Common Article 3). This provision includes the requirement that all persons who are not or are no longer taking active part in hostilities are treated humanely.¹¹ The United States was effectively positing that international humanitarian law applied to the exclusion of

<<http://www.state.gov/s/l/treaty/faqs/70139.htm>>: The United States has signed, but not ratified this Convention. The United States has said, however, that it considers many of its provisions to be customary international law. See, also, International Court of Justice (ICJ), *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September 1997, para. 49, <<http://www.icj-cij.org/docket/files/92/7375.pdf>>: “[The Court] needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law.”

⁹ The “war on terror” paradigm was originally set out in general terms in President George W. Bush’s address to a joint session of Congress and the nation on 20 September 2001. “Text: President Bush Addresses the Nation”, The Washington Post website, 20 September 2001, <http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html>.

¹⁰ Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011), p. 232; “Assessing Damage, Urging Action - Report of the Eminent Jurist Panel on Terrorism, Counterterrorism and Human Rights”, International Commission of Jurists, 2009, p. 51, <<http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf>>.

¹¹ Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (hereinafter, “Third Geneva Convention”), Art. 3,

<<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66>>; “The Geneva Conventions of 1949 and their Additional Protocols”, International Committee of the Red Cross (ICRC) website, 29 October 2010, <<https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>>; United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, Case No. 05-184, 29 June 2006, <<http://www.law.cornell.edu/supct/pdf/05-184P.ZO>>: the Supreme Court found that Common Article 3 of the Geneva Conventions was applicable to Guantánamo detainees.

international human rights law, but that the protections embodied in international humanitarian law did not apply to Guantánamo detainees since, among other reasons, al Qaeda is not a High Contracting Party to the Geneva Conventions and members of the Taliban did not distinguish themselves from the civilian population or comply with the laws of war. As such, the United States considered Guantánamo detainees to be “unlawful enemy combatants”, who were not entitled to protections under international humanitarian law.¹² The United States also sought to place these detainees outside the protection of the US Constitution and laws by detaining them at Guantánamo Bay.

107. Under the Obama administration, the United States has abandoned terminology referring to the “war on terror” but still considers itself in an armed conflict without geographical boundaries against al Qaeda, the Taliban and associated forces¹³ that justifies the detention of “unprivileged enemy belligerents” at Guantánamo. The US government has maintained that Guantánamo detainees are being lawfully held under the Authorization for Use of Military Force (AUMF) as informed by the laws of war until a competent authority determines that “the conflict has ended or that active hostilities have ceased”.¹⁴ The United States’ position that the International Covenant on Civil and Political Rights (ICCPR) does not apply extraterritorially and that international humanitarian law is the *lex specialis* during armed conflicts remains unchanged. In addition to considering itself bound by Common Article 3¹⁵ governing the treatment, including the conditions of detention and interrogation of individuals held at Guantánamo, the United States has also announced its support to the principles set forth in Article 75 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (API)¹⁶. The constitutional protections afforded to Guantánamo detainees are decided on a clause-by-clause basis by the US courts.

¹² United States President George W. Bush, “Memorandum: ‘Humane Treatment of Taliban and al Qaeda detainees’”, 7 February 2002, pp. 1-2, <http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf>; United States Press Secretary Ari Fleischer, “White House Press Secretary Announcement of President Bush’s Determination re Legal Status of Taliban and Al Qaeda Detainees”, United States Department of State website, 7 February 2002, <<http://www.state.gov/s/38727.htm>>; “Assessing Damage, Urging Action”, International Commission of Jurists, *op. cit.*, note 10, p. 51; Gabor Rona, “Interesting Times for International Humanitarian Law: Challenges from the ‘War on Terror’”, *Fletcher Forum of World Affairs*, Vol. 27:2, 2003, pp. 65-66, <https://www.icrc.org/eng/assets/files/other/rona_terror.pdf>.

¹³ “National Strategy for Counterterrorism”, June 2011, The White House website, p. 2, <https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf>; “The United States deliberately uses the word “war” to describe our relentless campaign against al-Qa’ida. However, this Administration has made it clear that we are not at war with the tactic of terrorism or the religion of Islam. We are at war with a specific organization—al-Qa’ida.” See, also, Jonathan Hafetz, “Military detention in the ‘war on terrorism’: Normalizing the exceptional after 9/11”, *Columbia Law Review*, Vol. 112, 20 March 2012, p. 31, <http://www.columbialawreview.org/wp-content/uploads/2012/03/31_Hafetz.pdf>.

¹⁴ Department of Defense (DoD) Directive 2310.01E, “DoD Detainee Program”, 19 August 2014, paras. 3(f), 3(m)(5), <<http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf>>.

¹⁵ United States Supreme Court, *Hamdan v. Rumsfeld*, *op. cit.*, note 11.

¹⁶ The United States is not a party to API, but does recognize the principles set forth in Article 75 in relation to international armed conflicts and declared that the Article’s principles are to be applicable to all individuals it detains in an international armed conflict. Article 75 of API is considered customary international humanitarian law, and, as such, is applicable to the armed conflict in Afghanistan, including to members of al Qaeda, the Taliban and associated forces. Article 72 of API further makes it clear that the guarantees set out in the Protocol are additional to “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”. Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, p. 377, <https://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf>; “Fact Sheet: New Actions on Guantánamo and Detainee Policy”, The White House website, 7 March 2011, <<http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>>; Department of Defense Directive 2310.01E, *op. cit.*, note 14, para. 3(a)(3).

108. ODIHR is of the view that the “war on terror” or the related notion of an armed conflict without geographical boundaries against al Qaeda, the Taliban and associated forces (hereinafter “the global war against terrorism”)¹⁷ as such, does not constitute an armed conflict for the purposes of the applicability of international humanitarian law.¹⁸ Although no treaty contains a universally accepted definition of armed conflict,¹⁹ jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) has clarified that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.²⁰ It is crucial to make a clear distinction between terrorist acts falling within an armed conflict and those that take place outside any armed conflict.²¹ While some acts of terrorism may amount to a threat to international peace and security, this does not mean that any terrorist act would create an armed conflict.²² Acts of terrorism committed outside an armed conflict are criminal acts and require law enforcement responses in line with international human rights law and OSCE commitments.
109. In ODIHR’s view, the “global war against terrorism” does not extend the application of international humanitarian law to all events included in it.²³ Rather, international humanitarian law is applicable only to those situations that involve an armed conflict within the meaning of international humanitarian law.²⁴ International humanitarian law in

¹⁷ In the rest of the report, these two concepts will be referred to as the “global war against terrorism”.

¹⁸ As explained later, specific situations of organized armed violence the United States considers as having been part of the “global war against terrorism” may have amounted to armed conflict. See, for example, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, pp. 724, 726, <<https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf>>.

¹⁹ “Final Report on the Meaning of Armed Conflict in International Law: The Hague Conference (2010) Use of Force”, Executive Committee of the International Law Association, 2010, p. 1, <<http://www.ila-hq.org/en/committees/index.cfm/cid/1022>>.

²⁰ ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-91-1-AR72, 2 October 1995, para. 70, <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>>. See, also, Rome Statute of the International Criminal Court (ICC), 17 July 1998 (hereinafter, “Rome Statute”), Art. 8(2)(f), <http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>; “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, ICRC Opinion Paper, March 2008, p. 5, <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>.

²¹ ICTY, *Prosecutor v. Duško Tadić*, Case No IT-94-1-T, 7 May 1997, para. 562, <<http://www.icty.org/x/cases/tadic/tjug/en/tad-sj70507JT2-e.pdf>>. See, also, “Assessing Damage, Urging Action”, International Commission of Jurists, *op. cit.*, note 10, pp. 51-53.

²² United Nations (UN) Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the Human Rights Council, A/HRC/6/17/Add.3, 21 November 2007, para. 9, <<http://www2.ohchr.org/english/issues/terrorism/docs/A.HRC.6.17.Add.3.pdf>>.

²³ UN Chairperson-Rapporteur of the Working Group on arbitrary detention, Leila Zerrougui, the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, “Situation of detainees at Guantánamo Bay”, 27 February 2006, E/CN.4/2006/120, para. 83, <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=12100>: “The war on terror, as such, does not constitute an armed conflict for the purpose of international humanitarian law”. See, also, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, October 2011, p. 10, <<https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>>: “It should be reiterated that the ICRC does not share the view that a conflict of global dimensions is or has been taking place (...) the ICRC has taken a case by case approach to legally analysing and classifying the various situations of violence that have occurred in the fight against terrorism.”; “Assessing Damage, Urging Action”, International Commission of Jurists, *op. cit.*, note 10, pp. 53-56.

²⁴ “The relevance of IHL in the context of terrorism”, ICRC Resource Centre, 1 January 2011, <<http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>>; International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 724.

this respect recognizes two categories of armed conflict: international and non-international. *International* armed conflict happens between states and involves the use of armed force by one state against another. *Non-international* armed conflict involves hostilities between government armed forces and organized armed groups or between such groups within the territory of a state party to the Geneva Conventions.²⁵ The widely accepted test for determining whether a non-international armed conflict exists, which is articulated by the ICTY,²⁶ and endorsed by the International Committee of the Red Cross (ICRC),²⁷ entails the consideration of two criteria. The first criterion involves “the identity and level of organization of the putative parties to the conflict”.²⁸ It requires “clearly identifiable armed groups and/or state forces”. These groups or forces must be cohesively organized, maintain a responsible and recognizable command strategy and be capable of sustaining military operations.²⁹ The level of organization of the armed group is assessed considering factors such as the existence of a chain of command, the capacity to transmit and enforce orders, the ability to plan and launch co-ordinated military operations and the capacity to recruit, train and equip new members.³⁰ The second criterion relates to the scale and intensity of the conflict.³¹ It requires a certain scale of violence and intensity that goes beyond sporadic and isolated acts of violence.³²

110. Based on the above, the situation in Afghanistan from the beginning of Operation Enduring Freedom on 7 October 2001, which was proclaimed as an exercise of self-defence under Article 51 of the Charter of the United Nations (UN), until the fall of the Taliban as the *de facto* government of Afghanistan in June 2002³³ warrant characterization as an international armed conflict.³⁴ After this date, the use of armed force by the United States and its coalition partners could no longer be construed as being directed against another state as the continued presence of their forces in Afghanistan after this date was on the basis of the host-state’s consent. As such, the situation was incapable of falling within the definition of an international armed conflict. It is, however, ODIHR’s view that after the

²⁵ Since the Geneva Conventions have been universally ratified, the requirement that the armed conflict arise on the territory of a state “has lost its importance in practice”. “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, ICRC, *op. cit.*, note 20, pp. 3, 5.

²⁶ ICTY, *Prosecutor v. Tadic*, 7 May 1997, *op. cit.*, note 21, para. 562.

²⁷ “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, ICRC, *op. cit.*, note 20, p. 5.

²⁸ ICTY, *Prosecutor v. Tadic*, 7 May 1997, *op. cit.*, note 21, para. 562.

²⁹ *Ibid.*

³⁰ This stems from Article 1 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977 (hereinafter, “APII”), <<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=93F022B3010AA404C12563CD0051E738>>: “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

³¹ ICTY, *Prosecutor v. Tadic*, 7 May 1997, *op. cit.*, note 21, para. 562.

³² APII, Art. 1(2); “Assessing Damage, Urging Action”, International Commission of Jurists, *op. cit.*, note 10, pp. 53-54.

³³ “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 725; Robin Geiß and Michel Siegrist, “Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?”, *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 13-14, <<https://www.icrc.org/eng/resources/international-review/review-881-afghanistan/review-881-all.pdf>>; “Afghanistan. Applicable International Law”, Rule of Law in Armed Conflicts Project, Geneva Academy of International Humanitarian Law and Human Rights website, <http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=1>.

³⁴ This does not signal a view from ODIHR that this international armed conflict was lawful. Without expressing a view either way, it is noted here that there are views that this conflict was unlawfully initiated. See, for example, Myra Williamson, *Terrorism, War and International Law. The Legality of the Use of Force Against Afghanistan in 2001* (Surrey: Ashgate Publishing Limited, 2009).

end of the international armed conflict in Afghanistan, an armed conflict continued which was non-international in nature despite the fact that it involved international armed forces.³⁵

Dual Application and Inter-Relationship between International Humanitarian Law and International Human Rights Law

111. In the context of armed conflicts, the application of international humanitarian law does not exclude the applicability of international human rights law. On the contrary, rather than involving the displacement of one set of laws in favour of another, these two bodies of law “are complementary, not mutually exclusive”,³⁶ as recognized in international and other case law.³⁷ States have a duty to apply both bodies of law in armed conflicts in order to achieve the greatest possible protection.
112. In other words, international human rights law does not cease to apply in times of war except by operation of specific provisions in human rights treaties whereby a state can derogate from certain rights in a time of public emergency or armed conflict threatening the life of the nation. A *lex specialis* construction may only be resorted to where there is an irreconcilable conflict between international humanitarian law and international human rights law.³⁸ It should be noted that specific safeguards have been put in place, as spelled out, for instance, in Article 4(1) of the ICCPR, to ensure that derogations from certain rights are exceptional, temporary and non-discriminatory measures. As will be analysed in further detail in the report, certain rights are considered non-derogable, such as the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the recognition of everyone as a person before the law and the freedom of thought, conscience and religion. ODIHR notes that the United States has not notified any official derogation from the ICCPR or any other international human rights treaty since 9/11 and has itself

³⁵ “Report on Preliminary Examination Activities 2014”, ICC, 2 December 2014, para. 79, <<http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>>: “The situation in Afghanistan is usually considered as an armed conflict of a non-international character between the Afghan Government, supported by the ISAF and US forces on the one hand (pro-government forces), and non-state armed groups, particularly the Taliban, on the other (anti-government groups). The participation of international forces does not change the non-international character of the conflict since these forces became involved in support of the Afghan Transitional Administration established on 19 June 2002”; Stuart Casey-Maslen (ed.), *The War Report 2012* (Oxford: Oxford University Press, 2013), pp. 68-69.

³⁶ UN Human Rights Committee (UN HRC), General Comment No. 31, The nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11, <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFD6ZSwMMvmQGVHA%3d%3d>>.

³⁷ See, for instance, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 25, <<http://www.icj-cij.org/docket/files/95/7495.pdf>>: “the Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 106, <<http://www.icj-cij.org/docket/files/131/1671.pdf>>: “More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights”.

³⁸ Alex Conte, Director of the International Law and Protection Programmes, International Commission of Jurists, “Exercise of the right to challenge the lawfulness of detention by individuals detained in the context of an armed conflict”, Global consultation on the right to challenge the lawfulness of detention, UN Working Group on Arbitrary Detention, 1-2 September 2014, Geneva, p. 2, <<http://www.ohchr.org/Documents/Issues/Detention/Consultation2014/AlexConte.pdf>>.

reiterated that “a time of war does not suspend the operation of the Covenant to matters within its scope of application”.³⁹ It also takes note of the US position that while “international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing”,⁴⁰ the latter is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.

113. ODIHR considers that those Guantánamo detainees captured in the context of the international armed conflict in Afghanistan were entitled, until the end of the conflict, to the protection of international human rights law and international humanitarian law, consistent with the provisions of the ICCPR and the Geneva Conventions of 1949, as well as relevant customary international law. Protections under international human rights law continue to be applicable in armed conflicts except as specifically provided by authorized derogations.⁴¹ According to this, detainees should have been repatriated to their country or prosecuted for war crimes at the end of the inter-state conflict.⁴² Moreover, certain obligations under international humanitarian law continue to apply after the cessation of an armed conflict.
114. Many of the detainees at Guantánamo were apprehended outside, and/or unconnected to, any armed conflict. In such cases, international humanitarian law does not apply, and international human rights standards alone govern their arrest and detention.

Status of Detainees

115. International humanitarian law does not explicitly refer to unlawful combatants or unprivileged belligerents. Instead, in the context of an international armed conflict, international humanitarian law makes reference to “combatants” and “prisoners of war” and defines civilians as persons who do not fall into either of those categories.⁴³ In the context of an armed conflict of a non-international character, the terms combatant and prisoner of war do not apply.⁴⁴ In both international and non-international armed conflicts, civilians may lose their protection from attack because they have directly participated in

³⁹ UN HRC, Fourth periodic report of the United States of America, CCPR/C/USA/4, 30 December 2011, para. 506, <<http://www.un.org/Docs/journal/asp/ws.asp?m=CCPR/C/USA/4>>.

⁴⁰ UN HRC, Fourth periodic report of the United States of America, *ibid.*, para. 507: “it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing. These two bodies of law contain many similar protections.”

⁴¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, note 37, para. 106.

⁴² Third Geneva Convention, Art. 118; UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 22-24.

⁴³ “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Geneva, 8 June 1977, Art. 50, <<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument>>.

⁴⁴ Instead, individuals may be referred to by a variety of terms, including armed forces, dissident armed forces and other organized armed groups, civilians taking direct part in hostilities, civilians who take a direct part in hostilities, persons who take a direct part in hostilities, combatant adversary, etc. “Customary International Humanitarian Law, Rule 3: Definition of Combatants”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3>.

hostilities but only “for such time as they take a direct part in hostilities”.⁴⁵ As far as the status, rights and protections of persons detained in connection with the war against al Qaeda, the Taliban and associated forces are concerned, the terms unlawful combatants or unprivileged belligerents are simply “shorthand for persons – civilians – who have directly participated in hostilities in an international armed conflict without being members of the armed forces as defined by [international humanitarian law] and who have fallen into enemy hands”.⁴⁶

116. The US government did not initially provide full criteria on who it considered to be an “unlawful enemy combatant”.⁴⁷ As a result, in 2004, the United States Supreme Court created a definition for the purposes of *Hamdi v. Rumsfeld*, which defined “enemy combatants” as those who are “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States”.⁴⁸ Subsequently, the US government defined “unlawful enemy combatants” when it established Combatant Status Review Tribunals (CSRTs). This definition specified that an “unlawful enemy combatant” was “an individual who was part of or supporting” al Qaeda, the Taliban or associated forces “that are engaged in hostilities against the United States or coalition partners”. It further specified that this definition “includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy

⁴⁵ API, Art. 51(3): “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”; “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 727: unlike prisoners of war, civilians that directly participate in hostilities do not receive the combatant’s privilege regarding immunity from criminal prosecution for acts that do not violate international humanitarian law so they may be prosecuted under domestic law for taking part in hostilities; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 11; Knut Dormann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, *International Review of the Red Cross*, Vol. 85. No. 849, March 2003, pp. 47-48, <https://www.icrc.org/eng/assets/files/other/irrc_849_dorman.pdf>.

ODIHR notes that, for the purpose of the principle of distinction – namely to determine who is protected against direct attack during the conduct of hostilities – the ICRC has specified that members of organized armed groups of a non-State party to a non-international armed conflict are not considered as civilians, and therefore lose protection against direct attack for as long as they carry out their “continuous combat function” (individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a “continuous combat function”; they are to be distinguished from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions). However, the status, rights, and protections of persons *outside* the conduct of hostilities (which are the main focus of this section) in both international and non-international armed conflicts are not dependent upon their qualification as civilians for the specific purpose of the principle of distinction, but rather on the “precise personal scope of application of the provisions conferring the relevant status, rights, and protections”. Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, ICRC, May 2009, p. 13 footnote 5 and pp. 27, 31-36, <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>>.

⁴⁶ “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *ibid.*, p. 727; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *ibid.*, para. 11; Dormann, *ibid.*, pp. 47-48.

⁴⁷ United States Supreme Court, *Yaser Esam Hamdi v. Donald H. Rumsfeld*, No. 03-6696, 28 June 2004, <<https://supreme.justia.com/cases/federal/us/542/507/>>; United States President George W. Bush, Military Order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”, 13 November 2001, <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html>>; prior to *Hamdi v. Rumsfeld*, President George W. Bush had authorized the detention of an individual who “(i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.”

⁴⁸ United States Supreme Court, *Hamdi v. Rumsfeld*, *ibid.*

forces” [emphasis added].⁴⁹ The United States District Court for the District of Columbia later determined that this definition was broader than the Supreme Court definition as it permitted the “indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies”.⁵⁰ In this case the government had said that it had the authority to detain (1) “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance al Qaeda activities”; (2) “a person who teaches English to the son of an al Qaeda member”; and (3) “a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source”.⁵¹ The US government has now created various definitions of “unlawful enemy combatants” and “unprivileged enemy belligerents” (the term used by the Obama administration), that are applicable to detention⁵² or to military commissions.⁵³ All of the definitions of “unlawful enemy combatants” and “unprivileged enemy belligerents”, however, appear to go beyond the law of war as being “part of”, “purposefully and materially supporting hostilities” or

⁴⁹ United States Deputy Secretary of Defense Paul D. Wolfowitz, “Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal”, 7 July 2004, <<http://www.defense.gov/news/jul2004/d20040707review.pdf>>.

⁵⁰ As will be discussed in Part I-A of this report, international humanitarian law does authorize the internment of civilians, including those that have not directly participated in an armed conflict, in the context of an international armed conflict, but only in exceptional circumstances, whereby it is “absolutely necessary” for the detaining country’s security or for “imperative reasons of security”. The individual must be released once the exceptional circumstances cease to exist even if the relevant armed conflict has not ended.

⁵¹ This case was vacated on other grounds in *Boumediene v. Bush*. United States District Court for the District of Columbia, *In re Guantánamo Detainee Cases*, Nos. CIV.A.02–CV–0299CKK, 31 January 2005, <www.legislationline.org/documents/id/7453>.

⁵² For instance: Department of Defense Directive 2310.01E, *op. cit.*, note 14, Part II: unprivileged belligerent refers to “an individual who is not entitled to the distinct privileges of combatant status (e.g. combatant immunity), but who by engaging in hostilities has incurred the corresponding liabilities of combatant status. Examples of “unprivileged belligerents” are: [i]ndividuals who have forfeited the protections of civilian status by joining or substantially supporting an enemy non-state armed group in the conduct of hostilities. Combatants who have forfeited the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines”; United States District Court for the District of Columbia, *In Re: Guantánamo Bay Detainee Litigation*, “Respondents’ Memorandum regarding the Government’s detention authority relative to detainees held at Guantánamo Bay”, Case Nos. 08-442, 05-0763, 05-1646, 05-2378, 13 March 2009,

<<http://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf>>: the United States position on the Authorization for Use of Military Force’s (AUMF) detention authority is that: “[t]he President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces”; National Defense Authorization Act (NDAA) for Fiscal Year 2012, 31 December 2011, § 1021, <<http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>>: this provision aimed to codify the AUMF’s detention authority. It included “[a] covered person under this section is any person as follows: (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks. (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”

⁵³ For instance: Military Commissions Act (MCA) of 2006, 17 October 2006, § 948a,

<http://www.loc.gov/frd/Military_Law/pdf/PL-109-366.pdf>: (1) (A) “The term ‘unlawful enemy combatant’ means – (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense”; MCA of 2009, 28 October 2009, § 948a(7), <<http://www.mc.mil/Portals/0/MCA20Pub20Law200920.pdf>>: “The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter”.

“substantially supporting” could be interpreted to encompass individuals that never “directly participated in hostilities”.⁵⁴

117. For the above reasons, the US concepts of “unlawful enemy combatant” and “unprivileged enemy belligerent” do not create a separate status that is outside the protections of international humanitarian law.⁵⁵ Both combatants and civilians are entitled to the protections provided for in the Geneva Conventions. Combatants⁵⁶ are entitled to the privileges contained in the Third Geneva Convention.⁵⁷ Civilians, who meet the nationality

⁵⁴ Since treaty international humanitarian law does not define the notion of direct participation in hostilities, the ICRC has interpreted it “in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose” of international humanitarian law. According to the ICRC interpretation, the notion of direct participation in hostilities refers to “specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict” irrespective of the international or non-international character of the armed conflict. The ICRC further explained: “[P]articipation’ in hostilities refers to the (individual) involvement of a person in these hostilities”. “Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.” “[T]here can also be ‘indirect’ participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person’s direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities. Generally speaking, beyond the actual conduct of hostilities, the general war effort could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations), while war-sustaining activities would additionally include political, economic or media activities supporting the general war effort (e.g., political propaganda, financial transactions, production of agricultural or non-military industrial goods) (...) Admittedly, both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities. Some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause – i.e. bring about the materialization of – the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm. (...) For a specific act to qualify as ‘direct’ rather than ‘indirect’ participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm. Standards such as ‘indirect causation of harm’ or ‘materially facilitating harm’ are clearly too wide, as they would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against direct attack (...). Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities. (...) Likewise, although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect. Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.” Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *op. cit.*, note 45, pp. 41, 43-54, <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>>. See, also, Laura M. Olson, “Guantánamo Habeas Review: Are the D.C. District Court’s Decisions Consistent with Internment Standards”, *Case Western Reserve Journal of International Law*, Vol. 42, December 2009, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515928>.

⁵⁵ See, for instance, UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, Report to the General Assembly, A/63/223, 6 August 2008, para. 22, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/63/223>>; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 11: “the term ‘unlawful enemy combatant’ is a description of convenience, meaningful only in international armed conflicts, and even then only denoting persons taking a direct part in hostilities while not being members of the regular armed forces or of assimilated units”; “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 728: “[o]ne of the purposes of the law of war is to protect the life, health and dignity of all persons involved in or affected by armed conflict. It is inconceivable that calling someone an ‘unlawful combatant’ (or anything else) should suffice to deprive him or her of rights guaranteed to every individual under the law”.

⁵⁶ Article 4 outlines the requirements for an individual to qualify as a prisoner of war. For instance, Article 4(A)(1) entitles “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces” to be treated as prisoners of war. Third Geneva Convention, Art. 4.

⁵⁷ A combatant has the “right” to participate directly in hostilities and is immune from criminal prosecution for belligerent acts which do not violate international humanitarian law. Upon capture, a combatant is entitled to prisoner of war status. API, Arts. 43(2), 44(1); Third Geneva Convention, Art. 4.

requirement,⁵⁸ are protected under the Fourth Geneva Convention, whether they have directly participated in hostilities or not. Civilians who do not meet the nationality requirement⁵⁹ are protected, at a minimum, by Common Article 3 and Article 75 of API,⁶⁰ as well as other relevant laws, such as customary international law and international human rights law.⁶¹

118. Thus, during any form of armed conflict – including an international armed conflict – there is no intermediate status that is outside the protections of international humanitarian law.⁶²

⁵⁸ “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.” Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949, (hereinafter, “Fourth Geneva Convention”), Art. 4,

<<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>>. See, also, Commentary on Art. 4, Fourth Geneva Convention, ICRC website, <<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=78EB50EAD6EE7AA1C12563CD0051B9D4>>; “Foreign Fighters Under International Law”, Geneva Academy of International Humanitarian Law and Human Rights, October 2014, p.18, <<http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20briefs/Foreign%20Fighters%20Under%20International%20Law%20Briefing%20no7.pdf>>.

⁵⁹ The ICTY associates the nationality requirement with allegiance. “In the cases provided for in Article 4(2), in addition to nationality, account was taken of the existence or non-existence of diplomatic protection: nationals of a neutral State or a co-belligerent State are not treated as ‘protected persons’ unless they are deprived of or do not enjoy diplomatic protection. In other words, those nationals are not ‘protected persons’ as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of ‘protected persons’. (...) [N]ot only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.” ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, 15 July 1999, paras. 165-166, <<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>>.

⁶⁰ “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 727. *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, p. 377,

<https://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf>; “Fact Sheet: New Actions on Guantánamo and Detainee Policy”, The White House website, 7 March 2011, <<http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>>; Department of Defense Directive 2310.01E, *op. cit.*, note 14, para. 3(a)(3).

⁶¹ Article 75(8) of API, for instance, provides that “[n]o provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1” (paragraph 1 is applicable to all “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol”). See, also, “The relevance of IHL in the context of terrorism”, ICRC Resource Centre, *op. cit.*, note 24; Pejic, “Procedural Principles and Safeguards”, *op. cit.*, note 16, p. 378.

⁶² ICTY, *Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21-T, 16 November 1998, para. 271, <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf>: “there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Geneva Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied.”; Commentary on Art. 4, Fourth Geneva Convention, ICRC website, *op. cit.*, note 58: “Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.” See, also, API, Art. 51(3); Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *op. cit.*, note 45, pp. 83-84: Any civilians who participate directly in hostilities do not lose their civilian status although during their participation in hostilities they lose their immunity from attack. While civilians have a duty to respect international humanitarian law, direct participation in hostilities by civilians in itself does not constitute a violation of international humanitarian law and does not constitute a war crime although such participation may be prosecuted under domestic law. When civilians who have participated in hostilities are captured they remain protected civilians under the Fourth Geneva Convention. Antonio Cassese, “Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law”, 2006, para. 7, <<http://www.stoptorture.org.il/files/cassese.pdf>>: “the term ‘unlawful combatants’ is merely descriptive and is by no means intended to create a *third status* between those of combatant and civilian.”

Moreover, international humanitarian law and the use of terms, such as combatants, “prisoners of war” and civilians who “take a direct part in hostilities” are only relevant during armed conflicts within the meaning of international humanitarian law.⁶³

119. ODIHR has not sought to carry out an individual analysis of the status of the detainees to determine how many can be classified as civilians. Nevertheless, ODIHR is of the view that the detainees held at Guantánamo, including those charged before the military commissions, do include civilians. This is based on ODIHR’s view that, with regard to the rights, status and protections of detainees, the definition of civilian includes all persons who do not fall within the definition of combatant,⁶⁴ (applicable, as stated, only to international armed conflicts and to carefully defined criteria under international humanitarian law) as well as all detainees who were not arrested in the context of an armed conflict. In particular, ODIHR considers that the “global war against terrorism” cannot be understood to confer combatant status to persons detained for conduct outside of an armed conflict.

Extraterritorial Application of International Human Rights Law

120. The United States questions the applicability of some international human rights treaty obligations to the situations of detainees in Guantánamo, arguing that such obligations do not apply extraterritorially, thus reiterating its consistent position since 1995. The United States maintains that Article 2(1) of the ICCPR⁶⁵ is applicable only to individuals who are *both* within the territory of a State party *and* under that State party’s jurisdiction. In other words, the United States has insisted that the ICCPR should not apply to individuals outside its territory.⁶⁶ On this particular point, ODIHR emphasizes the conclusion of the UN Human Rights Committee (UN HRC) that the United States should “interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extraterritorial application of the Covenant under certain circumstances”.⁶⁷
121. The US position is inconsistent with the interpretation of Article 2(1) of the ICCPR by the UN Human Rights Committee and the International Court of Justice (ICJ). Both the Human Rights Committee and the International Court of Justice have explained that the

⁶³ “Customary International Humanitarian Law, Rule 3”, ICRC website, *op. cit.*, note 44.

⁶⁴ The definition includes “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces” and “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied” who fulfil certain conditions. Third Geneva Convention, Art. 4(A).

⁶⁵ “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” [emphasis added]. ICCPR, New York, 16 December 1966, Art. 2(1), <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

⁶⁶ “Human Rights Committee considers report of the United States”, Office of the High Commissioner for Human Rights (OHCHR) website, 14 March 2014, <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E>>.

⁶⁷ UN HRC, Concluding observations on the fourth periodic report of the United States of America, 23 April 2014, CCPR/C/USA/CO/4, para. 4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/USA/CO/4&Lang=En>.

ICCPR is legally binding upon a state for acts occurring outside its territory, interpreting Article 2(1) of the ICCPR as applying to all persons who are within a state's territory *or* otherwise subject to a state's jurisdiction, including when outside of a state's territory. The Human Rights Committee clearly stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State Party".⁶⁸ Similarly, the ICJ concluded in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".⁶⁹ The Human Rights Committee has similarly specified that: "[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent or a State Party assigned to an international peace-keeping or peace-enforcement action".⁷⁰

122. In other words, a state, whenever exercising effective control over a person in another territory, has the same obligations to respect, protect and fulfil human rights as in "its own territory". This applies to the situation at Guantánamo as a result of the international lease agreement between the United States and Cuba, which specifies that "the United States shall exercise complete jurisdiction and control over and within the said areas" during the period of occupation of these areas.⁷¹ The high level of US control over Guantánamo and the persons in it is further emphasized by the United States Supreme Court decisions that allowed detainees to challenge their detention in federal courts in the United States⁷² and that provided Guantánamo detainees with the right to *habeas corpus* under Article 1 Section 9 of the US Constitution.⁷³
123. Similarly, Article 2(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) requires that each State party take effective measures to prevent torture on its territory, as well as any territory under its jurisdiction.⁷⁴ This requirement is extended to cruel, inhuman and degrading treatment or punishment under Article 16⁷⁵ of the CAT.⁷⁶ The United States has now clarified its position before the

⁶⁸ UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 10.

⁶⁹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, note 37, para. 111.

⁷⁰ UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 10.

⁷¹ Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Havana, 23 February 1903, Art. III, <http://avalon.law.yale.edu/20th_century/dip_cuba002.asp>.

⁷² United States Supreme Court, *Shafiq Rasul et al. v. George W. Bush*, Case Nos. 03-344, 03-343, 28 June 2004, <<https://supreme.justia.com/cases/federal/us/542/466/opinion.html>>.

⁷³ United States Supreme Court, *Lakhdar Boumediene et al. v. George W. Bush*, Case Nos. 06-1195 and 06-1196, 12 June 2008, <<https://supreme.justia.com/cases/federal/us/553/06-1195/>>.

⁷⁴ "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." CAT, New York, 10 December 1984, Art. 2(1), <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>.

⁷⁵ "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." CAT, Art. 16(1).

⁷⁶ UN Committee against Torture (UN CAT), General Comment No. 2: Implementation of Article 2 by States parties, CAT/C/GC/2, 24 January 2008, para. 3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en>.

UN Committee against Torture (UN CAT), affirming that “torture and cruel, inhuman and degrading treatment are prohibited at all times and in all places” and acknowledging that the CAT’s reference to “any territory under a [State Party’s jurisdiction]” binds it legally wherever the US government “controls as a governmental authority”, including at Guantánamo Bay.⁷⁷ ODIHR welcomes the acceptance of the universal prohibition of torture and ill-treatment, although the wording used by the United States leaves doubt as to whether it accepts the application of some articles, such as Articles 2 and 16, of the CAT in places over which it does not exercise governmental authority such as CIA secret detention facilities.⁷⁸ The UN Committee against Torture considers that the respective Articles apply to all areas over which a state exercises “directly or indirectly, in whole or in part, de jure or de facto effective control”.⁷⁹ ODIHR also notes that the prohibition of torture and ill-treatment is non-derogable and is therefore applicable at all times, including during times of armed conflict and states of emergency.⁸⁰

⁷⁷ “UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, 13 November 2014, <<http://www.treatybodywebcast.org/category/webcast-archives/cat/>>.

⁷⁸ Harold Hongju Koh, “America’s ‘Unequivocal Yes’ to the Torture Ban”, Just Security website, 18 November 2014, <<http://justsecurity.org/17551/americas-unequivocal-yes-torture-ban/>>.

⁷⁹ UN CAT, General Comment No. 2, *op. cit.*, note 76, paras. 7, 16.

⁸⁰ CAT, Art. 2(2); UN CAT, General Comment No. 2, *ibid.*, paras. 1, 5; OSCE, “Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE”, Copenhagen, 29 June 1990, (hereinafter, “OSCE Copenhagen Document”), para. 16.3, <<http://www.osce.org/odihr/elections/14304>>; OSCE Ministerial Council, “Ministerial Declaration on the Occasion of the 25th Anniversary of the Adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, Athens, 2 December 2009, (hereinafter, “OSCE Athens Document”), para. 4, <<http://www.osce.org/cio/40697>>.

PART 1: HUMAN RIGHTS ISSUES IN THE DETENTION OF INDIVIDUALS AT GUANTÁNAMO

124. Following the 9/11 terrorist attacks, Congress passed the AUMF on 18 September 2001. This Act enabled the US President to use all “necessary and appropriate force against those” who perpetrated or supported the terrorist attacks on 9/11 and those who harboured them.⁸¹ The US government has broadly interpreted the authority the AUMF provides,⁸² including the ability to conduct attacks against, and detain members and supporters of, al Qaeda, the Taliban or associated forces. The US government has transferred 780 detainees to Guantánamo since 11 January 2002.
125. On 22 January 2009, President Barack Obama issued Executive Order 13492 creating the Guantánamo Review Task Force, which received the mandate to promptly and thoroughly review the factual and legal basis for the detention of detainees at Guantánamo.⁸³ On 22 June 2010, the Task Force completed its review and recommended the release of 126 detainees, the potential prosecution of 36 detainees, the continued detention of 48 detainees under the AUMF and the conditional detention of 30 Yemeni detainees whose repatriation was precluded based on US concerns relating to the security situation in Yemen.⁸⁴
126. As of 31 August 2015, 116 detainees remain in detention at Guantánamo Bay. Fifty-four of these detainees have been designated for transfer, 22 are candidates for prosecution,⁸⁵ 30 are designated for “continued law-of-war detention”,⁸⁶ seven are currently in the pre-trial phase of their military commission trials and three were convicted⁸⁷ before military commissions.⁸⁸
127. Part 1-I of this report highlights some of the main standards designed to prevent arbitrary detention and addresses related US practice at Guantánamo. It does not aim to cover all issues related to arbitrary detention. For instance, it does not address the registration of

⁸¹ AUMF, 18 September 2001, <<https://www.govtrack.us/congress/bills/107/sjres23/text>>.

⁸² ODIHR interview with the American Civil Liberties Union, 24 February 2014.

⁸³ United States President Barack H. Obama, Executive Order 13492, “Review and disposition of individuals detained at the Guantánamo Bay Naval Base and closure of detention facilities”, 22 January 2009, § 2(d), <<http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf>>.

⁸⁴ Michael John Garcia *et al.*, “Closing the Guantanamo Detention Center: Legal Issues”, Congressional Research Service, 28 March 2011, pp. 4-5, <http://assets.opencrs.com/rpts/R40139_20110328.pdf>. See, also, “Final Report: Guantanamo Review Task Force”, Guantánamo Review Task Force, 22 January 2010, p. ii, <<http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>>.

⁸⁵ Experts interviewed by ODIHR have indicated that they expect the number of detainees to actually be prosecuted to be much lower. In early 2015, the Department of Defense reportedly envisioned the prosecution of at most seven more detainees. Carol Rosenberg, “Pentagon envisions up to 7 more Guantánamo trials”, Miami Herald website, 26 March 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article16415225.html>>.

⁸⁶ Following the Guantánamo Review Task Force report, 11 detainees who had previously been recommended for continued detention under the AUMF were designated for transfer by the PRB, two of whom were subsequently transferred from Guantánamo. Two detainees died in detention and five others were exchanged for Sergeant Bowe Bergdahl.

⁸⁷ Ali Hamza Ahmad Suliman al Bahlul was convicted following trial, and his case is under appeal. Two other detainees, Majid Khan and Ahmed Mohammed Ahmed Haza al Darbi, have pled guilty and are awaiting sentencing.

⁸⁸ “The Guantánamo Docket”, The New York Times website, <<http://projects.nytimes.com/guantanamo>>; Carol Rosenberg, “By the Numbers”, Miami Herald website, 19 September 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/Guantanamo/article2163210.html>>; Carol Rosenberg, “List of ‘indefinite detainees’”, Miami Herald website, 17 June 2013, <<http://www.miamiherald.com/incoming/article1952554.html>>.

individuals, access to immediate medical care or the ongoing monitoring of the detention facilities by the ICRC.

128. Part 1-II-A focuses on issues related to Guantánamo detainees' treatment in detention and conditions of confinement. First, it covers the law and practice of the United States in relation to the prohibition of torture and ill-treatment, and addresses the authorization and use of "enhanced interrogation techniques" and detention conditions that impinged on the basic human rights of detainees during the Bush administration. It also covers concerns that persist under the Obama administration that are related, for instance, to the use of solitary confinement, hunger strikers' conditions of confinement, as well as the decision to force-feed detainees and the procedures used to do so. Finally, it discusses allegations of medical personnel's involvement in detainee abuses and the complicity of other OSCE participating States in acts of torture and ill-treatment.
129. Part 1-II-B of the report then explores other human rights issues that have arisen in connection with detainees' conditions of confinement and treatment in detention. These include, more specifically, concerns related to the respect of freedom of religion or belief and the provision of medical care to detainees.

I. PROHIBITION OF ARBITRARY DETENTION

a. International Standards

130. The prohibition of unlawful or arbitrary arrest and detention is enshrined in various international treaties, including Article 9 of the ICCPR.⁸⁹ This prohibition is also included in OSCE commitments, such as Vienna 1989 and Moscow 1991.⁹⁰ The right to be free from unlawful or arbitrary arrest and detention entails that "[n]o one shall be subjected to arbitrary arrest or detention" and that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law".⁹¹ This right applies to all persons, irrespective of nationality or citizenship, and includes those who are suspected of, or who have engaged in, terrorist activity.⁹²

⁸⁹ The United States has either ratified or signed the following conventions that prohibit arbitrary arrest and detention: ICCPR, Art. 9; American Convention on Human Rights (ACHR), San Jose, 22 November 1969, Art. 7, <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>. Although not a treaty, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights determined that the following Declaration contains legal obligations for the Member States of the Organization of American States, including the United States: The American Declaration of the Rights and Duties of Man (ADRDM), Bogotá, 2 May 1948, Arts. I, XXV, <<http://www.cidh.org/basicos/english/Basic2.American%20Declaration.htm>>. The following also contain relevant provisions: Universal Declaration of Human Rights (UDHR), Paris, 10 December 1948, Art. 9, <<http://www.un.org/en/documents/udhr/>>; "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", New York, 9 December 1988, Principles 10-18, <<http://www.un.org/documents/ga/res/43/a43r173.htm>>.

⁹⁰ OSCE Conference on Security and Co-operation in Europe, "Questions Relating to Security in Europe: Principles", Vienna, 1989 (hereinafter, "OSCE Vienna Document"), para. 23.1, <<http://www.osce.org/mc/16262>>; OSCE Copenhagen Document, *op. cit.*, note 80, para. 5.15; OSCE, "Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE", Moscow, 3 October 1991 (hereinafter, "OSCE Moscow Document"), para. 23.1, <<http://www.osce.org/odihr/elections/14310>>; OSCE Ministerial Council, Decision No. 12/05, "Upholding Human Rights and the Rule of Law in Criminal Justice Systems", Ljubljana, 6 December 2005 (hereinafter, "OSCE Ljubljana Document"), <<http://www.osce.org/mc/36575?download=true>>.

⁹¹ ICCPR, Art. 9(1).

⁹² UN HRC, General Comment No. 35, Article 9: Liberty and security of person, CCPR/C/GC/35, 28 October 2014, para. 3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en>.

131. Any deprivation of liberty must comply with the requirements of domestic law and must not be “manifestly disproportional, unjust or unpredictable”.⁹³ Hence, laws governing deprivation of liberty must not be arbitrary or applied in an arbitrary manner.⁹⁴ The Human Rights Committee has for instance specified that arbitrary conduct includes elements such as “inappropriateness, injustice, lack of predictability, and [lack of] due process of law, as well as elements of reasonableness, necessity and proportionality”.⁹⁵
132. To prevent the use of arbitrary arrest or detention, states are required to ensure that specific safeguards are in place to protect individuals deprived of their liberty. These safeguards include, but are not limited to: (1) informing individuals of the reasons for their arrest and of any charges against them; (2) bringing arrested or detained individuals promptly before an official with judicial power, as well as either trying them within a reasonable time or releasing them; and (3) providing access to court proceedings to challenge the lawfulness of their detention.⁹⁶ Safeguards (2) and (3) reflect State parties’ obligation to provide for judicial oversight of an individual’s detention. As will be further explained below, some of these safeguards apply to all individuals deprived of their liberty, irrespective of the grounds for their detention, including persons in military, security or counter-terrorism detention.⁹⁷ Others apply only to persons arrested in contemplation of prosecution on a criminal charge.⁹⁸
133. Any individual deprived of his or her liberty has the right to be informed of the reasons for his or her arrest and/or detention and of any charges against him or her.⁹⁹ Accordingly, all detainees should be informed of the official basis for their arrest or detention at the time this takes place and in a language they understand.¹⁰⁰ In the case of persons arrested and detained in contemplation of criminal prosecution, the authorities must, in addition, promptly inform the accused of the charges in a language they understand. Information at the time of arrest may be a general description of the reasons for arrest, but, once charged, the nature and cause of the charges are to be explained in detail without delay. Information about the charges is not only to be given to persons detained in connection with ordinary criminal prosecutions, but also in relation to “military prosecutions or other special regimes directed at criminal punishment”.¹⁰¹
134. The first aspect of judicial oversight arises when a person is arrested or detained for allegedly committing a criminal offence. This person must be brought promptly before a judicial authority and be tried within a reasonable time or released.¹⁰² This safeguard

⁹³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 2005), pp. 224-225.

⁹⁴ ICCPR, Art. 9(1); OSCE Moscow Document, *op. cit.*, note 90, para. 23.1(i); Nowak, *CCPR Commentary*, *ibid.*, pp. 224-225.

⁹⁵ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 12.

⁹⁶ ICCPR, Art. 9.

⁹⁷ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 40.

⁹⁸ *Ibid.*, para. 4.

⁹⁹ ICCPR, Arts. 9(2) and (4); OSCE Moscow Document, *op. cit.*, note 90, para. 23.1(ii); UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Interim report to the General Assembly, A/63/271, 12 August 2008, paras. 24, 33, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/63/271>>; “Body of Principles”, *op. cit.*, note 89, Principle 10.

¹⁰⁰ UN HRC, General Comment No. 35, *op. cit.*, note 92, paras. 26-27; Nowak, *CCPR Commentary*, *op. cit.*, note 93, pp. 228-229.

¹⁰¹ UN HRC, General Comment No. 35, *ibid.*, para. 29; Nowak, *CCPR Commentary*, *ibid.*, pp. 229-230.

¹⁰² ICCPR, Art. 9(3); OSCE Moscow Document, *op. cit.*, note 90, para. 23.1(iv); “Body of Principles”, *op. cit.*, note 89, Principle 37.

applies in all cases involving alleged criminal conduct and runs from the time of initial arrest or detention, including before formal charges are asserted, through to the final conclusion of criminal proceedings.¹⁰³ Access to a judicial authority must be “prompt”. While the circumstances of a particular case may allow for a short delay, any time period exceeding 48 hours from the time of arrest must be “absolutely exceptional”.¹⁰⁴ In the same vein, pre-trial detention is to remain an exception and should last as short a time as possible.¹⁰⁵ According to the Human Rights Committee, detention will be considered arbitrary if a state continues to detain an individual “beyond the period for which the State party can provide appropriate justification”.¹⁰⁶ International bodies and expert have also found that detaining persons accused of criminal conduct for prolonged periods or indefinitely without charge constitutes a *per se* violation of the prohibition.¹⁰⁷ Furthermore, the greater the uncertainty of the duration of the detention, the greater the risk that such continued detention could cause severe mental pain and suffering to detainees, which may constitute ill-treatment.¹⁰⁸

135. The second required mechanism of judicial oversight arises in the case of any form of detention and it requires states to establish and ensure detainees’ access to an effective and speedy mechanism to challenge the lawfulness of their arrest or detention before a court

¹⁰³ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 32.

¹⁰⁴ The HRC has treated delays of three or more days, for example, as being in violation of the prohibition of arbitrary and unlawful detention. UN HRC, General Comment No. 35, *ibid.*, para. 33; “Report on Terrorism and Human Rights”, IACHR, OEA/Ser.L/V/II.116, 22 October 2002, para. 122, <<http://www.cidh.oas.org/Terrorism/Eng/toc.htm>>. See, for example: UN HRC, *Rotislav Borisenko v. Hungary*, Communication No. 852/1999, 6 December 2002, para. 7.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f76%2fd%2f852%2f1999&Lang=en>; three days; UN HRC, *Michael Freemantle v. Jamaica*, Communication No. 625/1995, 28 April 2000, para. 7.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f68%2fd%2f625%2f1995&Lang=en>; four days.

¹⁰⁵ ICCPR, Art. 9(3); UN HRC, General Comment No. 35, *ibid.*, para. 37; “Report on Terrorism and Human Rights”, IACHR, *ibid.*, para. 23. In one case, for example, four years and four months of pre-trial detention was considered to be a violation of the prohibition of arbitrary and unlawful detention. UN HRC, *Famara Koné v. Senegal*, Communication No. 389/1989, 27 October 1994, paras. 8.6-8.7, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f52%2fd%2f386%2f1989&Lang=en>.

¹⁰⁶ UN HRC, *Omar Sharif Baban v. Australia*, Communication No. 1014/2001, 18 September 2003, para. 7.2, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f78%2fd%2f1014%2f2001&Lang=en>; UN HRC, *Danyal Shafiq v. Australia*, Communication No. 1324/2004, 13 November 2006, para. 7.2, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f88%2fd%2f1324%2f2004&Lang=en>.

¹⁰⁷ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, CAT/C/USA/CO/3-5, 19 December 2014, para. 14, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fCO%2f3-5&Lang=en>; UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, 25 July 2006, para. 22, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/USA/CO/2&Lang=En>; Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 36; “IACHR, UN Working Group on arbitrary detention, UN Rapporteur on torture, UN Rapporteur on human rights and counter-terrorism, and UN Rapporteur on health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis”, OHCHR website, 1 May 2013, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13278>>.

¹⁰⁸ “Statement of the UN Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay – Inter-American Commission on Human Rights”, OHCHR website, 3 October 2013, <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E>>.

without delay.¹⁰⁹ Article 9(4) of the ICCPR provides that any person deprived of liberty “shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. This corresponds to the procedure known in many countries, including the United States, as *habeas corpus*. This right is applicable to all persons detained “by official action or pursuant to official authorization”, including all persons detained “in connection with criminal proceedings, military detention, security detention [and] counter-terrorism detention”.¹¹⁰ The Human Rights Committee and the Inter-American Court of Human Rights have said that this right is non-derogable.¹¹¹

136. The determination of a “delay” in relation to challenging the right to *habeas corpus* is dependent upon the type of deprivation of liberty and the circumstances of a particular case. The right attaches from the moment of detention, and, no matter the circumstances, any “substantial delay” to a detainee’s “first challenge to his detention is impermissible”.¹¹² To ensure the effectiveness of the right to challenge the lawfulness of detention, courts hearing *habeas corpus* cases are to make a decision without delay, usually within several weeks,¹¹³ and are to be empowered to order a detainee’s immediate release in the case of unlawful detention. Continued detention following a judicial order of release would defeat the purpose of the right to *habeas corpus* and violate the prohibition of arbitrary detention.¹¹⁴ Detainees are also entitled to challenge the lawfulness of their detention on multiple occasions, including on similar grounds, so long as “an appropriate period of time” has passed after the last court decision.¹¹⁵ Laws and practices effectively depriving a specific category of detainees of the ability to exercise their right to *habeas corpus*,

¹⁰⁹ ICCPR, Art. 9(4); ADRDM, Art. XXV; UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 39; “Body of Principles”, *op. cit.*, note 89, Principles 11, 32; Nowak, *CCPR Commentary*, *op. cit.*, note 93, pp. 235-237; UN Special Rapporteur on the independence of judges and lawyers, Interim report to the General Assembly, A/63/271, *op. cit.*, note 99, para. 28; UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, Special Rapporteur on torture, Manfred Nowak, Working Group on arbitrary detention represented by its Vice-Chair, Shaheen Sardar Ali, Working Group on enforced or involuntary disappearances represented by its Chair, Jeremy Sarkin, “Joint study on global practices in relation to secret detention in the context of countering terrorism”, A/HRC/13/42, 19 February 2010, para. 46, <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>>.

¹¹⁰ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 40.

¹¹¹ UN HRC, General Comment No. 29, Article 4: States of emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en>; UN HRC, General Comment No. 35, *ibid.*, para. 67; Inter-American Court of Human Rights, *Habeas corpus in emergency situations*, Advisory Opinion No. OC-8/87, 30 January 1987, pp. 3, 12, <http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf>; IACHR, *Coard et al. v. United States*, Case No. 10.951, 29 September 1999, para. 55, <<https://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>>.

¹¹² UN HRC, General Comment No. 35, *ibid.*, paras. 42-43; “Body of Principles”, *op. cit.*, note 89, Principle 32; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 236.

¹¹³ The general rule is that a decision without delay typically means within several weeks, but the time limit depends on the types of deprivation of liberty and on the circumstances of the case in question. ICCPR, Art. 9(4); UN HRC, General Comment No. 35, *ibid.*, para. 47; Nowak, *CCPR Commentary*, *ibid.*, p. 236.

¹¹⁴ For instance, the HRC found that the continued detention for two months after a court determined the detention was unlawful constituted arbitrary detention. See UN HRC, *Alex Soteli Chambala v. Zambia*, Communication No. 856/1999, 30 July 2003, para. 7.3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f78%2fD%2f856%2f1999&Lang=en>; UN HRC, General Comment No. 35, *op. cit.*, note 92, paras. 36, 41; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 236.

¹¹⁵ UN HRC, General Comment No. 35, *ibid.*, para. 43.

including incommunicado detention, likewise breach the prohibition on arbitrary detention.¹¹⁶

137. It should also be noted that detainees are to be afforded effective, “prompt and regular access to counsel” to facilitate the exercise of their right to be free from arbitrary arrest and detention.¹¹⁷ The detaining officials are to inform the detainees of their right to counsel promptly after arrest.¹¹⁸ Ensuring detainees’ access to counsel from the outset of their detention is essential given that those arrested or detained on a criminal charge are to be quickly brought before a judge or official with judicial power.¹¹⁹ Lawful restrictions on access to counsel should be specified in law, limited to extraordinary circumstances, temporary and assessed on a case-by-case basis.¹²⁰
138. The prohibition of arbitrary detention further prescribes that persons should only be detained in officially acknowledged places of detention, registered, provided prompt medical assistance and entitled to inform their relatives of their arrest, detention and whereabouts.¹²¹ The prohibition of unacknowledged detention cannot be derogated from, even in times of armed conflict.¹²² The secret detention¹²³ of individuals always amounts to an enforced disappearance,¹²⁴ and is considered to be arbitrary *per se* as well as a *per se* violation of the CAT.¹²⁵

¹¹⁶ *Ibid.*, para. 46.

¹¹⁷ *Ibid.* See, also, UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 13; Pejic, “Procedural Principles and Safeguards”, *op. cit.*, note 16, p. 388.

¹¹⁸ “Body of Principles”, *op. cit.*, note 89, Principle 17.

¹¹⁹ UN HRC, General Comment No. 35, *op. cit.*, note 92, paras. 34-35.

¹²⁰ “Body of Principles”, *op. cit.*, note 89, Principle 18; *Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers* (Warsaw: OSCE/ODIHR, 2013), p. 90, <<http://www.osce.org/odihr/108930?download=true>>.

¹²¹ International Convention for the Protection of All Persons from Enforced Disappearances, New York, 20 December 2006, Art. 17, <<http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>>; UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 58; UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 13; OSCE Moscow Document, *op. cit.*, note 90, para. 23.1(vi); “Body of Principles”, *ibid.*, Principles 12, 16, and 24. For more details about the provision of medical care at Guantánamo, see Part I-II-B of this report.

¹²² UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 13(b); UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, paras. 46-47.

¹²³ For the purpose of this report, it is considered that a “person is kept in secret detention if state authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the State, deprive persons of their liberty; where the person is not permitted any contact with the outside world (‘incommunicado detention’); and when the detaining or otherwise competent authority denies, refuses to confirm or deny or actively conceals the fact that the person is deprived of his/her liberty hidden from the outside world, including, for example family, independent lawyers or non-governmental organizations, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee”. UN Special Procedures, “Joint study on global practices in relation to secret detention”, *ibid.*, para. 8.

¹²⁴ Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances defines enforced disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”. “Customary International Humanitarian Law, Rule 98: Enforced Disappearance”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule98>: While the United States is not a party to this Convention, the treaty is considered to codify binding customary international law.

¹²⁵ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 11; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, paras. 20, 28. See, also, UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 17; Nowak, *CCPR Commentary*, *op. cit.*, note 93, pp. 227-228.

139. Additionally, customary international humanitarian law prohibits enforced disappearances in all circumstances, including during international and non-international armed conflicts.¹²⁶
140. International human rights bodies have stressed that the imposition of security detention, also known as administrative detention or internment that is not in connection with a criminal charge “presents severe risks of arbitrary deprivation of liberty”.¹²⁷ This detention “would normally amount to arbitrary detention”.¹²⁸ As a result, administrative detention must be restricted to very limited and exceptional circumstances,¹²⁹ such as where a detainee would constitute a clear and serious threat to society that cannot be contained in any other manner.¹³⁰ The security detention of a person “for the sole purpose of gathering information or on broad grounds in the name of prevention” is also deemed unlawful.¹³¹ Similarly, subjecting an individual to security detention on the “sole basis” of broadly formulated suspicion that the individual may be a threat to national security raises serious concerns, particularly given that information on the reasons for such detention is usually classified.¹³² States are therefore to ensure that security detention “does not last longer than absolutely necessary”, that there is a limit on the “overall length of possible detention” and that the guarantees provided for in Article 9 of the ICCPR are fully respected. This entails “prompt and regular review” of the existence of grounds for continued detention by an independent and impartial judicial body, access to independent counsel and “disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken”.¹³³

¹²⁶ While not specifically mentioned in any of the Geneva Conventions, the prohibition of enforced disappearances is viewed as a violation of other prohibitions in the Geneva Conventions, including arbitrary deprivation of liberty, torture and ill-treatment and murder. “Customary International Humanitarian Law, Rule 98”, ICRC website, *op. cit.*, note 124.

¹²⁷ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 15.

¹²⁸ *Ibid.*

¹²⁹ UN HRC, Concluding observations: Third periodic report of Jordan, CCPR/C/79/Add.35, 10 August 1994, paras. 16, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.35&Lang=en>; UN HRC, Concluding observations: Third periodic report of Morocco, CCPR/C/79/Add.44, 23 November 1994, para. 21, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.44&Lang=en>.

¹³⁰ In the examination of specific instances of administrative detention, however, the UN HRC has generally found that such instances are not in compliance with the requirements of Article 9 of the ICCPR. The UN CAT has also recommended the elimination of administrative detention because it puts the detainee at greater risk of torture, ill-treatment or other violations of human rights. UN HRC, *Capora Schweizer v. Uruguay*, Communication No. 66/1980, 12 October 1982, para. 18.1, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f17%2fd%2f66%2f1980&Lang=en>; UN HRC, Concluding observations: Fourth periodic report of Jordan, CCPR/C/JOR/CO/4, 18 November 2010, para. 11, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/JOR/CO/4&Lang=En>; UN HRC, Concluding observations: Sixth periodic report of Colombia, CCPR/C/COL/CO/6, 4 August 2010, para. 20, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/COL/CO/6&Lang=En>; UN CAT, Concluding observations: Second periodic report of Jordan, CAT/C/JOR/CO/2, 25 May 2010, para. 13, <<http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.JOR.CO.2.pdf>>; UN HRC, Concluding observations: Second periodic report of Egypt, CCPR/C/79/Add.23, 9 August 1983, para. 10, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.23&Lang=en>.

¹³¹ UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, Report to the Human Rights Council, A/HRC/10/3, 4 February 2009, para. 38, <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.3.pdf>>. See, also, Pejic, “Procedural Principles and Safeguards”, *op. cit.*, note 16, p. 380.

¹³² UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, paras. 19-20; “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 730.

¹³³ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 15; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 38.

141. Customary international humanitarian law also prohibits arbitrary detention in international and non-international armed conflicts.¹³⁴ The Third and Fourth Geneva Conventions, as well as Article 75 of API, govern the detainment of combatants and civilians during international armed conflicts. The Third Geneva Convention allows for the detention of combatants as prisoners of war until the end of active hostilities.¹³⁵ While an administrative or judicial review of the lawfulness of detention is not generally required for prisoners of war, as the lawfulness of such detention is presumed, a competent tribunal must determine the individual's status if there are doubts as to whether the person falls within the category of a prisoner of war under Article 4 of the Third Geneva Convention.¹³⁶ The Fourth Geneva Convention allows for civilians to be interned or placed in assigned residence in exceptional circumstances, when they are either an alien civilian within the territory of a party to the international conflict (Article 42) or a civilian within an occupied territory (Article 78). Civilians are only to be detained in exceptional cases. Detention under Article 42 of the Fourth Geneva Convention is permissible only when it is "absolutely necessary" for the detaining country's security. The detention of civilians in occupied territory is permissible only if it is "necessary, for imperative reasons of security".¹³⁷ Civilians detained during international armed conflicts are to have their detention "reconsidered as soon as possible by an appropriate court or administrative board" (in the case of detention under Article 42) or "subject to periodical review, if possible every six months, by a competent body" (in the case of detention under Article 78).¹³⁸ Such review must be undertaken by a body that offers the necessary guarantees of independence and impartiality.¹³⁹ Article 75 of API provides that detained persons maintain the right to be promptly informed of the reasons for detention in a language they understand.¹⁴⁰

¹³⁴ "Customary International Humanitarian Law, Rule 99: Deprivation of Liberty", ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99>.

¹³⁵ Third Geneva Convention, Art. 21: "The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary." See, also, Third Geneva Convention, Art. 118: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."

¹³⁶ Third Geneva Convention, Art. 5. See, also, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", ICRC, September 2007, *op. cit.*, note 18, pp. 726-727.

¹³⁷ Fourth Geneva Convention, Art. 42: "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary"; Art. 78: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment." See, also, Art. 68: "Protected persons who commit an offence which is solely intended to harm the Occupying Power, (...) shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed"; Art. 41 on non-repatriated persons assigned to residence or internment and Art. 79 on cases of internment and applicable provisions. See, also, "Customary International Humanitarian Law, Rule 99", ICRC website, *op. cit.*, note 134.

¹³⁸ Fourth Geneva Convention, Art. 43: "Any protected person who has been interned (...) shall be entitled to have action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose."; Art. 78: "Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power"; "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", ICRC, September 2007, *op. cit.*, note 18, p. 728: "after the end of an international armed conflict, the Fourth Geneva Convention can no longer be considered a valid legal framework for the detention of persons who are not subject to criminal proceedings". See, also, Pejic, "Procedural Principles and Safeguards", *op. cit.*, note 16, pp. 386-387; Milanović, *op. cit.*, note 10, p. 249.

¹³⁹ Commentary on Art. 43, Fourth Geneva Convention, ICRC website, <<https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/b76d6efa7c1a4956c12563cd0042c193>>;

142. Prisoners of war apprehended during an international armed conflict, who are not facing criminal proceedings or are not convicted and serving a sentence linked to the armed conflict, are to be released or, if applicable, prosecuted at the end of active hostilities.¹⁴¹ Civilians are to be released as soon as the reasons which necessitated their detention no longer exist, unless criminal proceedings are pending or a sentence is being served, or, at the latest, as soon as possible after the end of hostilities.¹⁴² An “unjustifiable delay in the repatriation of prisoners of war or civilians” would constitute a grave breach of API, as well as be a clear violation of the prohibition of arbitrary detention under international human rights law.¹⁴³
143. Detainees captured in relation to non-international armed conflicts are, at a minimum, protected under Common Article 3, customary international law, domestic law, international human rights law and other relevant bodies of law.¹⁴⁴ The Geneva Conventions, including Common Article 3, and their Additional Protocols are silent, however, concerning the authority or procedures for detention in a non-international armed conflict. This means that any detention in this context must take the form of administrative detention which, as noted earlier, presents severe risks of arbitrary deprivation of liberty and must comply with several safeguards mentioned above. The ICRC specifically refers to international human rights law, particularly the ICCPR, in relation to the grounds and procedures for detention during these armed conflicts.¹⁴⁵ The only applicable rule of international humanitarian law is to be found in Rule 128(C) of the ICRC’s catalogue of rules of customary international humanitarian law, stating that: “[p]ersons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist”.¹⁴⁶ Some international law

Commentary on Art. 78, Fourth Geneva Convention, ICRC website,

<<https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/d794403e436f0823c12563cd0042cf9a>>.

¹⁴⁰ API, Art. 75(3): “Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”

¹⁴¹ Third Geneva Convention, Art. 118: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”; Art. 119(5): “Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of punishment”; UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 22; “Customary International Humanitarian Law, Rule 128: Release and Return of Persons Deprived of Their Liberty”, ICRC website, <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule128>; “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 729.

¹⁴² Fourth Geneva Convention, Art. 132: “Each interned person shall be released by the Detaining power as soon as the reasons which necessitated his internment no longer exist. Internees in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty”; Art. 133: “Internment shall cease as soon as possible after the close of hostilities”.

¹⁴³ An unjustifiable delay is a grave breach when committed wilfully and in violation of the Conventions or the Protocol. API, Art. 85(4)(b). See, also, “Customary International Humanitarian Law, Rule 128”, ICRC website, *op. cit.*, note 141.

¹⁴⁴ “Customary International Humanitarian Law, Rule 99”, ICRC website, *op. cit.*, note 134; Pejic, “Procedural Principles and Safeguards”, *op. cit.*, note 16, pp. 377-379; “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 726; “The relevance of IHL in the context of terrorism”, ICRC Resource Centre, *op. cit.*, note 24.

¹⁴⁵ “Customary International Humanitarian Law, Rule 99”, ICRC website, *op. cit.*, note 134; “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 726; Jelena Pejic, “The protective scope of Common Article 3: more than meets the eye”, *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, p. 27, <<https://www.icrc.org/spa/assets/files/review/2011/irrc-881-pejic.pdf>>.

¹⁴⁶ “Customary International Humanitarian Law, Rule 128”, ICRC website, *op. cit.*, note 141.

experts have specified that, “(...) the general IHL rule is that internment must cease [at the latest] at the end or close of active hostilities in the armed conflict in relation to which a person was interned. The close of hostilities is a factual matter that is determined on a case by-case basis.”¹⁴⁷

144. During an international armed conflict, international humanitarian law provides for substantive and procedural rules that “limit the ability to derogate” from international human rights law and “mitigate the risk of arbitrary detention”.¹⁴⁸ Article 4 of the ICCPR allows for derogations during armed conflict, including from some provisions of Article 9, only to the extent where the “life of the nation” is threatened. These measures are to be temporary and strictly required and may not be justified where the result “could be achieved through less intrusive means”. The measures must also be consistent with other international laws, including international humanitarian law.¹⁴⁹ A State party derogating from ICCPR provisions must notify other State parties through the UN Secretary-General.¹⁵⁰ The United States has never given any notification of an official derogation from the ICCPR.¹⁵¹

b. Domestic Standards

145. The US Constitution prohibits arbitrary detention and provides detainees with the ability to challenge the lawfulness of their arrest or detention before a court. The Fifth Amendment stipulates that no one is to be deprived of their liberty without due process of law.¹⁵² The Fourth Amendment recognizes the right to be free from unreasonable searches and seizures.¹⁵³ The right to be informed of the nature and reasons for accusations and to have assistance of counsel in all criminal prosecutions is protected under the Sixth Amendment.¹⁵⁴ Article 1 Section 9 of the US Constitution, also known as the Suspension Clause, grants the privilege of the writ of *habeas corpus*, which allows detainees to challenge the lawfulness of their detention. The writ can only be suspended where “in Cases of Rebellion or Invasion the public Safety may require it”.¹⁵⁵ The privilege of *habeas corpus*, as discussed below, is now available to Guantánamo detainees.¹⁵⁶ The

¹⁴⁷ Pejic, “The protective scope of Common Article 3”, *op. cit.*, note 145, p. 23.

¹⁴⁸ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 66; UN HRC, General Comment No. 29, *op. cit.*, note 111, paras. 3, 9.

¹⁴⁹ ICCPR, Art. 4; UN HRC, General Comment No. 29, *ibid.*, para. 4; UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 12-13.

¹⁵⁰ ICCPR, Art. 4(3).

¹⁵¹ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 13.

¹⁵² The Fourteenth Amendment also prohibits the deprivation of liberty without due process, but it relates to state action, which is not addressed in this report. US Constitution, 17 September 1787, Fifth Amendment, <<http://www.law.cornell.edu/constitution/overview>>: “nor be deprived of life, liberty, or property, without due process of law”.

¹⁵³ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” US Constitution, Fourth Amendment.

¹⁵⁴ “In all criminal prosecutions, the accused shall enjoy the right to (...) to be informed of the nature and cause of the accusation (...) and to have the Assistance of Counsel for his defence.” US Constitution, Sixth Amendment.

¹⁵⁵ US Constitution, Art. 1 § 9.

¹⁵⁶ United States Supreme Court, *Boumediene v. Bush*, *op. cit.*, note 73; United States Supreme Court, *Rasul v. Bush*, *op. cit.*, note 72. The latter case dealt with a federal statute rather than a constitutional right.

applicability of the Constitutional Amendments as they relate to Guantánamo detainees has not been definitively determined or ruled upon.¹⁵⁷

146. Although the AUMF does not specifically mention detention, US courts have determined that the AUMF authorizes the US government to detain at least some Guantánamo detainees. The AUMF authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons” the President determines “planned, authorized, committed or aided the terrorist attacks” on 9/11. The Act also allows the use of necessary and proportionate force against those that harboured these organizations and people to prevent future acts of international terrorism against the United States.¹⁵⁸ A plurality in the Supreme Court’s decision in *Hamdi v. Rumsfeld* recognized that the US President could detain persons captured fighting on behalf of Taliban forces during the armed conflict in Afghanistan to prevent their “return to the battlefield”.¹⁵⁹ Congress recognized the AUMF’s detention authority in the National Defense Authorization Act (NDAA) of 2012.¹⁶⁰
147. In practice, detention under the AUMF is not limited to those individuals who are captured on the battlefield or those who directly participated in hostilities. Instead, the authority to detain individuals at Guantánamo has thus far turned primarily on a detainee’s association with al Qaeda, the Taliban or associated forces.¹⁶¹ In 2009, lower courts adopted the Obama administration’s position and determined that the AUMF allows for the detention of those seized outside the United States when they were “part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or coalition partners”.¹⁶² Other lower court determinations include that membership in al Qaeda, the Taliban or associated forces can be established by a mere preponderance of evidence and that vitiation and lack of dangerousness are of no relevance to the government’s authority to continue to detain persons under the AUMF.¹⁶³

¹⁵⁷ In *Kiyemba v. Obama*, the United States Court of Appeals for the District of Columbia Circuit did say that Guantánamo detainees did not have due process rights in *habeas corpus* proceedings: “Decisions of the Supreme Court and of this Court (...) hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.” United States Court of Appeals for the District of Columbia Circuit, *Kiyemba v. Obama*, Case Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428 and 08-5429, 18 February 2009, <<https://casetext.com/case/kiyemba-v-obama-7/>>.

¹⁵⁸ AUMF, Sec. 2.

¹⁵⁹ The decision in *Hamdi* was limited to the confinement of an American citizen who fought alongside the Taliban against the United States. United States Supreme Court, *Hamdi v. Rumsfeld*, *op. cit.*, note 47; Jonathan Hafetz, “Calling the Government to Account: Habeas Corpus after Boumediene”, Seton Hall Law School Working Papers Series, 14 December 2011, p. 46, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972542>.

¹⁶⁰ NDAA 2012, §§ 1021-1022.

¹⁶¹ Hafetz, “Calling the Government to Account”, *op. cit.*, note 159, p. 47; Stephan I. Vladeck, “Detention after the AUMF”, *Fordham Law Review*, Vol. 82, No. 5, April 2014, pp. 2189-2207, at 2194, <http://fordhamlawreview.org/assets/pdfs/Vol_82/Vladeck_April.pdf>.

¹⁶² This was the executive’s position as per the Obama administration’s March 2009 brief submitted to the district court in the Guantánamo *habeas corpus* litigation. Courts, and then Congress, essentially adopted this position (although the United States Court of Appeals for the District of Columbia Circuit in *Bihani* initially used the language “materially supported”). In virtually all cases, courts have rested on the “part of” prong of the AUMF detention standard. United States District Court for the District of Columbia, *In Re: Guantanamo Bay Detainee Litigation*, “Respondents’ Memorandum regarding the Government’s detention authority relative to detainees held at Guantanamo Bay”, *op. cit.*, note 52; UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, CAT/C/USA/3-5, 12 August 2013, para. 59, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en>; Hafetz, “Calling the Government to Account”, *ibid.*, pp. 19-22, 45-51.

¹⁶³ Vladeck, “Detention after the AUMF”, *op. cit.*, note 161, p. 2194. See, also, Hafetz, “Calling the Government to Account”, *ibid.*, pp. 22-30.

148. The AUMF and the NDAA 2012 are the only domestic laws that authorize prolonged military detention without trial.¹⁶⁴ Other US policies, however, are also applicable to the Guantánamo Bay detention facility, such as the Department of Defense (DoD) Directive on the DoD Detainee Program. The Directive specifies that prisoners of war and “unprivileged [enemy] belligerents” may be lawfully detained “until a competent authority determines that the conflict has ended or that active hostilities have ceased” and once a “safe and orderly transfer or release is practicable”, unless criminal proceedings are pending or a conviction has been issued. Civilians may also be lawfully detained for security reasons or for their protection until the reasons requiring their detention cease to exist. If convicted of a criminal offence, civilians will be released after their sentences are completed.¹⁶⁵ The policy also provides that detainees will be “promptly informed of the reasons for their detention in a language they understand”.¹⁶⁶
149. Prior to June 2004, Guantánamo detainees could not challenge the lawfulness of their detention. In *Rasul v. Bush*, the United States Supreme Court determined that detainees could challenge their detention in US federal courts.¹⁶⁷ Subsequently, the Detainee Treatment Act (DTA) of 2005 and the Military Commissions Act (MCA) of 2006 were enacted and included provisions that prohibited courts from hearing detainees’ *habeas corpus* cases.¹⁶⁸ The Supreme Court invalidated these provisions in *Boumediene v. Bush* in 2008 and ruled that Guantánamo detainees had a right to writs of *habeas corpus* under Article 1 Section 9 of the US Constitution.¹⁶⁹ As a result, detainees are now able to challenge the lawfulness of their detention in court.

c. Findings and Analysis

CIA RENDITION, DETENTION AND INTERROGATION PROGRAMME

150. Shortly after the 9/11 attacks, the CIA began running a programme of extraordinary rendition¹⁷⁰ and secret detention, where it secretly captured, detained and interrogated individuals in secret locations abroad (including reportedly at Guantánamo),¹⁷¹ and

¹⁶⁴ Vladeck, “Detention after the AUMF”, *ibid.*, p. 2196; NDAA 2012, §§ 1021-1022.

¹⁶⁵ Department of Defense Directive 2310.01E, *op. cit.*, note 14, paras. 3(f), 3(m)(5).

¹⁶⁶ *Ibid.*, para. 3(c).

¹⁶⁷ United States Supreme Court, *Rasul v. Bush*, *op. cit.*, note 72.

¹⁶⁸ In Section 7 of the 2006 MCA Congress amended the DTA to make explicit the elimination of *habeas* jurisdiction over past, present and future *habeas* petitions by enemy combatants. DTA, 30 December 2005, § 1005(e)(1), <[https://www.icrc.org/ihl-nat/a24d1cf3344e99934125673e00508142/b22319a0da00fa02c1257b8600397d29/\\$FILE/Detainee%20Treatment%20Act%20of%202005%20.pdf](https://www.icrc.org/ihl-nat/a24d1cf3344e99934125673e00508142/b22319a0da00fa02c1257b8600397d29/$FILE/Detainee%20Treatment%20Act%20of%202005%20.pdf)>; MCA 2006, § 7.

¹⁶⁹ United States Supreme Court, *Boumediene v. Bush*, *op. cit.*, note 73.

¹⁷⁰ For the purpose of this report, “extraordinary rendition” is to be understood as “the transfer – without legal process – of a detainee to the custody of a foreign state for purposes of detention and interrogation”. It is to be distinguished from the concept of “rendition”, defined as the “transfer – without legal process – of a detainee (...) to the custody of a foreign government for purposes of criminal prosecution”. *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (New York: Open Society Foundations, 2013), p. 13, <<http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>>.

¹⁷¹ From September 2003, a number of detainees have allegedly been under CIA detention at Guantánamo and kept separately from detainees under military custody. CIA detention at Guantánamo has reportedly continued after 2006. United States Senate Select Committee on Intelligence, “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program” (hereinafter, “Senate Study on the CIA RDI Programme”), Executive Summary, 9 December 2014, pp. 140, 161, <http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf>.

transferred other individuals it apprehended to third countries so that they could secretly detain and interrogate these individuals on its behalf.¹⁷² The CIA received the authority to detain individuals from the Memorandum of Notification (MON) issued by President Bush on 17 September 2001. It is said to have authorized the CIA to “detain persons who pose a continuing, serious threat of violence or death to US persons and interests or who are planning terrorist activities”. The CIA was also reportedly given “significant discretion” to determine who to detain, the reasons for detention and the length of detention.¹⁷³ Ultimately, the CIA RDI programme included acts of enforced disappearances, secret detentions, unlawful inter-state transfers and torture and ill-treatment.¹⁷⁴

151. This section of the report focuses primarily on the situation of those detainees who were subsequently transferred to Guantánamo under military custody, and, to a certain extent, under CIA detention. It explores the issues raised by the programme insofar as they relate to the prohibition of arbitrary detention. The detention and interrogation practices inflicted on the detainees as part of the CIA RDI programme are analysed in further detail in Part I-II-A.
152. Following the issuance of the MON, the CIA allegedly instructed personnel that they could go beyond the authority provided for in the MON and “detain individuals who might not be high-value targets (...), but could provide information on high-value targets”.¹⁷⁵ The Senate Select Committee on Intelligence’s Study on the CIA RDI Programme determined that the CIA detained at least 119 individuals as part of this programme.¹⁷⁶ This would have included 26 persons who did not meet the standard for detention authorized by the MON. In addition to these 26 people, it was reported that the CIA disagreed internally about whether the detention of some of the other individuals met the MON standard for detention, and that numerous individuals detained were subsequently found not to be persons who “pose a continuing threat or violence” or who were “planning terrorist activities”.¹⁷⁷
153. President Bush publicly acknowledged the existence of the CIA RDI programme in September 2006, following the transfer of 14 so-called “high-value detainees” to

¹⁷² For instance, Abd Al-Rahim Al-Nashiri and Abu Zubaydah were detained in a CIA secret detention facility in Poland. ECtHR, *Al Nashiri v. Poland*, Application No. 28761/11, 24 July 2014, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044>>; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, Application No. 7511/13, 24 July 2014, para. 496, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047>>; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 141.

¹⁷³ Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 11, 13.

¹⁷⁴ Dick Marty, “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states”, Council of Europe Committee on Legal Affairs and Human Rights, Doc. 10957, 12 June 2006, para. 5, <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/306_martydetentionsfirst_/306_martydetentionsfirst_en.pdf>; Dick Marty, “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report”, Council of Europe Committee on Legal Affairs and Human Rights, Doc. 11302 rev, 11 June 2007, paras. 1-2, <<http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=11555&Language=EN>>; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, paras. 390, 398, 401, 417, 530-532.

¹⁷⁵ Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, p. 13.

¹⁷⁶ *Ibid.*, p. 14: “While the CIA has represented in public and classified settings that it detained ‘fewer than one hundred’ individuals, the Committee’s review of CIA records indicates that the total number of CIA detainees was at least 119. Internal CIA documents indicate that inadequate record keeping made it impossible for the CIA to determine how many individuals it had detained.”

¹⁷⁷ *Ibid.*, p. 16.

Guantánamo.¹⁷⁸ While he explained that the CIA was no longer holding any detainees in secret locations at that time,¹⁷⁹ his Executive Order 13440, addressing the requirement for the compliance of the programme with Common Article 3, officially confirmed in July 2007 that the CIA was still running the programme.¹⁸⁰ Furthermore, two other “high-value detainees” were apprehended and held in secret detention in late 2006 and 2007, before their transfer to Guantánamo in 2007 and 2008, respectively.¹⁸¹

154. “High-value detainees” subjected to the CIA rendition, detention and interrogation programme were held in incommunicado detention for periods of 16 months up to almost four and a half years.¹⁸² During this time, detainees were placed in secret facilities outside judicial control and outside the legal protection provided for by both international humanitarian and human rights law.¹⁸³ They were flown to multiple facilities around the world, estimated between three and ten,¹⁸⁴ which facilitated their detention without charge, without access to *habeas corpus* and without the ability to exercise other applicable rights.¹⁸⁵ In the secret CIA detention facilities, detainees were held in solitary confinement and were unable to access counsel or relatives.¹⁸⁶ Without access to the outside world, those subjected to the RDI programme were unable to challenge the lawfulness of their detention.¹⁸⁷ Five detainees were even reportedly removed from CIA detention in

¹⁷⁸ United States President George W. Bush, “President Discusses the Creation of Military Commissions to Try Suspected Terrorists”, The White House website, 6 September 2006, <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>>; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 105.

¹⁷⁹ George W. Bush, “President Discusses the Creation of Military Commissions”, *ibid.*; Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, p. 16.

¹⁸⁰ United States President George W. Bush, Executive Order 13440, “Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency”, 20 July 2007, <<http://www.gpo.gov/fdsys/pkg/FR-2007-07-24/pdf/07-3656.pdf>>. See also CIA - “Extraordinary Rendition” Flights, Torture and Accountability - A European Approach (Berlin: European Center for Constitutional and Human Rights, 2009), Second edition, p. 35 <<http://www.ecchr.de/ecchr-publications/articles/publications.html>>.

¹⁸¹ These detainees are Abd al Hadi al-Iraqi and Muhammad Rahim. Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 143, 461; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 129; “Defense Department Takes Custody of a High-Value Detainee”, United States Department of Defense website, 27 April 2007, <<http://www.defense.gov/releases/release.aspx?releaseid=10792>>; “Defense Department Takes Custody of a High-Value Detainee”, United States Department of Defense website, 14 March 2008, <<http://www.defense.gov/releases/release.aspx?releaseid=11758>>.

¹⁸² This takes into account the time spent in secret detention by the first 14 high-value detainees transferred to Guantánamo in 2006. “ICRC Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody”, ICRC, February 2007 (hereinafter, “ICRC Report”), p. 3, <<http://wllstorage.net/file/icrc-report-2007.pdf>>; Laura N. Pannelle, “The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?”, *California Western International Law Journal*, Vol. 36, No. 2, 2005, p. 312, <<http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1139&context=cwilj>>; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, paras. 397-398, 401.

¹⁸³ Pannelle, “The Guantanamo Gap”, *ibid.*, p. 312; ICRC Report, *ibid.*, p. 24; *The Report of The Constitution Project's Task Force on Detainee Treatment* (Washington: The Constitution Project, 2013), pp. 168-169, <<http://detaineeataskforce.org/pdf/Full-Report.pdf>>.

¹⁸⁴ ICRC Report, *ibid.*, p. 6; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 398.

¹⁸⁵ UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 141; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, pp. 168-169.

¹⁸⁶ The UN joint study concluded such factors amounted to arbitrary detention. UN Special Procedures, “Joint study on global practices in relation to secret detention”, *ibid.*, paras. 20, 106, 126, 146, 179; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *ibid.*, p. 16; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 398.

¹⁸⁷ Pannelle, “The Guantanamo Gap”, *op. cit.*, note 182, p. 312; ICRC Report, *op. cit.*, note 182, p. 7.

Guantánamo after the United States Supreme Court agreed to hear a case that would grant those detainees access to courts to challenge their detention.¹⁸⁸

155. Both international humanitarian law and human rights law prohibit the use of enforced disappearances and unacknowledged detention.¹⁸⁹ Accordingly, the CIA RDI programme violated various international standards such as the prohibitions of enforced disappearance, torture and ill-treatment, as well as arbitrary arrest and detention.¹⁹⁰

DETENTION AT GUANTÁNAMO

156. Under the Bush administration, the United States considered itself in a global “war on terror”, which was not limited by geographical boundaries, against al Qaeda, the Taliban and associated forces. This administration maintained that the President could detain people based on the President’s constitutional role as commander-in-chief and under the AUMF.¹⁹¹ Under the Obama administration, the US government stopped referring to its ongoing operations against terrorism as a global “war on terror” and no longer maintained that the President had constitutional authority to detain people.¹⁹² The Obama administration articulates that the United States is in an armed conflict against al Qaeda, the Taliban and associated forces and asserts that the authority to detain individuals captured in this conflict is provided by the AUMF, as informed by the laws of war.¹⁹³
157. The US government maintains that all Guantánamo detainees were captured in connection with an armed conflict and that they are being lawfully held in conformity with the laws of

¹⁸⁸ Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 140-141: “Beginning in September 2003, the CIA held a number of detainees at CIA facilities on the grounds of, but separate from, the U.S. military detention facilities at Guantanamo Bay, Cuba. (...) After consultation with the U.S. solicitor general in February 2004, the Department of Justice recommended that the CIA move four detainees out of a CIA detention facility at Guantanamo Bay pending the Supreme Court’s resolution of the case. (...) By April [redacted], 2004, all five CIA detainees were transferred from Guantanamo Bay to other CIA detention facilities.” See, also, *The Report of The Constitution Project’s Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 169.

¹⁸⁹ ICRC Report, *op. cit.*, note 182, p. 24.

¹⁹⁰ Detaining individuals in secret detention is a *per se* violation of the CAT. UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 11; Nowak, *CCPR Commentary*, *op. cit.*, note 93, pp. 226-228: the UN HRC determined that the use of enforced disappearance, incommunicado detention and kidnapping by secret agents constitutes arbitrary arrest and detention; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, paras. 20, 28; UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, paras. 17-18.

¹⁹¹ United States Supreme Court, *Shafiq Rasul et al. v. George W. Bush*, “Brief for the Respondents”, Case Nos. 03-334, 03-343, March 2004, <http://www.pegc.us/archive/Supreme_Court/Al-Odah_Rasul_merits/Govt_Merits_Al-Odah_20040304.pdf>.

¹⁹² United States District Court for the District of Columbia, *In Re: Guantanamo Bay Detainee Litigation*, “Respondents’ Memorandum regarding the Government’s detention authority relative to detainees held at Guantanamo Bay”, *op. cit.*, note 52; Jeffrey F. Addicott, “Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the ‘War Against al-Qaeda’ – Why It Matters in Rendition and Targeted Killings,” *Case Western Reserve Journal of International Law*, Vol. 45, Issues 1, 2, 2012, p. 273, <<http://law.case.edu/journals/JIL/Documents/45CaseWResJIntL1&2.14.Article.Addicott.pdf>>.

¹⁹³ ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, 5 September 2014. United States District Court for the District of Columbia, *In Re: Guantanamo Bay Detainee Litigation*, “Respondents’ Memorandum regarding the Government’s detention authority relative to detainees held at Guantanamo Bay”, *ibid.* In this memorandum, the United States acknowledges that the laws of war include treaties such as the Geneva Conventions and customary international law, and asserts that “[p]rinciples derived from law-of-war rules governing international armed conflicts (...) must inform the interpretation of the detention authority Congress has authorized for the current armed conflict” since the laws of war are “less well-codified with respect to [their] current, novel type of armed conflict against armed groups such as al-Qaida and the Taliban”.

war.¹⁹⁴ Accordingly, the US government's position is that it can hold detainees at Guantánamo without charge under the laws of war until a competent authority determines that "the conflict has ended or that active hostilities have ceased".¹⁹⁵

158. ODIHR's view is that the "global war against terrorism" does not constitute an armed conflict and does not justify an extended application of international humanitarian law beyond those events that constitute part of an armed conflict as defined by international humanitarian law. ODIHR recognizes the conflict in Afghanistan from 7 October 2001 until 19 June 2002 as an international armed conflict. Therefore, the Third and Fourth Geneva Conventions, customary international law, including Article 75 of API, and international human rights law¹⁹⁶ were all applicable to the detention of Guantánamo detainees directly involved and apprehended in the context of this conflict from the date of apprehension to the end of the international armed conflict.¹⁹⁷ For those apprehended in connection with the subsequent non-international armed conflict in Afghanistan, detention is regulated by Common Article 3, customary international law, international human rights law, domestic law and other relevant bodies of law.¹⁹⁸

159. Additionally, ODIHR considers that many of the detainees at Guantánamo were apprehended outside any armed conflict involving the United States at the time of their arrest.¹⁹⁹ ODIHR rejects the US position that it is enabled to capture individuals anywhere in the world and subject them to detention under the law of armed conflict based on mere allegations that they are or intended to be a member²⁰⁰ of al Qaeda, the Taliban or associated forces.²⁰¹ For instance, ODIHR does not agree with the position that the

¹⁹⁴ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, 5 September 2014.

¹⁹⁵ Department of Defense Directive 2310.01E, *op. cit.*, note 14, paras. 3(f), 3(m)(5). See, also, UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, para. 19.

¹⁹⁶ International human rights law does allow for some derogation during times of armed conflict. Thus, international human rights law is applicable during armed conflict but it is subject to acceptable derogations given the proper notification is given. As mentioned in the introduction of this report, a *lex specialis* construction may only be resorted to where there is an irreconcilable conflict between international humanitarian law and international human rights law.

¹⁹⁷ United States Supreme Court, *Hamdi v. Rumsfeld*, *op. cit.*, note 47: "It is a clearly established principle of the law of war that detention may last no longer than active hostilities". See, also, Third Geneva Convention, Art. 118; Laws and Customs of War on Land (Hague II), The Hague, 29 July 1899, Art. 20, <http://avalon.law.yale.edu/19th_century/hague02.asp>; Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Hague Convention (IV), The Hague, 18 October 1907, Art. 20, <<https://www.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/1d1726425f6955aec125641e0038bfd6>>. See, also, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.*, note 37, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, note 37, para. 106; UN Working Group on arbitrary detention, *Obaidullah v. United States of America*, Communication No. 10/2013, 25 July 2013, paras. 28-33, <<http://www1.umn.edu/humanrts/wgad/10-2013.html>>; UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 11.

¹⁹⁸ "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", ICRC, September 2007, *op. cit.*, note 18, p. 726; "Customary International Humanitarian Law, Rule 99", ICRC website, *op. cit.*, note 134; Pejic, "Procedural Principles and Safeguards", *op. cit.*, note 16, pp. 377-379; "The relevance of IHL in the context of terrorism", ICRC Resource Centre, *op. cit.*, note 24.

¹⁹⁹ UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, para. 25.

²⁰⁰ This was the stance of the Bush administration. The current stance is that the individual must have been part of or substantially supported al Qaeda, the Taliban or associated forces. All Guantánamo detainees were apprehended under the Bush administration.

²⁰¹ Mark Denbeaux, Joshua Denbeaux *et al.*, "Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data", Seton Hall Public Law Research Paper No. 46, February 2006, <http://law.shu.edu/publications/GuantanamoReports/Guantanamo_report_final_2_08_06.pdf>: A study of Defense Department data found that US authorities only identified eight percent of detainees as al Qaeda fighters, and only 45 percent of detainees

apprehension of the so-called Algerian Six²⁰² in Bosnia and Herzegovina was sufficiently connected to an armed conflict, thereby invoking international humanitarian law rules of detention, simply because the United States alleged that they planned to travel to Afghanistan at some point in the future to take up arms against the United States.²⁰³ The detention of all detainees apprehended outside an armed conflict is governed by international human rights law.²⁰⁴ Thus, the prohibition of arbitrary detention as guaranteed by international human rights law is unquestionably and fully applicable to these detainees throughout their detention. ODIHR again stresses that acts of terrorism committed outside an armed conflict are to be treated as criminal acts requiring law enforcement responses in line with international human rights standards and OSCE commitments.

160. Although the United States did capture individuals in the context of the international armed conflict in Afghanistan, hundreds of detainees later held in Guantánamo were apprehended after the end of that conflict in June 2002. To ODIHR's knowledge, approximately 215 people were transferred to Guantánamo after this date. It appears that, of the 116 persons still held at Guantánamo, just 26 were captured in Afghanistan before July 2002. This number would rise to 79 if it included those apprehended in Pakistan before July 2002.²⁰⁵ Other current detainees were apprehended in other places such as Djibouti, Kenya, Thailand and United Arab Emirates after July 2002.²⁰⁶ It can therefore reasonably be assumed that a significant proportion of Guantánamo detainees, both past and present, were apprehended outside any international armed conflict.

were believed to have committed a hostile act against the US or coalition forces. Furthermore, “[t]he Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watchlist”; “US: Prolonged Indefinite Detention Violates International Law: Current Detention Practices at Guantanamo Unjustified and Arbitrary”, Human Rights Watch website, 24 January 2011, <<http://www.hrw.org/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law>>; *The Report of The*

Constitution Project's Task Force on Detainee Treatment, *op. cit.*, note 183, p. 66: Former interrogators and military personnel also expressed their opinions that there are detainees who should not have been detained in Guantánamo.

²⁰² The Algerian Six consisted of Bensayah Belkacem, Hajj Boudella, Lakhdar Boumediene, Mustafa Ait Idir, Sabir Mahfouz Lahmar and Mohammed Nechle. They were all born in Algeria but were residing in Bosnia and Herzegovina at the time of their apprehension. The US government accused them of plotting to attack the US Embassy in Sarajevo and of planning to travel to Afghanistan to take up arms against the United States. The Algerian Six were arrested by Bosnian authorities and held for 90 days before the Bosnian Supreme Court dismissed the charges. Although the Human Rights Chamber of Bosnia and Herzegovina ordered the government to take all steps to prevent the deportation of the Algerian Six, the six men were all apprehended and taken to Guantánamo.

²⁰³ Although the US government also initially alleged that the Algerian Six plotted to attack the US Embassy in Sarajevo, it later dropped these accusations. According to the judge in their *habeas corpus* case, “all six petitioners (...) were residing (...) over a thousand miles away from the battlefield in Afghanistan”. The US government relied on a single source to show the alleged plan to travel to Afghanistan, which resulted in the judge finding that “[t]o allow enemy combatancy to rest on so *thin* a reed would be inconsistent with this Court’s obligation (...) to protect petitioners from the risk of erroneous detention”. United States District Court for the District of Columbia, *Lakhdar Boumediene v. George W. Bush*, Civil Case No. 04-1166, 20 November 2008, <<http://www.scotusblog.com/wp-content/uploads/2008/11/leon-boumediene-order-11-20-2008.pdf>>.

²⁰⁴ “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, September 2007, *op. cit.*, note 18, p. 726.

²⁰⁵ A number of detainees apprehended close to the Afghan border in Pakistan were allegedly escaping from Afghanistan. While ODIHR does not agree with the assumption that they were all captured in connection with the international armed conflict in Afghanistan, it is possible that some of them may have been involved in a belligerent activity or directly participated in hostilities.

²⁰⁶ “The Guantánamo Docket”, The New York Times website, *op. cit.*, note 88; Carol Rosenberg, “Who’s still being held at Guantánamo”, Miami Herald website, 22 September 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html>>.

161. While the United States likely had authority to detain some of the Guantánamo detainees based on their direct participation in hostilities, ODIHR is concerned that other detainees allegedly apprehended and detained under international humanitarian law may in fact have been detained based on the particular circumstances in which they found themselves rather than their involvement in any direct participation in hostilities on their part.²⁰⁷ Reports that find that over 90 per cent of all detainees were not captured by US or coalition forces and that bounties were paid in exchange for handing people over to US authorities raise numerous questions about the basis for their capture and subsequent detention.²⁰⁸
162. Following the end of active hostilities in an international armed conflict, prisoners of war must be released without delay unless they are subject to pending criminal proceedings for, or convicted of, an indictable offence.²⁰⁹ Similarly, civilians are to be released once the reasons for their detention no longer exist and, at the latest, “as soon as possible after the close of hostilities”.²¹⁰ Detainees captured in connection with the international armed conflict in Afghanistan should therefore have been charged or released once the active hostilities in that conflict ceased.²¹¹ However, from July 2002 to December 2002, only five detainees were transferred from Guantánamo. In 2003, 88 detainees were transferred from Guantánamo while 655 people remained in detention.²¹² To date, only 30 Guantánamo detainees have been charged, and the charges against 15 of those individuals were dropped without prejudice.²¹³
163. The continued detention of approximately 79 people apprehended prior to July 2002 amounts to more than 13 years of detention following the end of the international armed conflict in Afghanistan. While international humanitarian law may allow for a reasonable period of time to pass before repatriation, ODIHR does not view a period of several years, or indeed 13 years, to be reasonable. On the contrary, it holds the view that such a period of time constitutes an “unjustifiable delay”.²¹⁴ Accordingly, ODIHR considers that the

²⁰⁷ Numerous reports have alleged that many detainees were simply in the wrong place at the wrong time. See, for instance, *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 66; ODIHR interview with Brent Rushforth, 2 April 2014, where he explained that his client, Abdurrahman Abdallah Ali Mahmoud al Shubati, is a scholar who went to Afghanistan to teach the Koran, and that there was nothing in his records to justify his detention at Guantánamo; ODIHR interview with Michael E. Mone, 11 March 2014; Mone explained that after talking with his client, Oybek Jabbarov, it was apparent that he was simply another one of the Guantánamo mistakes and had been in the wrong place at the wrong time. He had already lived in northern Afghanistan for two years before the attack in 2001. He got a ride with some soldiers one day who handed him over to US authorities. Then he was detained for eight years; Resolution P6_TA(2007)0032, “Transportation and illegal detention of prisoners: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners”, European Parliament, 30 January 2007, para. 84, <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0020&language=EN>>: “all investigations concluded, as early as the end of October 2002, that Murat Kurnaz posed no terrorist threat”. Kurnaz was apprehended by Pakistani authorities on a bus during a routine check.

²⁰⁸ Denbeaux, Denbeaux *et al.*, Report on Guantanamo Detainees: A Profile of 517 Detainees”, *op. cit.*, note 201, pp. 2-3; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 66.

²⁰⁹ Third Geneva Convention, Arts. 118, 119(5); UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, para. 21.

²¹⁰ Fourth Geneva Convention, Arts. 132-133.

²¹¹ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 22-24.

²¹² “The Guantánamo Docket”, The New York Times website, *op. cit.*, note 88.

²¹³ This statistic does not differentiate between detainees who were apprehended in the context of, or outside of, the international armed conflict in Afghanistan. Nevertheless, it illustrates the very small number of individuals who have been charged before the military commissions in comparison to the number of detainees.

²¹⁴ API, Art. 85(4)(b); “Customary International Humanitarian Law, Rule 128”, ICRC website, *op. cit.*, note 141.

continued detention without charge of individuals apprehended in connection with the international armed conflict in Afghanistan violates the prohibition of arbitrary detention.

REASONS FOR DETENTION

164. Credible reports and interviews with former detainees indicate that some detainees were being held for the sole purpose of intelligence gathering, rather than for reasons permitted by law.²¹⁵ Hajj Boudella, Lakhdar Boumediene and Mustafa Ait Idir all maintain that they still do not know the reasons why they were held in Guantánamo. Boumediene said “[I] spent seven and a half years [in Guantánamo], and now five years later, I still do not know why. I still have no idea why I was there”. He also recalled one interrogator telling him that the US government had nothing on him but that they needed him to testify against others.²¹⁶ In the same vein, Ait Idir reported that he was told he was being detained so that he could provide information on Bosnia and Herzegovina, individuals and rescue organizations.²¹⁷ These three detainees were held in Guantánamo for over six years. Holding persons for prolonged periods for the sole purpose of intelligence gathering amounts to unlawful detention.²¹⁸ Furthermore, both international humanitarian and human rights law mandate that those detained be promptly informed of the reasons for their detention.²¹⁹ Accordingly, the US government may have violated international standards by detaining individuals for the sole purpose of intelligence gathering and by failing to inform detainees of the reasons for their detention.

CONTINUED AND INDEFINITE DETENTION AT GUANTÁNAMO

165. In 2010, the Guantánamo Review Task Force approved 48 detainees for “continued detention under the AUMF”.²²⁰ It considered a detainee to fall under this category if: (1) the detainee was a threat to US national security that could not be sufficiently mitigated; (2) the detainee could not feasibly be prosecuted in any forum; and (3) the detainee could continue to be detained without criminal charges under the AUMF. The third requirement was assessed by the Task Force in consultation with the Department of Justice based on their legal analysis of the detainee’s detention under the AUMF and “the government’s

²¹⁵ For instance, in 2006, the UN Working Group on arbitrary detention and several UN Special Rapporteurs reported that credible sources had revealed that the purpose of the ongoing detention of detainees was not to prevent detainees from returning to the battlefield to take up arms against the United States, but to gather information and intelligence on al Qaeda. UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 23.

²¹⁶ ODIHR interview with Lakhdar Boumediene, 21 June 2014. Lakhdar Boumediene was transferred to France on May 15, 2009.

²¹⁷ ODIHR interview with Mustafa Ait Idir and Hajj Boudella, 12 July 2014. Mustafa Ait Idir and Hajj Boudella were transferred to Bosnia and Herzegovina on December 16, 2008. During his interview with ODIHR, Ait Idir said he was told to forget about the alleged plot to attack the US Embassy in Sarajevo and to focus on providing information on organizations and Arabs in Bosnia and Herzegovina.

²¹⁸ United States Supreme Court, *Hamdi v. Rumsfeld*, *op. cit.*, note 47: “Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized”; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 38.

²¹⁹ API, Art. 75(3); ICCPR, Art. 9(2).

²²⁰ “Final Report”, Guantánamo Review Task Force, *op. cit.*, note 84, p. 23.

case for defending the detention in any habeas litigation”.²²¹ Since 2010, the number of detainees recommended for continued detention has fallen to 30.²²²

166. The Task Force Review, as well as subsequent reviews by the PRB, have designated for transfer or release 54 of the current 116 Guantánamo detainees. The majority of these detainees have been designated for transfer or release for over five years. Thirty-Eight of the detainees designated for transfer or release are from Yemen. To designate a detainee for transfer or release, the responsible US authorities must determine in particular that any threat the detainee posed to US national security can be mitigated and evaluate potential receiving countries.²²³ Yet, even though the US government believes that these individuals pose a threat to US national security that can be mitigated, these individuals remain in indefinite detention in Guantánamo,²²⁴ uncertain as to whether they will ever be released. Indefinite detention is a *per se* violation of the CAT.²²⁵
167. ODIHR further considers that the indefinite detention of individuals at Guantánamo has likely had an adverse effect on the health of the detainees and, moreover, constitutes ill-treatment.²²⁶ In 2004, the ICRC had already pointed out that the uncertainty surrounding the length of detention and the lack of access to legal mechanisms was negatively affecting the detainees’ health.²²⁷ David Hicks, a former detainee, explained that “you did not know if you were going to be released, if you would ever be released, because they liked to have us believe that we would die there, that no one could intervene, that we were powerless, that no one, no organization or anyone, had the power to intervene and help us”.²²⁸ The Special Rapporteur on torture and cruel, inhuman or degrading treatment (hereinafter “the Special Rapporteur on torture”) explained that the indefinite detention of detainees without charge at Guantánamo caused physical and mental suffering, stress, fear, depression and anxiety and constituted arbitrary detention and ill-treatment.²²⁹ Similarly, the Inter-

²²¹ *Ibid.*, p. 8.

²²² As of 31 August 2015, the PRB has designated 11 detainees for transfer (two of them were transferred from Guantánamo), five detainees were transferred to Qatar in exchange for US Sergeant Bowe Bergdahl, and two detainees died. One detainee, Awal Gul, reportedly died from a heart attack, and the other detainee, Inayatullah, reportedly committed suicide.

²²³ “Final Report”, Guantánamo Review Task Force, *op. cit.*, note 84, p. 7: A third evaluation consisted of a “legal evaluation to ensure that any detainee falling outside the government’s lawful detention authority under the AUMF was recommended for transfer or release”.

²²⁴ This view is also supported by the IACHR, UN Working Group on arbitrary detention, UN Special Rapporteur on torture, UN Special Rapporteur on human rights and counter-terrorism, and UN Special Rapporteur on health. “IACHR, UN Working Group on arbitrary detention, UN Rapporteur on torture, UN Rapporteur on human rights and counter-terrorism, and UN Rapporteur on health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis”, OHCHR website, *op. cit.*, note 107.

²²⁵ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 14.

²²⁶ “Statement of the UN Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay - Inter-American Commission on Human Rights”, OHCHR website, *op. cit.*, note 108; “IACHR, UN Working Group on arbitrary detention, UN Rapporteur on torture, UN Rapporteur on human rights and counter-terrorism, and UN Rapporteur on health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis”, OHCHR website, *op. cit.*, note 107.

²²⁷ “Guantanamo Bay: Overview of the ICRC’s work for internees”, ICRC website, 1 January 2004, <<http://www.icrc.org/eng/resources/documents/misc/5qrc5v.htm>>.

²²⁸ ODIHR interview with David Hicks, 12 April 2014. David Hicks was transferred to Australia on May 18, 2007.

²²⁹ “Statement of the UN Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay - Inter-American Commission on Human Rights”, OHCHR website, *op. cit.*, note 108; ODIHR interview with the Center for Victims of Torture, 25 February 2014: in most cases indefinite detention amounts to cruel, inhuman

American Commission on Human Rights (IACHR) reported that this indefinite detention led to cardiovascular problems, asthma, diabetes, suicide attempts, self-wounding and hunger strikes.²³⁰ Furthermore, physicians explained that indefinite detention exacerbates physical and mental symptoms and prevents opportunities for healing. They said that when taken together with past treatment and conditions of detention, indefinite detention constitutes ill-treatment.²³¹

168. Moreover, ODIHR is concerned by the situation of the Yemeni detainees who have been designated for transfer or release for years²³² but whose repatriation has been restricted based on their nationality and the political situation in their country.²³³ Such restrictions may constitute a violation of the principle of non-discrimination.²³⁴

JUDICIAL REVIEW OF LAWFULNESS OF DETENTION

169. US representatives informed ODIHR that the detention of individuals held in Guantánamo has been reviewed on multiple occasions. These are said to have included reviews on the day of the detainees' apprehension, in Guantánamo, in numerous subsequent administrative reviews and in federal courts.²³⁵ In addition to *habeas corpus* proceedings, the United States has created CSRTs, the Administrative Review Board (ARB) and the PRB to review detainees' cases.

170. CSRTs and the ARB, which were both established in 2004, were administrative mechanisms designed to review each detainee's detention. CSRTs consisted of three military officers and determined whether detainees were enemy combatants.²³⁶ The CSRTs held 581 reviews and concluded that all but 39 detainees were enemy combatants.²³⁷ In

or degrading treatment or punishment or torture. The hopelessness is so profound that it can have severe psychological effects on an individual detainee.

²³⁰ "Annex to the Press Release Issued at the Close of the 147th Session", Organization of American States website, 5 April 2013, <http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp>.

²³¹ Stephen Xenakis described the practice of indefinite detention as one that evokes considerable despair. He added that more than one Guantánamo detainee has said their religion prohibits suicide, so they say they are not suicidal. He explained that prisoners in the United States know the duration of their sentence, which helps them adjust to the situation. On the contrary, the open ended part of indefinite detention has undoubtedly had adverse effects on detainees at Guantánamo. ODIHR interview with Brigadier General Stephen Xenakis, 31 March 2014. See, also, ODIHR interview with Scott Allen, 19 March 2014; *Punishment Before Justice: Indefinite Detention in the US* (Cambridge: Physicians for Human Rights, 2011), p. 41, <https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf>.

²³² "[M]ost of the 79 detainees who are currently designated for transfer had already been cleared for transfer five years ago". UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 16.

²³³ For more information on the situation of Yemeni detainees and obstacles to their transfer, see Part 3-I-A of this report.

²³⁴ See, also, "IACHR, UN Working Group on arbitrary detention, UN Rapporteur on torture, UN Rapporteur on human rights and counter-terrorism, and UN Rapporteur on health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis", OHCHR website, *op. cit.*, note 107.

²³⁵ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194.

²³⁶ Wolfowitz, "Memorandum: Order Establishing Combatant Status Review Tribunal", *op. cit.*, note 49; Hafetz, "Calling the Government to Account", *op. cit.*, note 159, pp. 7-8; UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Report to the Commission on Human Rights, E/CN.4/2005/60, 20 January 2005, para. 23, <<http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>>.

²³⁷ "Combatant Status Review Tribunal Summary", United States Department of Defense website, 10 February 2009, <<http://www.defense.gov/news/csrtsummary.pdf>>. Five hundred thirty-nine detainees were found to be enemy combatants, and three tribunals were suspended.

2008, the Supreme Court found that CSRTs denied detainees counsel, extensively used classified information that was withheld from the detainee, allowed the use of hearsay evidence and created a “considerable risk of error in [its] finding of fact”.²³⁸ Additionally, the government did not use witnesses, the government’s classified evidence was presumed to be reliable, detainees received only a summary of the government’s classified evidence, detainees’ requests for calling witnesses and producing evidence were often denied, and new reviews were typically ordered when the CSRTs determined that detainees were not enemy combatants.²³⁹

171. The ARB was also an administrative mechanism which consisted of three military officers that reviewed each detainee’s case. Each year the ARB would assess whether a detainee should be released, transferred or subjected to continued detention.²⁴⁰ It did not review the lawfulness of the detainees’ detention. CSRTs and the ARB are no longer used.
172. Despite the decision in *Rasul v. Bush*, which allowed detainees to challenge their detention in US courts, no *habeas corpus* petition was decided on the merits until after the Supreme Court decided in 2008 that the Suspension Clause applied to detainees.²⁴¹ This effectively means that, from 2002 to 2008, detainees did not have effective access to an independent court to challenge the legality of their detention as required by international human rights law.²⁴² Although the Third Geneva Convention does not require a review of the detention of prisoners of war, unless their status as a prisoner of war is in doubt, the United States has not recognized any detainees as prisoners of war. The Fourth Geneva Convention requires either a judicial or an administrative board review, but this Convention was no longer applicable following the end of the international armed conflict in Afghanistan in 2002. Given the deficiencies of CSRTs outlined by the United States Supreme Court and other reports, this administrative review did not offer the necessary guarantees of independence and impartiality as required by the Fourth Geneva Convention.²⁴³ Thus, the

²³⁸ United States Supreme Court, *Boumediene v. Bush*, *op. cit.*, note 73; Hafetz, “Calling the Government to Account”, *op. cit.*, note 159, p. 13.

²³⁹ Mark Denbeaux, Joshua Denbeaux *et al.*, “No-Hearing Hearings - CSRT: the Modern Habeas Corpus?”, Seton Hall Public Law Research Paper No. 951245, pp. 4-6,

<http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf>.

²⁴⁰ United States Deputy Secretary of Defense Paul D. Wolfowitz, “Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba”, 11 May 2004, <<http://www.defense.gov/news/May2004/d20040518gtmoreview.pdf>>; United States Deputy Secretary of Defense Gordon R. England, “Memorandum: Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba”, 14 July 2006,

<<http://www.defense.gov/news/Aug2006/d20060809ARBProceduresMemo.pdf>>.

²⁴¹ After *Rasul v. Bush* and until the Supreme Court decision in *Boumediene v. Bush*, the DTA and MCA 2006 prevented courts from hearing *habeas corpus* cases. DTA, § 1005(e); MCA 2006, § 7. Laws preventing *habeas corpus* review also violate the ICCPR. UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 46; Hafetz, “Calling the Government to Account”, *op. cit.*, note 159, p. 17. While the DTA 2005 created a judicial mechanism of CSRT determinations, the United States Supreme Court found in *Boumediene v. Bush* that it failed to provide “an adequate and effective substitute for the habeas writ”. The first decision on the merits related to a petition for the review of a CSRT determination under the DTA is dated June 2008, after the Supreme Court decision in *Boumediene v. Bush*. United States Court of Appeals for the District of Columbia Circuit, *Parhat v. Gates*, Case No. 06-1397, 20 June 2008.

²⁴² ICCPR, Art. 9.

²⁴³ Commentary on Art. 43, Fourth Geneva Convention, ICRC website, *op. cit.*, note 139; Commentary on Art. 78, Fourth Geneva Convention, ICRC website, *op. cit.*, note 139; IACHR, *Coard et al. v. United States*, *op. cit.*, note 111, para. 55; United States Supreme Court, *Boumediene v. Bush*, *op. cit.*, note 73; Hafetz, “Calling the Government to Account”, *op. cit.*, note 159, p. 13; Denbeaux, Denbeaux *et al.*, “No-Hearing Hearings”, *op. cit.*, note 239, pp. 4-6; UN Working Group on arbitrary detention, *Obaidullah v. United States of America*, *op. cit.*, note 197, paras. 16, 35: “The CSRT and ARB administrative review hearings

United States was in violation of international standards from 2002 to 2008 by not allowing detainees to challenge the lawfulness of their detention in accordance with international humanitarian law or international human rights law.

173. The PRB also assesses the possibility for a detainee's release. Similar to CSRTs and the ARB, the PRB is an administrative mechanism. It does not assess the lawfulness of detention, but instead analyses the detainee's threat to the United States if released.²⁴⁴ The IACHR has concluded that the PRB falls short of the standards required by the ICRC regarding the independence and impartiality of any review body in the context of armed conflicts.²⁴⁵ The PRB only held its first hearing in 2013 by which time detainees were already able to challenge their detention in court. Since detainees already had an avenue to challenge their detention in court, the existence of the PRB is not relevant to assessing whether the United States complied with international standards in relation to the obligation to ensure that detainees have access to a court to challenge the lawfulness of their detention. This mechanism, however, will be discussed in Part 3 of this report in relation to the closure of Guantánamo.
174. Even though the United States Supreme Court determined that Guantánamo detainees have the right to *habeas corpus* hearings in 2008, some detainees have waited years for US courts to rule on their petitions.²⁴⁶ For instance, Obaidullah filed his *habeas corpus* petition in July 2008. The Bush administration subsequently filed charges against him, which were later withdrawn. Before the charges were withdrawn, his *habeas corpus* petition was held in abeyance from 2008 to June 2010.²⁴⁷ International law stipulates that challenges to the lawfulness of detention must be determined without delay, usually within several weeks.²⁴⁸ While the particular circumstances of a case may justify some delay, ODIHR considers that a delay of over two years is a substantial delay in violation of the prohibition of arbitrary detention.²⁴⁹
175. Contrary to international standards, US courts have not ordered the immediate release of detainees following successful *habeas corpus* petitions. This has allowed the US government to continue to unlawfully hold detainees at Guantánamo for extended periods

were not held before an independent and impartial tribunal", "CSRT is not an adequate and effective substitution to habeas corpus proceedings, and the Working Group has itself previously stated that 'the procedures of the CSRT and the ARB are not adequate ... to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature.'"; UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, para. 22.

²⁴⁴ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, 4 September 2014.

²⁴⁵ IACHR, "Towards the Closure of Guantanamo", 3 June 2015, paras. 262-265,

<<http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf>>.

²⁴⁶ Article 9(4) of the ICCPR requires the court be able to "decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

²⁴⁷ UN Working Group on arbitrary detention, *Obaidullah v. United States of America*, *op. cit.*, note 197, paras. 8, 17; "I Am Fallen into Darkness: The Case of Obaidullah, Guantánamo Detainee Now in His 12th Year without Trial", Amnesty International, July 2013, p. 14, <<http://www.amnestyusa.org/sites/default/files/amr510512013en.pdf>>. His *habeas corpus* petition was subsequently denied in October 2010. United States District Court for the District of Columbia, *Obaydullah v. Barack H. Obama*, No. 08-1173, 19 October 2010, <<https://casetext.com/case/obaydullah-v-obama-6?page=349>>.

²⁴⁸ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 47; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 236.

²⁴⁹ See, also, UN Working Group on arbitrary detention, *Obaidullah v. United States of America*, *op. cit.*, note 197, paras. 35, 44: "The two-year delay in allowing Mr. Obaidullah to challenge his detention is a grave and clear violation, further aggravated by his continued detention [of Article 9(4) of the ICCPR]." The Working Group on arbitrary detention also determined that Obaidullah's detention in general was arbitrary.

of time.²⁵⁰ The Human Rights Committee found a violation of Article 9(4) of the ICCPR when an individual was not released immediately and remained in detention for two months after his detention was determined to be unlawful.²⁵¹ In the majority of successful *habeas corpus* cases, the United States has continued to detain individuals beyond two months, in some cases for over four years.²⁵² ODIHR notes that the transfer of detainees is complicated by various issues, including the need to ensure that detainees are not tortured or persecuted once transferred as well as logistical issues resulting from the location of the detention facility. ODIHR also observes that the US government is currently unable to transfer detainees to the United States.²⁵³ Though some delay may occur due to the complexities of transfers from Guantánamo, continued detention following a judicial finding of unlawful detention, particularly in excess of several months after the ruling, defeats the purpose of such a review and thereby violates the prohibition of arbitrary detention.²⁵⁴

176. A number of other challenges for detainees appear in relation to *habeas corpus* petitions. Since the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's decision in *Al Adahi v. Obama* in 2010, questions have been raised as to whether this remedy is truly available due to the low standard of proof for the government and to the deference that district courts give to the US government's reasons for detention.²⁵⁵ Furthermore, as detainees are associated with terrorism by virtue of their

²⁵⁰ United States Supreme Court, *Jamal Kiyemba et al. v. Barack H. Obama*, Case Nos. 08-1234, 20 October 2009, <http://scholar.google.pl/scholar_case?case=3060628020692206265&hl=en&as_sdt=6&as_vis=1&oi=scholar&sa=X&ei=PLiuVLSzJcPdauC1gZgC&ved=0CB4QgAMoADAA>; United States Court of Appeals for the District of Columbia Circuit, *Jamal Kiyemba v. Barack Obama*, Case Nos. 08-5424, 08-5425, 08-5426, 08, 5427, 08-5428, 08-5429, 28 May 2010, <http://scholar.google.pl/scholar_case?case=8032365351883273404&hl=en&as_sdt=6&as_vis=1&oi=scholar&sa=X&ei=1LiuVPvADtDlaLubgKAJ&ved=0CB4QgAMoADAA>; United States Court of Appeals for the District of Columbia Circuit, *Kiyemba v. Obama*, 18 February 2009, *op. cit.*, note 157; Hafetz, "Calling the Government to Account", *op. cit.*, note 159, pp. 30-36; ODIHR interview with the American Civil Liberties Union, 24 February 2014, *op. cit.*, note 82; interlocutors told ODIHR that even if a detainee wins his *habeas* petition, the government may still claim that he should not be transferred out of Guantánamo back to his own country due to security conditions or risks of torture.

²⁵¹ UN HRC, *Chambala v. Zambia*, *op. cit.*, note 114, para. 7.3.

²⁵² See Part 3-II-B of this report for additional information. Andy Worthington, "Guantánamo Habeas Results: The Definitive List", andyworthington.co.uk, February 2014, <<http://www.andyworthington.co.uk/Guantanamo-habeas-results-the-definitive-list/>>; Mark Denbeaux, Jonathan Hafetz *et al.*, "No Hearing Habeas: DC Circuit Restricts Meaningful Review", Seton Hall Public Law Research Paper No. 2145554, 1 May 2012, p. 5, <<http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf>>; "The Guantánamo Docket", The New York Times website, *op. cit.*, note 88.

²⁵³ The United States cannot currently transfer detainees to the United States due to the transfer restrictions in the NDAA as discussed further in Part 3 of this report.

²⁵⁴ UN HRC, *Chambala v. Zambia*, *op. cit.*, note 114, para. 7.3; ADRDM, Art. XXV; UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 41.

²⁵⁵ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 14: "the Committee is concerned at reports that indicate that federal courts have rejected a significant number of *habeas corpus* petitions"; Denbeaux, Hafetz *et al.*, "No Hearing Habeas", *op. cit.*, note 252, pp. 4, 11; Hafetz, "Calling the Government to Account", *op. cit.*, note 159, p. 27; ODIHR interview with the Center for Constitutional Rights, 24 February 2014: interlocutors explained that the burden of proof is much lower than in regular civil cases, and that all evidence, including hearsay and coerced evidence, is admissible. As long as the government presents some evidence they win the case; ODIHR interview with Matthew O'Hara, 14 March 2014: O'Hara stated that he and other counsel came to the conclusion that no detainee in Guantánamo can ever win a *habeas corpus* case based on the United States Court of Appeals for the District of Columbia Circuit's view of the law; indeed, no detainee could obtain a writ of *habeas corpus* in the District Court for the District of Columbia and then prevail in the Court of Appeals for the District of Columbia Circuit when the government appeals. The standard was created so that whatever the executive says will be accepted, no matter the source; ODIHR interview with Brent Rushforth, *op. cit.*, note 207: Rushforth said that many successful trial court decisions have been reversed by the Court of Appeals for the District of Columbia Circuit, which has set the bar of standard of evidence so low for the government that it is

detention in Guantánamo judges have in some cases appeared hesitant to rule in favour of detainees given the costs of a potential error. For instance, in a concurring opinion in *Esmail v. Obama*, the judge said, “[w]hen we are dealing with detainees, (...) one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism”.²⁵⁶ Finally, while the United States has informed ODIHR that extensive efforts have been undertaken to declassify evidence in *habeas corpus* proceedings,²⁵⁷ federal courts reviewing Guantánamo detention still routinely consider classified information.²⁵⁸ As classified information is accessible to attorneys with security clearances only but cannot be shared with the petitioner,²⁵⁹ its use may hinder detainees’ ability to challenge the lawfulness of their detention. ODIHR is concerned that these issues appear to be preventing detainees from effectively accessing their right to challenge the lawfulness of their detention before a court, which would be a violation of international standards on the prohibition of arbitrary detention.

ACCESS TO COUNSEL

177. Individuals held at Guantánamo did not have access to counsel until the second half of 2004, following the Supreme Court decision in *Rasul v. Bush*.²⁶⁰ Consequently, all persons apprehended and detained at Guantánamo until that time were denied the assistance of a lawyer for up to two years of their detention. International human rights law, however, provides for “prompt and regular access” to counsel to facilitate the exercise of the right to *habeas corpus* and ensure its effectiveness.²⁶¹ It also stipulates that individuals detained in connection with criminal prosecutions are to receive legal assistance from the outset of their detention.²⁶² ODIHR therefore concludes that, in situations where international human rights law governs the grounds and procedures for the detention of Guantánamo detainees, i.e., when detainees were arrested outside of any armed conflict or after the end of the international armed conflict in Afghanistan, a delay of several months to two years before receiving any legal assistance violates Article 9 of the ICCPR. Such access cannot

very hard to see this Court upholding any successful petition. For example, the court will accept any amount of hearsay evidence. Additionally, the presumptions always work in the government’s favour; ODIHR interview with David Remes, 4 March 2014: Remes explained that the Court of Appeals for the District of Columbia Circuit considers that it has no role in looking into law-of-war detention. Therefore, the judiciary is no longer a meaningful resort. See, also, ODIHR interview with the American Civil Liberties Union, 28 February 2014; ODIHR interview with Navy Lieutenant Commander Kevin B. Bogucki, JAGC, 26 February 2014.

²⁵⁶ United States Court of Appeals for the District of Columbia Circuit, *Yasein Khasem Mohammad Esmail v. Barack Obama*, Case No. 10-5282, 8 April 2011,

<http://scholar.google.com/scholar_case?case=113971465202053355&hl=en&as_sdt=6&as_vis=1&oi=scholarr>.

²⁵⁷ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194.

²⁵⁸ David Cole, “Military Commissions and the Paradigm of Prevention”, in Fionnuala Ni Aolain & Oren Gross, *Guantánamo and Beyond, Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge: Cambridge University Press, 2013), p. 103; *ibid.*

²⁵⁹ US comments to the draft report.

²⁶⁰ Richard J. Wilson, “Defending the Detainees at Guantánamo Bay”, *American University Washington College of Law Human Rights Brief*, 2005, p. 2, <<http://www.wcl.american.edu/hrbrief/12/3wilson.pdf>>; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 64; ODIHR interview with Matthew O’Hara, *op. cit.*, note 255; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216.

²⁶¹ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 46.

²⁶² *Ibid.*, para. 35.

be considered as “prompt” and has ultimately resulted in the full denial of Guantánamo detainees’ right to legal assistance over a lengthy period of time.

178. While Guantánamo detainees’ right to legal assistance is no longer denied as a matter of law, logistical constraints due to Guantánamo’s location and policies adopted by the Joint Task Force Guantánamo (JTF-GTMO),²⁶³ continue to hinder, even sometimes to prevent, regular access to lawyers. For instance, lawyers have to submit a request to the Department of Defense to meet with their client, have to take time away from their legal practice and have to pay for their trips to Guantánamo, which may create problems for pro bono lawyers.²⁶⁴ The number of flights to Guantánamo has also been severely curtailed by the US government, which has forced attorneys to “wait in queue for at least two months before they may meet with their clients”.²⁶⁵
179. Additionally, some policies put in place by the JTF-GTMO, such as the modified search procedure instituted since May 2013, have an adverse impact on detainees’ access to counsel. Each time a detainee is moved from a cell to meet with non-JTF-GTMO personnel, this new procedure is conducted two to four times, including for meetings and phone calls with their attorneys.²⁶⁶ The procedure involves a full body search, including a genital search, and is reportedly used for the safety of guards and detainees.²⁶⁷ To avoid being subjected to such invasive searches, multiple detainees have refused phone calls or meetings with counsel.²⁶⁸ For instance, Mohammad al Rahman al Shumrani said he did not attend his meetings with lawyers and his PRB hearing because he found the searches humiliating and degrading.²⁶⁹ In July 2013, the District of Columbia District Court found this procedure to be invalid, as it effectively left detainees “without alternative avenues to

²⁶³ The JTF-GTMO is the principal organization running the detention facility. It is comprised of a multi-service military task force placed under the Southern Command. The JTF-GTMO is responsible for all logistical issues related to the operation of the facility, such as providing medical care, meals and communal facilities of the detainees. They are also in charge of the transportation to and from the court complex as well as facilitation of legal representation of the detainees, by arranging meetings with lawyers or providing all types of communication between the detainees and their lawyers.

²⁶⁴ ODIHR interview with Matthew O’Hara, *op. cit.*, note 255: O’Hara explained that travelling to Guantánamo may require lawyers to be absent from their legal practice for an entire week and cost thousands of dollars; ODIHR interview with David Remes, *op. cit.*, note 255: Remes mentioned that one trip may cost approximately \$1,200.

²⁶⁵ “The government has severely curtailed the number of flights to Guantanamo. Predictably, given the limited number of commercial flights to Guantanamo, counsel must now wait in queue for at least two months before they may meet with their clients”. United States District Court for the District of Columbia, *Saeed Mohammed Saleh Hatim v. Barack H. Obama*, Misc. No. 12-mc-398, 11 July 2013, <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012mc0398-47>. In this regard, US officials have argued that the United States has not curtailed commercial flights to Guantánamo, which they do not control. On the contrary, they said that the Government has fought to ensure that these commercial flights would be maintained. US comments to the draft report.

²⁶⁶ While the government has indicated that detainees are searched twice, i.e., once before the meeting in question and once after, counsel for one of the detainees stated that detainees would be searched four times, i.e., once before leaving their cell, once after transportation to the location of the meeting, once after said meeting and prior to their transportation back, and once upon return to their cells. United States District Court for the District of Columbia, *Hatim v. Obama*, *ibid.*

²⁶⁷ US representatives reported finding weapons and hoarding of medication, which led to the need for this procedure. ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194. See, also, United States District Court for the District of Columbia, *Hatim v. Obama*, *ibid.*

²⁶⁸ ODIHR interview with Brent Rushforth, *op. cit.*, note 207: Rushforth reported that he had not been able to meet with his clients since this procedure was put in place. See, also, ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255; United States District Court for the District of Columbia, *Hatim v. Obama*, *ibid.*

²⁶⁹ “Opening Statement of Personal Representative for Muhammad Abd Al-Rahman Al-Shumrani”, Periodic Review Board website, 5 May 2014, <http://www.prs.mil/Portals/60/Documents/ISN195/140416_U_ISN195_PR_OPENING_STATEMENT_UNCLASS_PUBLIC.pdf>.

exercise their right to *habeas corpus*”.²⁷⁰ The Court of Appeals for the District of Columbia Circuit, however, later determined that prison officials could implement this procedure due to security concerns.²⁷¹

180. While lawful restrictions on access to counsel are permissible, they should not effectively result in the denial of access to legal assistance. In detention facilities, search procedures may be justified and necessary for security and safety reasons.²⁷² However, restrictions on access to counsel should be decided on a case-by-case basis, remain extraordinary and temporary, should be conducted in a manner consistent with the human dignity of each detainee and should not result in the full denial of the right of access to counsel.²⁷³ In ODIHR’s view, the search procedure applied to the detainees appears to be excessively invasive. In some cases, it even results in denial of access to counsel, as preparing a “habeas case for trial or appeal where counsel could only contact [detainees] by legal mail” is “untenable”.²⁷⁴

d. Recommendations

- To promptly end the ongoing arbitrary detention of detainees;
- To promptly release any detainee who has not been charged with, or convicted of, a criminal offence;
- To promptly charge those detainees against whom there is credible and lawfully obtained evidence of criminal conduct in a court or tribunal which meets international fair trial standards;
- To ensure that federal courts decide on *habeas corpus* petitions without delay, acting as an independent fact finder in *habeas corpus* cases;
- To ensure that any detainee is immediately released following a successful *habeas corpus* petition without the need for further approvals, including for any internal administrative procedures;
- To ensure that detainees have regular access to counsel and that any obstacles to access to counsel are strictly necessary and proportionate to achieving a legitimate aim; in particular to ensure that search procedures do not have the effect of significantly disrupting the attorney-client relationship;
- To provide prompt and effective redress to victims of arbitrary detention, particularly in cases of prolonged arbitrary detention, on account of the physical and mental suffering, stress, fear, depression, anxiety and physical symptoms suffered by them.

²⁷⁰ United States District Court for the District of Columbia, *Hatim v. Obama*, *op. cit.*, note 265.

²⁷¹ United States Court of Appeals for the District of Columbia Circuit, *Hatim v. Obama*, Case No. 13-5218, 1 August 2014, <<http://caselaw.findlaw.com/us-dc-circuit/1674437.html>>.

²⁷² United States District Court for the District of Columbia, *Hatim v. Obama*, *op. cit.*, note 265.

²⁷³ “Body of Principles”, *op. cit.*, note 89, Principle 18; *Human Rights in Counter-Terrorism Investigations*, *op. cit.*, note 120, p. 90.

²⁷⁴ United States District Court for the District of Columbia, *Hatim v. Obama*, *op. cit.*, note 265.

II. CONDITIONS OF, AND TREATMENT IN, DETENTION

A. PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

a. *International Standards*

181. “All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person”.²⁷⁵ This broad guarantee is applicable to all persons deprived of their liberty, whether on suspicion of having committed a criminal offence or otherwise, and is reflected in Article 10(1) of the ICCPR and OSCE commitments, among others.²⁷⁶ It is “a fundamental and universally applicable rule”,²⁷⁷ treated by the Human Rights Committee as a legal norm that is not subject to derogation, even in states of emergency or situations of armed conflict.²⁷⁸
182. Various provisions in the ICCPR and other international instruments supplement the right to humane treatment and respect for the dignity of a detained person. One of the most important of these is the prohibition of torture and cruel, inhuman or degrading treatment or punishment, which is enshrined in Article 7 of the ICCPR, Articles 2 and 16 of the CAT, OSCE commitments,²⁷⁹ as well as a number of other human rights instruments and customary international law.²⁸⁰ As part of its OSCE commitments, the United States “strongly condemn[s] all forms of torture as one of the most flagrant violations of human

²⁷⁵ ICCPR, Art. 10(1).

²⁷⁶ Relevant OSCE commitments include: OSCE Vienna Document, *op. cit.*, note 90, para. 23.2. This guarantee is also protected under ACHR, Art. 5; ADRDM, Art. XXV.

²⁷⁷ UN HRC, General Comment No. 9, Article 10: Humane treatment of persons deprived of liberty, HRI/GEN/1/Rev.1, p. 9, para. 1, 30 July 1982,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4719&Lang=en>; UN HRC, General Comment No. 21, Article 10: Humane treatment of persons deprived of liberty (replaces General Comment No. 9), HRI/GEN/1/REV.1, 13 March 1993, p. 180, para. 4,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4731&Lang=en>

²⁷⁸ UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 13(a).

²⁷⁹ Relevant OSCE commitments include the OSCE Vienna Document, *op. cit.*, note 90, para. 23.4; OSCE Budapest Document, *op. cit.*, note 3, para. 20; OSCE Summit, “Charter for European Security: III. Our Common Response”, Istanbul, 19 November 1999 (hereinafter, “OSCE Istanbul Document”), para. 21, <<http://www.osce.org/mc/17502>>; OSCE Ljubljana Document, *op. cit.*, note 90; OSCE Ministerial Council, Ministerial Declaration, “Ministerial Declaration on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights”, Helsinki, 5 December 2008, <<http://www.osce.org/mc/35476>>; OSCE Athens Document, *op. cit.*, note 80, paras. 1-9.

²⁸⁰ These include, inter alia: UDHR, Art. 5; ADRDM, Art. XXV; ACHR, Art. 5; and European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3. A number of soft-law documents also prohibit torture and ill-treatment and provide guidance to states on how to prevent torture and ill-treatment, in particular in places of detention. See, for instance, “Code of Conduct for Law Enforcement Officials”, New York, 17 December 1979,

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>>; “Standard Minimum Rules for the Treatment of Prisoners”, Geneva, 30 August 1955,

<https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf>;

“Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment”, New York, 9 December 1975,

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeclarationTorture.aspx>>; “Basic Principles for the Treatment of Prisoners”, New York, 14 December 1990,

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>>. As part of their OSCE commitments, the United States has committed itself to “observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the United Nations Code of Conduct for Law Enforcement Officials”. OSCE Vienna Document, *op. cit.*, note 90, para. 23.3.

rights and human dignity” and has committed to strive for its elimination, recognizing the importance of international standards such as those codified in the CAT.²⁸¹

183. No exceptional circumstance whatsoever may justify acts of torture, including threats of terrorist acts or armed conflict.²⁸² Fundamental security challenges cannot be used to question the absoluteness and non-derogability of the torture prohibition.²⁸³ Nor can an order from a superior officer or a public authority serve as justification to violate the prohibition of torture.²⁸⁴ The absolute and non-derogable character of the prohibition is part of customary international law,²⁸⁵ as acknowledged by the United States,²⁸⁶ and is considered a peremptory norm of international law, or *jus cogens*.²⁸⁷ The prohibition of ill-treatment is similarly considered non-derogable by the Committee against Torture,²⁸⁸ and is reflected in non-derogable terms within Article 7 of the ICCPR.²⁸⁹
184. The United States, as a State party to the CAT, has an obligation to prevent torture and ill-treatment “in any territory under its jurisdiction”.²⁹⁰ As explained in the introduction of this report, international bodies have interpreted this obligation to extend not only to their sovereign territory, but also to any areas over which States parties exercise “directly or indirectly, in whole or in part, de jure or de facto effective control”.²⁹¹ Accordingly, the prohibition of torture and ill-treatment also covers acts committed on ships or aircraft registered by a state as well as at military bases and detention facilities, so long as the State party in question exercises factual or effective control.²⁹² Similarly, rights protected under the ICCPR, including the prohibition of torture and ill-treatment, are understood to be applicable to all individuals in the territory or under the jurisdiction of a state, irrespective

²⁸¹ OSCE Budapest Document, *op. cit.*, note 3, para. 20.

²⁸² CAT, Art. 2; UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 5; ICCPR, Art. 4; UN HRC, General Comment No. 20, Article 7: Prohibition of torture and cruel, inhuman or degrading treatment or punishment, HRI/GEN/1/Rev.1 at 30, 10 March 1992, para. 3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11>; OSCE Copenhagen Document, *op. cit.*, note 80, para. 16.3; OSCE Athens Document, *op. cit.*, note 80, para. 4; ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, 10 December 1998, para. 144, <<http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>>.

²⁸³ UN Special Rapporteur on torture, Manfred Nowak, “Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention”, A/HRC/13/39/Add.5, 5 February 2010, paras. 44-45, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf>.

²⁸⁴ CAT, Art. 2; UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 3; UN Special Rapporteur on torture, Theo van Boven, Interim report to the General Assembly, A/59/324, 1 September 2004, para. 15, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/59/324>>; UN Special Rapporteur on torture, “Study on the phenomena of torture”, *ibid.*, para. 42.

²⁸⁵ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 1; ICJ, *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, 20 July 2012, para. 99, <<http://www.icj-cij.org/docket/files/144/17064.pdf>>.

²⁸⁶ UN HRC, Fourth periodic report of the United States of America, *op. cit.*, note 39, para. 171.

²⁸⁷ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 1; UN HRC, General Comment No. 24 (52): Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 10, <<http://www.un.org/Docs/journal/asp/ws.asp?m=CCPR/C/21/Rev.1/Add.6>>; ICJ, *Belgium v. Senegal*, *op. cit.*, note 285, para. 99; ICTY, *Prosecutor v. Anto Furundžija*, *op. cit.*, note 282, para. 144.

²⁸⁸ UN CAT, General Comment No. 2, *ibid.*, para. 3; OSCE Athens Document, *op. cit.*, note 80, para. 3.

²⁸⁹ ICCPR, Art. 7.

²⁹⁰ CAT, Arts. 2, 16.

²⁹¹ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 16.

²⁹² *Ibid.*

of their nationality or statelessness. This includes any individual “within the power or effective control of the forces of a State party acting outside its territory”.²⁹³

185. Article 1 of the CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”
186. The severity of the pain does not need to amount to a level equal to that of a serious physical injury.²⁹⁴ Moreover, torture presupposes that the conduct is inflicted by state officials or otherwise “executed with their active or passive agreement” or occurs as a result of their lack of intervention in circumstances where intervention would have been possible.²⁹⁵
187. Cruel or inhuman treatment or punishment likewise entails severe mental or physical pain or suffering.²⁹⁶ Degrading treatment or punishment, on the other hand, involves the humiliation of the victim, even when the pain or suffering is not severe.²⁹⁷ The purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim are decisive criteria distinguishing cruel, inhuman or degrading treatment or punishment from torture.²⁹⁸
188. International and regional human rights bodies have identified certain interrogation and detention methods as amounting to torture and/or cruel, inhuman or degrading treatment or punishment. “Waterboarding”,²⁹⁹ prolonged incommunicado detention, exposure to extreme temperatures, deprivation of clothing, stripping detainees naked and threatening them with dogs, beatings, “restraining [detainees] in very painful conditions, (...) hooding under special conditions, (...) sounding of loud music for prolonged periods, (...) sleep deprivation for prolonged periods, (...) threats, including death threats, (...) violent shaking, and (...) using cold air to chill [detainees]” are examples of acts considered to constitute torture or ill-treatment, the effect of which will be intensified when used in combination.³⁰⁰

²⁹³ UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 10.

²⁹⁴ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 32.

²⁹⁵ *Ibid.*, para. 39.

²⁹⁶ *Ibid.*, para. 187.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*, para. 188.

²⁹⁹ Waterboarding is a torture technique whereby a suspect is immobilized and water is poured over his or her nose and mouth to simulate drowning. *Human Rights in Counter-Terrorism Investigations*, *op. cit.*, note 120, p. 97.

³⁰⁰ UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *op. cit.*, note 284, para. 17; UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 24; Resolution 2003/32, “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, UN Commission on Human Rights, E/CN.4/RES/2003/32, 23 April 2003, para.14, <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4980>; Extraordinary Chambers in the Courts of Cambodia, *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para. 241, <<http://www.eccc.gov.kh/en/documents/court/judgement-case-001>>. Useful guidance on the prohibited techniques can also be found in ECtHR, *Ireland v. the United Kingdom*, Application No 5310/71, 18 January 1978,

189. Where there is a structural deprivation of detainees' basic rights, such as access to "food, water, clothing, health care and a minimum of space, hygiene, privacy and security," conditions of detention may also constitute cruel, inhuman or degrading treatment or punishment.³⁰¹ The "combined deprivation and the non-fulfilment of these existential rights" would not only violate detainees' right to be treated with humanity and respect for their dignity, but could also cause severe psychological or physical pain or suffering and thereby amount to ill-treatment.³⁰² Furthermore, the use of force, restraint techniques or other instruments to control a detainee may also constitute torture or ill-treatment when they are disproportionate and/or applied in a degrading and painful manner.³⁰³ The Special Rapporteur on torture and the Committee against Torture have both condemned the use of restraint chairs, since these are "inherently inhuman, degrading or painful".³⁰⁴ Moreover, the use of restraints to punish detainees can never be justified.³⁰⁵
190. Solitary confinement³⁰⁶ is also an important cause of concern. When isolation is prolonged, it can constitute torture or ill-treatment, depending on the circumstances of a particular case.³⁰⁷ The determining circumstances include the purpose of the confinement, the conditions, the duration, the effects on the detainee in question, as well as the particular vulnerability of that detainee.³⁰⁸ Solitary confinement is never acceptable when it is imposed as a technique to extract information or a confession.³⁰⁹ It also amounts to torture or ill-treatment when it is used to punish detainees for breaching prison discipline, if it causes them to experience severe pain or suffering.³¹⁰ It should always remain a last resort,

<<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506>>; ECtHR, *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58003>>; ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, Application No. 39630/09, 13 December 2012,

<<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>>.

³⁰¹ UN Special Rapporteur on torture, "Study on the phenomena of torture", *op. cit.*, note 283, para. 230.

³⁰² UN Special Rapporteur on torture, "Study on the phenomena of torture", *ibid.*; "Statement of the UN Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay – Inter-American Commission on Human Rights", OHCHR website, *op. cit.*, note 108.

³⁰³ UN Special Rapporteur on torture, Theo van Boven, Report to the Commission on Human Rights, E/CN.4/2004/56, 23 December 2003, paras. 44-45, <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9140>.

³⁰⁴ UN Special Rapporteur on torture, Juan Mendez, Interim report to the General Assembly, 9 August 2013, A/68/295, para. 58, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/68/295>>. See, also, UN CAT, Report of the Committee against Torture, Twenty third session, Twenty fourth session, A/55/44, para. 180(c),

<http://www.un.org/ga/search/view_doc.asp?symbol=A/55/44&referer=/english/&Lang=E>.

³⁰⁵ UN Special Rapporteur on torture, Report to the Commission on Human Rights, E/CN.4/2004/56, *op. cit.*, note 303, para. 45. See, also, "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rule 33.

³⁰⁶ For the purpose of this report, solitary confinement is defined as the "physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. (...) Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative." "The Istanbul Statement on the Use and Effects of Solitary Confinement", 9 December 2007, p. 1, <http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf>; UN Special Rapporteur on torture, Juan Mendez, Interim report to the General Assembly, A/66/268, 5 August 2011, para. 25, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/268>>.

³⁰⁷ UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 6; UN Special Rapporteur on torture, Interim report to the General Assembly, A/66/268, *ibid.*, para. 76; UN Special Rapporteur on torture, Manfred Nowak, Interim report to the General Assembly, A/63/175, 28 July 2008, para. 80, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/63/175>>. The UN Special Rapporteur on torture defined "prolonged solitary confinement" as a period exceeding 15 consecutive days, "because at that point, (...) some of the harmful psychological effects of isolation can become irreversible". While this indication provides useful guidance, ODIHR also shares the view of the Special Rapporteur that such time period remains of an arbitrary nature as the adverse impact of solitary confinement depends greatly on the individual's personal circumstances. UN Special Rapporteur on torture, Interim report to the General Assembly, A/66/268, *ibid.*, para. 26.

³⁰⁸ *Ibid.*, para. 71.

³⁰⁹ *Ibid.*, para. 73.

³¹⁰ *Ibid.*, para. 72.

and be strictly regulated and limited to very exceptional cases for as short a time as possible.³¹¹

191. Additionally, it is essential to stress that the prohibition of torture and ill-treatment relates not only to the conduct of law enforcement agents or military personnel but also to medical personnel working in places such as detention facilities.³¹² Medical personnel must not play a role in torture, directly or indirectly, such as by examining and certifying the fitness of detainees for abusive interrogations, by being present or assisting during such interrogations or by providing any information to facilitate acts of torture or ill-treatment.³¹³
192. International bodies and experts such as the World Medical Association, the UN Special Rapporteur on torture and the IACHR have also recognized that the decision to force-feed detainees who are mentally competent and voluntarily take part in a hunger strike is unjustifiable, as it violates rules of ethics and the right to health, amongst other things.³¹⁴ Force-feeding should never be used to pressure detainees to stop a hunger strike.³¹⁵ Furthermore, force-feeding “accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment”³¹⁶ and may even amount to torture.³¹⁷

³¹¹ *Ibid.*, paras. 75, 89; UN Special Rapporteur on torture, Interim report to the General Assembly, A/63/175, *op. cit.*, note 307, paras. 80, 83; UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 20.

³¹² UN Special Rapporteur on torture, Interim report to the General Assembly, A/63/175, *ibid.*, para. 51.

³¹³ *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (New York and Geneva: United Nations Publication, 2004), paras. 52-53, <<http://www.ohchr.org/documents/publications/training8rev1en.pdf>>; UN Special Rapporteur on torture, Theo van Boven, Report to the Commission on Human Rights, “General Recommendations of the Special Rapporteur on torture”, E/CN.4/2003/68, 17 December 2002, para. n, <<http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>>; UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 73-74. See, also, “Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, New York, 18 December 1982, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/MedicalEthics.aspx>>; “Declaration of Tokyo, Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment”, World Medical Association, Tokyo, October 1975 (as revised in Divonne-les-Bains, May 2006), <<http://www.wma.net/en/30publications/10policies/c18/>>.

³¹⁴ See, for instance, UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *ibid.*, paras. 80, 82: “The Declarations of Tokyo and Malta prohibit doctors from participating in force-feeding a detainee, provided the detainee is capable of understanding the consequences of refusing food. This position is informed by the fundamental principle, which recurs throughout human rights law, of individual autonomy. As well as the World Medical Association, the American Medical Association and many others have endorsed the Declaration of Tokyo (...). [T]reating a competent detainee without his or her consent - including force-feeding - is a violation of the right to health, as well as international ethics for health professionals.” See, also, “IACHR, UN Working Group on arbitrary detention, UN Rapporteur on torture, UN Rapporteur on human rights and counter-terrorism, and UN Rapporteur on health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis”, OHCHR website, *op. cit.*, note 107.

³¹⁵ “World Medical Association Declaration of Malta on Hunger Strikers”, World Medical Association, Malta, November 1991 (as revised in Pilanesberg, October 2006), para. 13, <<http://www.wma.net/en/30publications/10policies/h31/>>; “IACHR, UN Working Group on arbitrary detention, UN Rapporteur on torture, UN Rapporteur on human rights and counter-terrorism, and UN Rapporteur on health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis”, OHCHR website, *ibid.*

³¹⁶ “Declaration of Malta on Hunger Strikers”, World Medical Association, *ibid.*, para. 16.

³¹⁷ The European Court of Human Rights has found a violation of the prohibition of torture where the existence of a medical necessity was not convincingly demonstrated by domestic authorities, the procedural safeguards were not complied with and the force-feeding procedure (prescribed by decree; with handcuffs, a mouth-widener and a special tube inserted into the food channel, and using force in the event of resistance) amounted to torture (ECtHR, *Nevmerzhitsky v. Ukraine*, Application No.

193. International standards on the prohibition of torture and ill-treatment impose a number of obligations on states. First, states are obliged to ensure that no branch of government adopt any measure, whatever its nature, which would authorize or condone acts of torture or ill-treatment.³¹⁸ Further, they are required to criminalize acts of torture in their domestic legislation.³¹⁹ In this regard, it is essential that the domestic definition of torture incorporate all the fundamental elements of the CAT definition to ensure that no conduct amounting to torture can go unpunished.³²⁰
194. Complicity or participation in acts of torture must also be punishable under domestic law,³²¹ and encompass conduct such as incitement, instigation, and superior orders, as well as instructions, consent, acquiescence and concealment.³²² As will be explored further in Part 3-II-A of this report, it is vital to ensure the accountability of both perpetrators of acts of torture as well as superior officials who knew, or should have known, that torture was inflicted by personnel under their command.³²³ Additionally, states are responsible when they “knowingly engage in, render aid to or assist in the commission of internationally wrongful acts” such as torture, enforced disappearances or arbitrary detention.³²⁴ There can be no immunity for authors, co-authors or accomplices of torture.³²⁵
195. The prohibition of torture and ill-treatment is also guaranteed under international humanitarian law. It is a norm of customary international humanitarian law enshrined in Common Article 3, Article 75(2) of API and other specific provisions of the four Geneva Conventions, among others.³²⁶

54825/00, 5 April 2005, paras. 96-99, <<http://hudoc.echr.coe.int/eng?i=001-68715>>). The Court also concluded to the violation of the prohibition of torture when force-feeding had occurred in the absence of medical evidence that the life or health of the detainee was in serious danger but rather for the purpose of “[...] discouraging him from continuing his protest”, without respecting the relevant procedural safeguards and in manner that “unnecessarily exposed [the detainee] to great physical pain and humiliation” and therefore amounted to torture (ECtHR, *Ciorap v. Moldova*, Application No. 12066/02, 19 June 2007, paras. 82-83, 88-89, <<http://hudoc.echr.coe.int/eng-press?i=001-81136>>).

³¹⁸ UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *op. cit.*, note 284, para. 15.

³¹⁹ CAT, Art. 4.

³²⁰ UN CAT, General Comment No. 2, *op. cit.*, note 76, paras. 8-9; UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 48.

³²¹ CAT, Art. 4; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 39.

³²² UN Special Procedures, “Joint study on global practices in relation to secret detention”, *ibid.*, para. 39; UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 142.

³²³ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *ibid.*

³²⁴ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Right Council, A/HRC/10/3, *op. cit.*, note 131, para. 53; “Draft articles on responsibility of States for internationally wrongful acts”, International Law Commission, 12 December 2001, Art. 16, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/56/83>>.

³²⁵ UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *op. cit.*, note 284, para. 15. For more details on the obligation of states to hold perpetrators, co-authors and accomplices of torture accountable, see Part 3-II-A of this report.

³²⁶ These include: Third Geneva Convention, Arts. 17(4), 87(3), 89; Fourth Geneva Convention, Art. 32; APII, Art. 4(2). Article 72 of API further makes it clear that the guarantees set out in the Protocol are additional to “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”, which must be taken to include the prohibition of torture and ill-treatment.

b. Domestic Standards

196. Upon ratification of the ICCPR and the CAT, the United States entered a number of reservations and understandings focusing on the definition of torture or ill-treatment.³²⁷ These appear to imply that the United States considers itself bound by the definitions of these treaties only insofar as such definitions correspond to existing US legislation.³²⁸ Both the Human Rights Committee and the Committee against Torture have expressed concerns about these reservations and have requested their withdrawal.³²⁹
197. The definition of torture incorporated in the Torture Convention Implementation Act reflects the US reservations and understandings to the CAT. In the view of the United States, “in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: 1) the intentional infliction or threatened infliction of severe physical pain or suffering; 2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; 3) the threat of imminent death; or 4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality”.³³⁰ Moreover, the US position is that “the definition of torture in Article 1 [of the CAT] is intended to apply only to acts directed against persons in the offender's custody or physical control”³³¹ and that “the term ‘acquiescence’ requires that the public official, prior to the activity constituting torture, [be aware] of such activity and thereafter breach his legal responsibility to intervene to prevent such activity”.³³² The United States recently reaffirmed that its understanding of psychological torture remains limited to prolonged mental harm.³³³ In addition, the United States considers itself bound by the obligation to prevent cruel, inhuman or degrading treatment or punishment under Article 16 of the CAT only to the extent that such treatment corresponds to the “cruel, unusual and inhumane treatment or punishment” prohibited under the US Constitution.³³⁴

³²⁷ “U.S. reservations, declarations, and understandings to the International Covenant on Civil and Political Rights”, 138 Cong. Rec. S4781-01, 2 April 1992 (hereinafter, “US reservations to the ICCPR”),

<<http://www1.umn.edu/humanrts/usdocs/civilres.html>>; “U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, Cong. Rec. S17486-01, 27 October 1990 (hereinafter, “US reservations to the CAT”), <<http://www1.umn.edu/humanrts/usdocs/tortres.html>>.

³²⁸ UN HRC, Concluding observations, United States of America, CCPR/C/79/Add.50, 6 April 1995, para. 279, <<http://www1.umn.edu/humanrts/usdocs/hrcuscomments.html>>.

³²⁹ *Ibid.*, paras. 279, 292, noting, for instance, that the HRC believes reservations to Article 7 of the ICCPR “to be incompatible with the object and purpose of the [ICCPR]” and recommending their withdrawal; and UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 40, reiterating its previous recommendation that the United States withdraw its reservations, declarations and understandings to the CAT. See, also UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 9.

³³⁰ US reservations to the CAT, *op. cit.*, note 327, para. II(1)(a).

³³¹ *Ibid.*, para. II(1)(b).

³³² *Ibid.*, para. II(1)(d).

³³³ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 12; UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 9.

³³⁴ US reservations to the CAT, *op. cit.*, note 327, para. I(1).

198. The Eighth Amendment to the US Constitution prohibits “cruel and unusual punishments” for convicted inmates, which encompasses those forms of punishment that violate human dignity or involve physical suffering, including torture. The due process clauses of the Fifth and Fourteenth Amendments forbid governmental conduct that “shocks the conscience”, such as acts of torture and cruel or inhuman treatment.³³⁵
199. Protection against torture and cruel, inhuman or degrading treatment or punishment is also provided through US federal and state laws. Relevant federal laws include: 1) the Torture Convention Implementation Act,³³⁶ which provides extraterritorial jurisdiction over persons who commit or attempt to commit torture outside the United States if the alleged offender is a US national or is present in the United States; 2) the War Crimes Act,³³⁷ which criminalizes war crimes to include “grave breaches” of Common Article 3 of the Geneva Conventions; and 3) the Detainee Treatment Act,³³⁸ which prohibits the cruel, inhuman and degrading treatment or punishment of individuals in the custody or under the physical control of the US government regardless of the individuals’ nationality or the location of the alleged acts.³³⁹
200. Cruel, inhuman and degrading treatment or punishment is not explicitly defined in the DTA of 2005, which refers to the constitutional prohibition. The War Crimes Act, as amended in 2006, defines cruel or inhuman treatment as “the act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control”.³⁴⁰ The Department of Defense Directive on the DoD Detainee Program, amended on 19 August 2014, stipulates that “[detainees] will be protected against threats or acts of violence, including (...) cruel, inhuman, or degrading treatment or punishment”.³⁴¹

c. Findings and Analysis

DEFINITIONS OF TORTURE AND ILL-TREATMENT UNDER US LAW

201. The definition of torture included in the Torture Convention Implementation Act and other relevant domestic legislation is narrower than the CAT definition and may therefore allow for conduct prohibited under international law to be deemed lawful under domestic law.

³³⁵ UN HRC, Fourth periodic report of the United States of America, *op. cit.*, note 39, para. 172. It should be noted, however, that the Fourteenth Amendment describes a legal obligation applicable at the state level and as such is not relevant in the context of our analysis.

³³⁶ Torture Convention Implementation Act, 30 April 1994, 18 U.S.C. §§ 2340-2340B, <http://psm.du.edu/media/documents/us_regulations/federal_law/us_law_federal%20torture_statute.pdf>.

³³⁷ War Crimes Act, 21 August 1996, 18 U.S.C. § 2441 (as amended by the MCA of 2006), <<http://www.law.cornell.edu/uscode/text/18/2441>>.

³³⁸ DTA, § 1003.

³³⁹ “Common Core Document of the United States of America: Submitted With the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights”, 30 December 2011, para. 120, <<http://www.state.gov/j/drl/rls/179780.htm>>.

³⁴⁰ War Crimes Act, 18 U.S.C. § 2441(d)(1)(B). The original Act, passed in 1996, criminalized “grave breaches of the Geneva Conventions” in general, without specifying any conduct, and was understood as also forbidding “outrages upon personal dignity, in particular humiliating and degrading treatment”.

³⁴¹ Department of Defense Directive 2310.01E, *op. cit.*, note 14, para. 3.b(2).

This is the case for acts of psychological torture that cause severe mental suffering (as captured by the CAT) but do not also involve “prolonged mental harm” (as required under US law). The Convention forbids a wider category of acts “irrespective of their prolongation or its duration”.³⁴² Similarly, while the level of physical pain or suffering is not defined in US law itself, it has been subject to interpretations in contradiction to the international prohibition of torture, as will be explained further below.

202. While international experts consider that the intent element is satisfied insofar as the infliction of severe pain or suffering aims to achieve a certain purpose,³⁴³ the US concept of torture requires “specific intent”, which entails both the intent to commit the act and the intention that the act inflict severe pain and suffering. This further limits the scope of acts that would fall under the domestic prohibition. This element of specific intent was used by the Bush administration to stress that authorized techniques would not qualify as torture since their infliction was not intended to cause severe pain or suffering.³⁴⁴
203. The concept of “acquiescence” is another component of the US definition that narrows the scope of the domestic prohibition of torture. The United States understands “acquiescence” as requiring an official both to have prior knowledge of the acts of torture and to fail to intervene to prevent them. The CAT, on the contrary, covers acts executed with the authorities’ “passive agreement” or lack of intervention,³⁴⁵ and the Committee against Torture made clear that where “State authorities (...) have reasonable grounds to believe that acts of torture or ill-treatment are being committed (...) and they fail to exercise due diligence to prevent [them] (...) its officials should be considered as authors, complicit or otherwise responsible (...) for consenting to or acquiescing in such impermissible acts”.³⁴⁶ This explanation does not require full prior knowledge, as does the US approach to acquiescence.
204. In a similar vein, the prohibition of cruel, inhuman or degrading treatment or punishment as defined under international law appears to cover a wider range of treatment than that outlawed in the United States. The War Crimes Act, as amended, contains a list of violations of Common Article 3 that includes “cruel or inhuman treatment” but no longer refers to “outrages upon personal dignity, in particular humiliating and degrading treatment”.³⁴⁷ This absence suggests that degrading treatment or punishment is not prohibited under the War Crimes Act. The State Department’s analysis of the CAT prior to ratification of the Convention by the United States would confirm this understanding, as it implied that the US Constitution, which is the US benchmark when it comes to the prohibition of cruel and unusual punishment under US law, may not cover degrading

³⁴² UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 13. See, also, UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 9.

³⁴³ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 34.

³⁴⁴ United States Assistant Attorney General Jay S. Bybee, “Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, ‘Interrogation of Al Qaeda Operative’”, 1 August 2002, p. 18, <<https://www.fas.org/irp/agency/doj/olc/zubaydah.pdf>>. See, also, Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, p. 34.

³⁴⁵ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 39.

³⁴⁶ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 18.

³⁴⁷ As specifically captured by Common Article 3(1)(c).

treatment or punishment to the same extent as Article 16 of the CAT.³⁴⁸ In this regard, the Committee against Torture has urged the United States to withdraw its reservation to Article 16 of the CAT which could permit interpretations incompatible with the absolute prohibition of torture and ill-treatment.³⁴⁹ Further, Executive Order 13440 also suggested that “willful and outrageous acts of personal abuse” could be used for the purpose of gaining intelligence.³⁵⁰ The revocation of Executive Order 13440 by President Obama in 2009³⁵¹ and the subsequent inclusion of a reference to the prohibition of degrading treatment or punishment in the Department of Defense Directive on the DoD Detainee Program³⁵² are welcome developments in this regard.

205. The Bush administration interpreted provisions against torture and ill-treatment in ways that defied and greatly weakened the prohibition of torture. Its interpretation of the notion of severe physical or mental pain or suffering³⁵³ is a critical example of this approach. That administration considered that only physical pain akin to that “accompanying serious physical injury such as organ failure, impairment of bodily function, or even death”³⁵⁴ reached the threshold of severe physical pain. By doing so, it drastically restricted the range of acts that would constitute torture as per the international definition. The interpretation of the concept of severe mental pain as pain resulting in “significant psychological harm or significant duration, e.g., lasting for months or even years”³⁵⁵ equally reduced the scope of the prohibition. Yet, under international law, torture encompasses acts causing severe physical or mental pain even when physical pain does not reach a level of suffering akin to that of a serious physical injury.³⁵⁶ Moreover, the infliction of mental pain may amount to torture even in the absence of significant and lasting psychological harm.³⁵⁷ ODIHR is concerned that this interpretation by the Bush

³⁴⁸ Michael John Garcia, “U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques”, Congressional Research Service, 26 January 2009, p. 3, <<http://fas.org/sgp/crs/intel/RL32438.pdf>>.

³⁴⁹ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 10.

³⁵⁰ George W. Bush, Executive Order 13440, *op. cit.*, note 180, Sec. 3: “(b) I hereby determine that a program of detention and interrogation approved by the Director of the [CIA] fully complies with the obligations of the United States under Common Article 3, provided that: (i) the conditions of confinement and interrogation practices of the program do not include: (...) (E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield”.

³⁵¹ President Obama revoked Executive Order 13440 in his Executive Order 13491. United States President Barack H. Obama, Executive Order 13491, “Ensuring Lawful Interrogations”, 22 January 2009, <http://www.whitehouse.gov/the_press_office/Ensuring_Lawful_Interrogations>, Sec. 1.

³⁵² Department of Defense Directive 2310.01E, *op. cit.*, note 14, para. 3.b(2).

³⁵³ United States Assistant Attorney General Jay S. Bybee, “Memorandum for Alberto R. Gonzales, Counsel to the President, ‘Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A’”, 1 August 2002, <<http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>>.

³⁵⁴ *Ibid.*, p. 1.

³⁵⁵ *Ibid.*, p. 1.

³⁵⁶ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, paras. 32, 74: “The severity does not have to be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure or impairment of bodily functions or even death, as suggested in the “torture memos” under the Bush administration in the United States.”

³⁵⁷ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *ibid.*, para. 74; UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 13. See, also, UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 9.

administration served to institutionalize a system effectively authorizing and perpetuating torture in violation of international law.³⁵⁸

206. A memorandum of 1 August 2002 from the then US Assistant Attorney General to the Acting General Counsel of the CIA analysed, on the basis of the above domestic interpretation of the law and factual information provided by the CIA, the legality of specific techniques that the CIA proposed to use in the interrogation of Abu Zubaydah. The analysis concluded that ten interrogation techniques did not amount to torture, namely attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box and “waterboarding”, which could potentially be used in combination and in an escalating manner. It considered that no specific intent to cause severe physical or mental pain or suffering appeared to be present in the application of these methods.³⁵⁹ Months later, Donald Rumsfeld, the Secretary of Defense at the relevant time, approved several “counter-resistance techniques” for interrogations at Guantánamo, which included removal of comfort items, “change of scenery down” (removing a detainee to a less pleasant interrogation scene, which “might include exposure to extreme temperatures and deprivation of light and auditory stimuli”), environmental manipulation to create moderate discomfort, sleep adjustment, and isolation.³⁶⁰

³⁵⁸ See, for instance, “Feinstein report: UN expert calls for prosecution of CIA officers and other US Government officials”, OHCHR website, 9 December 2014,

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E>>: “there was a clear policy orchestrated at a high level within the Bush administration, which allowed to commit systematic crimes and gross violations of international human rights law.”

³⁵⁹ Bybee, “Memorandum: ‘Interrogation of Al Qaeda Operative’”, *op. cit.*, note 344, pp. 16-18. While this memorandum was specific to the interrogation of Abu Zubaydah, the CIA presumably applied these techniques to “numerous other CIA detainees without seeking additional formal legal advice from the [Office of Legal Counsel]”. Reportedly, it was not until the end of July 2003 that “the attorney general stated that the legal principles of the August 1, 2002, memorandum could be applied to other CIA detainees”. Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, p. 411. The August 2002 memorandum describes attention grasp as the “grasping [of] the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator.” Walling is described a technique whereby an individual “is placed with his heels touching [a flexible false wall] (...) pull[ed] forward and then quickly and firmly push[ed] (...) into the wall. It is [his] shoulder blades that hit the wall. (...) [T]he false wall is in part constructed to create a loud sound (...) that will make the impact seem far worse than it is and that will be far worse than any injury that might result from the action”. Stress positions are said to be “designed to produce the physical discomfort associated with muscle fatigue”, rather than “the pain associated with contortions or twisting of the body”. “Waterboarding” includes the individual being “bound securely to an inclined bench (...). The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth (...). This (...) produces the perception of ‘suffocation and incipient panic’, i.e., the perception of drowning.”, *ibid.*, pp. 2-4. While the memorandum described how the CIA stated the techniques would be used, the Agency reportedly applied them “in a manner that a Department of Justice attorney concluded ‘was quite different from the [description] presented in 2002’”, including during the interrogations of Abu Zubaydah and subsequent CIA detainees. See, for instance, Senate Study on the CIA RDI Programme, Executive Summary, *ibid.*, pp. 411-412.

³⁶⁰ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 49-50; United States Secretary of Defense Donald H. Rumsfeld, “Memorandum for the Commander, United States Southern Command, ‘Counter-Resistance Techniques in the War on Terrorism’”, 16 April 2003, pp. 2-4, <<http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf>>. His initial authorization, dated 2 December 2002, included techniques such as stress positions for up to four hours, isolation for up to 30 days, hooding during transportation and questioning, deprivation of light and auditory stimuli, removal of all comfort items, forced grooming, removal of clothing, interrogations of up to 20 hours, use of detainees’ phobias to induce stress. He rescinded that authorization in January 2003, and later authorized, in April 2003, the counter-resistance techniques mentioned above. United States Joint Task Force 170, Lieutenant Colonel Jerald Phifer, “Memorandum for Commander, Joint Task Force 170, ‘Request for Approval of Counter-resistance Techniques’”, 11 October 2002, in United States General Counsel William J. Haynes II, “Memorandum for Secretary of Defense, ‘Counter-resistance

207. In his first days in office, President Obama signed Executive Orders 13491 and 13492, stressing the US commitment to Common Article 3 as a minimum baseline for treatment in detention, including detention conditions and the interrogation of detainees arrested in the context of any armed conflict. He reaffirmed the importance of humane treatment in all circumstances and of the prohibition of torture and cruel, inhuman or degrading treatment or punishment of individuals in the custody or effective control of the US government or detained in one of the facilities it operates, controls or owns, consistent with the requirements of the Torture Convention Implementation Act, the DTA and the CAT. He further revoked Executive Order 13440, as well as all relevant executive directives, orders, regulations and Office of Legal Counsel opinions related to the detention or interrogation of detainees that had been adopted between September 2001 and the date of his inauguration. Additionally, he enjoined US personnel to use Army Field Manual 2-22.3 as the guide for interrogations, and directed the CIA to close any detention facility it was operating.³⁶¹
208. ODIHR welcomes the explicit prohibition of abusive techniques in the revised Army Field Manual such as “waterboarding”, forcing detainees to be naked, sexual humiliation and the use of military dogs.³⁶² However, it is of concern that the list of unauthorized interrogation techniques, even if it is non-exhaustive, no longer includes a reference to stress positions, sleep deprivation and improper use of restraints.³⁶³ Additionally, an appendix provides that the “use of separation must not preclude the detainee getting four hours of continued sleep every 24 hours” and authorizes the use of goggles or blindfolds and earmuffs for up to 12 hours as part of the “separation” regime.³⁶⁴ Concerns have been raised that this appendix may allow for the interrogation of a detainee for periods of up to 40 hours without sleep over an initial period of 30 days, which is renewable. This would effectively allow for the use of sleep deprivation during a potentially indefinite period, and amount to torture or ill-treatment. Furthermore, the Army Field Manual does not explicitly forbid slaps during interrogations, exposure to extreme changes in temperature falling short of causing hypothermia, and prolonged solitary confinement.³⁶⁵ ODIHR notes US assurances that nothing in the Manual, including Appendix M, authorizes or condones the use of sleep manipulation or sensory deprivation, and that interrogation guidelines are to be applied

Techniques”, 27 November 2002 (approved by Secretary Rumsfeld on 2 December 2002), <<http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf>>.

³⁶¹ Barack H. Obama, Executive Order 13491, *op. cit.*, note 351; Barack H. Obama, Executive Order 13492, *op. cit.*, note 83. See, also, “Opening Statement, Mary E. McLeod, Acting Legal Adviser, U.S. Department of State, Committee Against Torture, November 12-13, 2014 – Geneva”, p. 2,

<http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_STA_USA_18815_E.pdf>.

³⁶² “Human Intelligence Collector Operations”, FM 2-22.3 (FM 34-52), Department of the Army, 6 September 2006, paras. 5-75, <<http://www.fas.org/irp/doddir/army/fm2-22-3.pdf>>; “The U.S. Army Field Manual on Interrogation: A Strong Document in Need of Careful Revision”, Human Rights First website, p. 2, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Army_Field_Manual.pdf>.

³⁶³ *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 359.

³⁶⁴ “Human Intelligence Collector Operations”, Department of the Army, *op. cit.*, note 362, Appendix M. “Separation” is a “restricted interrogation technique” aimed at preventing a detainee from communicating with others by removing him from other detainees and their environment.

³⁶⁵ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 35; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 327; UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 17.

consistently with the principle of human treatment of all detainees.³⁶⁶ Nevertheless, ODIHR remains concerned about the possibility for abuse that some of the techniques authorized by the Manual entail, in particular in Appendix M³⁶⁷ which may result in practices amounting to torture or cruel, inhuman or degrading treatment or punishment.

SCOPE OF THE PROHIBITION OF TORTURE AND ILL-TREATMENT

209. Following the 9/11 attacks, the Bush administration interpreted several existing provisions against torture and ill-treatment as non-applicable to alien enemy combatants held overseas, including Guantánamo detainees. A memorandum, dated early 2002, first concluded that the Geneva Conventions did not apply to the United States' conflict with al Qaeda and that Common Article 3 did not apply to either the conflict with al Qaeda or with the Taliban. President Bush nonetheless committed to treating detainees humanely and, "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of [the] Geneva [Conventions]".³⁶⁸
210. Subsequent legal opinions stressed that the prohibition of cruel, inhuman or degrading treatment or punishment did not apply to aliens detained abroad,³⁶⁹ and that some of the previously authorized detention and interrogation techniques would not violate Article 16 of the CAT,³⁷⁰ the War Crimes Act, the DTA or the requirements of Common Article 3, even when used in combination.³⁷¹ On 20 July 2007, following the Supreme Court's

³⁶⁶ The United States specified, in particular, that the four-hour standard is not a daily limit, but rather a minimum standard. It is not intended to mandate 30 days of separation with only four hours of sleep per day, nor would it allow 40 continuous hours of interrogation with only 4 hours of sleep on either end. US comments to the draft report.

³⁶⁷ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 17.

³⁶⁸ George W. Bush, "Memorandum: 'Humane Treatment of Taliban and al Qaeda detainees'", *op. cit.*, note 12, paras. 2(a), 2(c), 3.

³⁶⁹ See, for instance, United States Principal Deputy Assistant Attorney General Stephen G. Bradbury, "Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, 'Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees'", 30 May 2005, p. 2, <http://www2.gwu.edu/~nsarchiv/torture_archive/docs/Bradbury%20memo.pdf>: stating that "Article 16 [of the CAT] is inapplicable to the CIA's interrogation practices" and that in light of US reservations to the CAT, "[t]here is a strong argument that (...) the Senate intended to limit the scope of United States obligations under Article 16 to those imposed by the relevant provisions of the Constitution. As construed by the courts, the Fifth Amendment does not apply to aliens outside the United States. (...) For these reasons, (...) the interrogation techniques where and as used by the CIA are not subject to, and therefore do not violate, Article 16."

³⁷⁰ *Ibid.*, pp. 39-40.

³⁷¹ See, for instance, United States Principal Deputy Assistant Attorney General Steven G. Bradbury, "Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, 'Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees'", 20 July 2007, pp. 3-4,

<<http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-warcrimesact.pdf>>. The Office of Legal Counsel had previously concluded that the same techniques did not violate the Torture Convention Implementation Act. See, for instance, United States Principal Deputy Assistant Attorney General Steven G. Bradbury, "Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, 'Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees'", No. 12, 10 May 2005, <<http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-2.pdf>>; United States Principal Deputy Assistant Attorney General Steven G. Bradbury, "Memorandum to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, 'Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee'", 10 May 2005, No. 13, <<http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-3.pdf>>.

finding in *Hamdan v. Rumsfeld* that Common Article 3 applied to the detainees,³⁷² President Bush adopted Executive Order 13440, which “interpreted [Common Article 3 of] the Geneva Conventions in a manner to allow the CIA to use its enhanced interrogation techniques” against a particular detainee held as part of the RDI programme.³⁷³ This Executive Order also suggested that “willful and outrageous acts of personal abuse” would not be prohibited if done for the purpose of gaining intelligence, as opposed to humiliating and degrading the detainee.³⁷⁴

211. The current administration is of the view that it is for the US courts to determine whether specific constitutional provisions, including the Eighth and Fifth Amendments, are applicable to Guantánamo detainees. In meetings with ODIHR, State and Justice Department representatives expressed their confidence that the standards of protection afforded to Guantánamo detainees would meet constitutional requirements.
212. In its latest periodic report to the Committee against Torture, produced in 2013, the United States asserted that its laws forbid all US officials from committing acts of torture “in all places, not only in territory under US jurisdiction” and from engaging in cruel, inhuman or degrading treatment or punishment “wherever [US officials] may be”.³⁷⁵ ODIHR positively notes that Executive Order 13491 prohibits acts of torture or ill-treatment “against any individual detained in armed conflict by the United States or within a facility owned, operated, or controlled by the United States, in all circumstances”,³⁷⁶ and that acts of torture and ill-treatment committed outside the United States are criminalized under the Torture Convention Implementation Act and the DTA, respectively. ODIHR welcomes the commitment of the Obama administration to prohibit torture and ill-treatment in all places based on US domestic law, treaties and customary international law.³⁷⁷
213. ODIHR notes the US government’s recent acknowledgement that its obligations under the CAT extend to territory that it “controls as a governmental authority” outside of its sovereign territory, including Guantánamo Bay, and US registered ships and aircraft.³⁷⁸ The prohibition of torture and the prohibition of ill-treatment, as enshrined in the CAT and the ICCPR, apply to all areas in which the United States “exercises directly or indirectly, in

³⁷² United States Supreme Court, *Hamdan v. Rumsfeld*, *op. cit.*, note 11.

³⁷³ Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 451, 164: “CIA Director Michael Hayden sent a letter to the president formally requesting that the president issue the Executive Order interpreting the Geneva Conventions in a manner to allow the CIA to interrogate Rahim using the CIA’s enhanced interrogation techniques. A classified legal opinion from [the Office of Legal Counsel] concluding that the use of the CIA’s six enhanced interrogation techniques proposed for use on Rahim (sleep deprivation, dietary manipulation, facial grasp, facial slap, abdominal slap, and the attention grab) did not violate applicable laws was issued on July 20, 2007. The accompanying unclassified Executive Order was issued the same day.”

³⁷⁴ George W. Bush, Executive Order 13440, *op. cit.*, note 180, Sec. 3(b)(i)(E).

³⁷⁵ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 13.

³⁷⁶ “Opening Statement, Mary E. McLeod, Acting Legal Adviser, U.S. Department of State, Committee Against Torture, November 12-13, 2014 – Geneva”, *op. cit.*, note 361, p. 2. See, also, Barack H. Obama, Executive Order 13491, *op. cit.*, note 351.

³⁷⁷ “UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, *op. cit.*, note 77.

³⁷⁸ *Ibid*; “Opening Statement, Mary E. McLeod, Acting Legal Adviser, U.S. Department of State, Committee Against Torture, November 12-13, 2014 – Geneva”, *op. cit.*, note 361, p. 3.

whole or in part, de jure or de facto effective control”.³⁷⁹ Such areas include detention facilities and military bases under US control in places such as Afghanistan, Iraq, and Guantánamo Bay, as well as secret detention facilities operated by the CIA on foreign soil. Additionally, the United States’ recent acknowledgment that the prohibition of torture and ill-treatment cannot be derogated from even in times of, and in the context of, an armed conflict is welcome.³⁸⁰ ODIHR further urges the United States to clearly acknowledge that the prohibition applies to all areas over which it exercises “effective control” including, where applicable, detention facilities and military bases outside its sovereign territory.

DETENTION AND INTERROGATION PRACTICES IN THE CIA RDI PROGRAMME

214. Reports indicate that, during their apprehension, detainees held as part of the CIA RDI programme were stripped naked, photographed, subjected to body-cavity searches and forced to wear diapers. Prior to their transfer to a CIA detention facility or the custody of a foreign government, detainees were also handcuffed and/or shackled and had their eyes and ears covered.³⁸¹ Prior to their transfer to Guantánamo, “high-value detainees” were flown to multiple locations, estimated to be between three and ten.³⁸² Their secret detention lasted from 16 months to almost four and a half years.³⁸³
215. Individuals detained by the CIA were kept incommunicado, in solitary confinement, and subjected to “varying degrees” of interrogation techniques approved by the Bush administration, individually or in combination.³⁸⁴ Some detainees were also subjected to

³⁷⁹ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 16; UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 10. See, also, UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 10.

³⁸⁰ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 14; “Opening Statement, Mary E. McLeod, Acting Legal Adviser, U.S. Department of State, Committee Against Torture, November 12-13, 2014 – Geneva”, *op. cit.*, note 361, pp. 3-4 ; “UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, *op. cit.*, note 77.

³⁸¹ ICRC Report, *op. cit.*, note 182, p. 6; CIA - “Extraordinary Rendition” *Flights, Torture and Accountability*, *op. cit.*, note 180, p. 38. See, also, “Background Paper on CIA’s Combined Use of Interrogation Techniques”, Central Intelligence Agency, 30 December 2004, pp. 2-3, <<https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc97.pdf>>. This is consistent with the findings of the ECtHR, which took note of the standard procedures applied to “high-value detainees” as regards transfers between secret detention facilities, and subsequently found it established beyond reasonable doubt that for the purpose of his transfers in December 2002 and June 2003, Al-Nashiri was “photographed both clothed and naked prior to and again after the transfer; (...) underwent a rectal examination and was made to wear a diaper (...); 3) earphones were placed over his ears, through which loud music was sometimes played; 4) he was blindfolded with at least a cloth tied around the head and black goggles; 5) he was shackled by his hands and feet, (...); 7) during the journey he was not allowed to go to the toilet and, if necessary, was obliged to urinate or defecate into the diaper. (...) [A] strikingly similar account of his transfers in CIA custody was given by the applicant in *El-Masri*”. The Court also stressed that “CIA documents give a precise description of the treatment to which High Value Detainees were being subjected in custody as a matter of precisely applied and predictable routine, starting from their capture through rendition and reception at the black site, to their interrogations”. See ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, paras. 409, 437, 512.

³⁸² ICRC Report, *ibid.*, p. 6; ECtHR, *Al Nashiri v. Poland*, *ibid.*, para. 398.

³⁸³ This takes into account the time spent in secret detention by the first 14 “high-value detainees” transferred to Guantánamo in September 2006. ICRC Report, *ibid.*, pp. 3, 7. See, also, ECtHR, *Al Nashiri v. Poland*, *ibid.*, paras. 397, 401; George W. Bush, “President Discusses the Creation of Military Commissions”, *op. cit.*, note 178; Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 458-461.

³⁸⁴ ICRC Report, *ibid.*, pp. 7-9; ECtHR, *Al Nashiri v. Poland*, *ibid.*, paras. 398, 401, 416-417; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, paras. 418-419, 508; Bradbury, “Memorandum: ‘Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees’”, *op. cit.*, note 369, p. 5: “To date, the CIA (...) has employed enhanced techniques to varying degrees in the interrogations of 28 of these detainees”. See, also, Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note

practices that had not yet been legally sanctioned or went beyond what was authorized. These practices are said to have included water dousing, nudity, abdominal slaps, and dietary manipulation,³⁸⁵ as well as threats of harm to their family, and “rectal rehydration” or “rectal feeding”.³⁸⁶ Interrogators for instance subjected Al-Nashiri to mock executions with the use of a handgun and with the use of a power drill while he was naked and blindfolded.³⁸⁷ Some detainees were reportedly deprived of sleep for “up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads”.³⁸⁸ Khalid Shaikh Mohammad, Al-Nashiri and Abu Zubaydah were “waterboarded” multiple times.³⁸⁹ Outside of interrogations, detainees were presumably “subjected to sensory manipulation including the use of excruciatingly loud music, horrifying sounds, pitch dark conditions, and sensory deprivation”.³⁹⁰ These detention conditions were used to “demonstrate to [them] that [they had] no control over basic human needs (...) [so that they] value[d] [their] personal welfare, comfort, and immediate needs more than the

171, p. 96: “Of the 119 detainees identified by the Committee as held by the CIA, (...) 39 detainees (...) have been subjected to the CIA’s enhanced interrogation techniques, [including] 17 [who] were subjected to such techniques between January 2003 and August 2003”.

³⁸⁵ Senate Study on the CIA RDI Programme, Executive Summary, *ibid.*, pp. 105-106, 145, 412, 421. The report alleges that these techniques had been approved by the CIA Headquarters and used in 2003 and 2004 but were only reviewed and approved by the Office of Legal Counsel in memoranda of 10 and 30 May 2005, which stated their compliance with the CAT and the Torture Convention Implementation Act. In one of these memoranda, water dousing is described as a technique whereby “cold water is poured on the detainee either from a container or from a hose without a nozzle” during a limited period of time. Bradbury, “Memorandum: ‘Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee’”, No. 13, *op. cit.*, note 371, pp. 11-12. The Senate Study on the CIA RDI Programme however reports that this technique was used in various ways and that in one instance, a session of water dousing on al Hawsawi “could [have been] indistinguishable from the waterboard”. See, also, CIA Inspector General, “Special Review - Counterterrorism Detention and Interrogation Activities, September 2001 - October 2003”, 7 May 2004 (hereinafter, “CIA Inspector General Report”), para. 10, <<http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf>>; ICRC Report, *ibid.*, pp. 8-9.

³⁸⁶ Senate Study on the CIA RDI Programme, Executive Summary, *ibid.*, pp. 487-488; ICRC Report, *ibid.*, p. 9. See, also, ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 511: “[Al-Nashiri] was told that, if he did not ‘talk’, his mother and family members would be brought to the black site – leaving him to infer from this that his female relatives might be abused in front of him”.

³⁸⁷ ECtHR, *Al Nashiri v. Poland*, *ibid.*, paras. 99-100, 416-417, 511. See, also, Senate Study on the CIA RDI Programme, Executive Summary, *ibid.*, p. 69.

³⁸⁸ Senate Study on the CIA RDI Programme, Findings and Conclusions, 9 December 2014, p. 3, <<http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf>>.

³⁸⁹ Former CIA Director Michael Hayden acknowledged that these three detainees were waterboarded. See, for example, Andy Worthington, “Guantánamo Trials: Another Torture Victim Charged”, 7 February 2008, [andyworthington.co.uk](http://www.andyworthington.co.uk), <<http://www.andyworthington.co.uk/2008/07/02/guantanamo-trials-another-torture-victim-charged/>>. This is corroborated by the Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 40-44, 67, 85-92, 118, 495. The report for instance states that “CIA records indicate that [Khalid Shaikh Mohammad] received at least 183 applications of the waterboard technique, and that Abu Zubaydah received at least 83 applications of the waterboard technique” and that “[d]uring a waterboard session, Abu Zubaydah ‘became completely unresponsive, with bubbles rising through his open, full mouth’.” See, also, ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 401; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, para. 509.

³⁹⁰ CIA - “Extraordinary Rendition” *Flights, Torture and Accountability*, *op. cit.*, note 180, p. 38. See, also, “Background Paper on CIA’s Combined Use of Interrogation Techniques”, CIA, *op. cit.*, note 381, p. 4; CIA Inspector General Report, *op. cit.*, note 385, Appendix F, “Draft [Office of Medical Services] Guidelines on Medical and Psychological Support to Detainee Interrogations”, 4 September 2003, p. 1: the techniques include, “in approximately ascending degree of intensity”, “standard measures”, e.g., shaving, stripping, diapering, hooding, isolation, white noise or loud music, continuous light or darkness, uncomfortably cool environment, restricted diet, including reduced caloric intake, shackling in upright, sitting, or horizontal position, water dousing, sleep deprivation (up to 72 hours), and “enhanced measures”; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *ibid.*, paras. 506-509.

information [they were] protecting”.³⁹¹ It appears that at least two detainees died while they were held by the CIA in a secret facility.³⁹²

216. The programme run by the CIA violated the prohibition of torture and ill-treatment. Most of the detention and interrogation techniques used, whether inflicted individually or in combination, undoubtedly amounted to torture or ill-treatment.³⁹³ While some of the techniques, taken individually, may not have reached the threshold of torture (as may be the case, for instance, with stripping detainees naked), their use in combination and over prolonged periods of time to create discomfort and to “break” the detainees has constituted ill-treatment, or even torture.³⁹⁴
217. In his first days in office, President Obama signed Executive Order 13491, directing the CIA to close any remaining detention facility it operated and prohibiting the Agency from operating any such detention facility in the future.³⁹⁵ While this development is welcome, concern nevertheless remains that the order does not repudiate extraordinary rendition and may preserve the Agency’s authority to detain individuals “on a short-term, transitory basis” before transferring them to another country for interrogation or trial.³⁹⁶

DETENTION AND INTERROGATION PRACTICES AT GUANTÁNAMO

218. A wide variety of sources, including leaked ICRC and official reports, have described numerous instances of abuse at Guantánamo.³⁹⁷ Practices authorized by the Bush administration such as the removal of comfort items, “change of scenery down” (removing a detainee to a less pleasant interrogation scene, which “might include exposure to extreme

³⁹¹ “Background Paper on CIA’s Combined Use of Interrogation Techniques”, CIA, *ibid.*, p. 4. See, also, ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 515; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *ibid.*, para. 511.

³⁹² United States Attorney General Eric Holder, “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees”, United States Department of Justice website, 30 June 2011, <<http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees>>. See, also, Senate Study on the CIA RDI Programme, Findings and Conclusions, *op. cit.*, note 388, p. 10: “On November [redacted], 2002, a detainee who had been held partially nude and chained to a concrete floor died from suspected hypothermia at the facility.” See, also, UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 125, expressing concern about the possibility that three Guantánamo detainees “might have died during interrogations at [the Guantánamo secret detention] facility, instead of in their own cells, on 9 June 2006”.

³⁹³ “The treatment to which the applicant was subjected by the CIA during his detention in Poland at the relevant time amounted to torture”. ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, paras. 515-516; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, paras. 510-511. See, also, ICRC Report, *op. cit.*, note 182, pp. 5, 24; UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 11; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 51; UN HRC, Concluding observations on the fourth periodic report of the United States of America, *op. cit.*, note 67, para. 5; Marty, “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report”, *op. cit.*, note 174, para. 7; Resolution P7_TA(2012)0309, “Alleged transportation and illegal detention of prisoners in European countries by the CIA”, European Parliament, 11 September 2012, para. A, <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0309&language=EN>>.

³⁹⁴ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 51-52.

³⁹⁵ Barack H. Obama, Executive Order 13491, *op. cit.*, note 351, Sec. 4(a).

³⁹⁶ *Globalizing Torture*, *op. cit.*, note 170, p. 7. See also, OSCE Parliamentary Assembly, “Monaco Declaration, Resolution on Extraordinary Rendition Investigations”, Monaco, 5 to 9 July 2012, para. 3, <<http://www.oscepa.org/publications/declarations/2012-monaco-declaration/1266-monaco-declaration-english/file>>. Such authority raises human rights concerns related to respect for the prohibitions of arbitrary detention, torture and ill-treatment, as well as respect for international fair trial standards, among others.

³⁹⁷ These sources include news reports, leaked documents, reports from specific US government agencies, accounts of detainees’ attorneys and of former detainees themselves.

temperatures and deprivation of light and auditory stimuli”), environmental manipulation to create moderate discomfort, sleep adjustment, and isolation³⁹⁸ were reportedly part of a more general system designed to cause stress, “break the will of the prisoners (...), and make them wholly dependent on their interrogators”,³⁹⁹ in order to force them to cooperate.

219. Former detainees interviewed by ODIHR reported being subjected to sleep deprivation, as well as a variety of practices such as regular and severe beatings, food deprivation, water deprivation, use of stress positions, exposure to constant loud noise and neon lights, as well as to the use of prolonged solitary confinement.⁴⁰⁰ The treatment suffered by Mohammed al Qahtani, the alleged would-be 20th hijacker involved in the 9/11 attacks, is another example of the severity of the abuses inflicted on some detainees. His interrogation log reveals that, from November 2002 to early January 2003, he was subjected to an intense combination of practices, including, *inter alia*, sleep deprivation, forced standing, exposure to loud music and white noise, forced grooming, being forced to perform dog tricks, sexual humiliation and being forced to stand naked.⁴⁰¹ He is said to have developed serious medical conditions and his treatment during interrogations reportedly left him in a “life-threatening condition”.⁴⁰² The treatment of Mohammed Jawad in May 2004 illustrates the use of the sleep deprivation technique known as the “frequent flyer” programme. Pursuant to this practice, Jawad was shackled, moved from cell to cell, and unshackled “112 times from 7 May to 20 May 2004, on average of about once every three hours”.⁴⁰³
220. At Guantánamo, both interrogation and detention conditions were reportedly meant to show detainees that their interrogators had total control over their level of isolation, access to comfort items and basic needs,⁴⁰⁴ including access to food, drinkable water, sunlight or

³⁹⁸ Donald H. Rumsfeld, “Memorandum: ‘Counter-Resistance Techniques in the War on Terrorism’”, *op. cit.*, note 360; UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 49-50.

³⁹⁹ Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo”, The New York Times website, 30 November 2004, <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?_r=0>.

⁴⁰⁰ ODIHR interview with Murat Kurnaz, 26 March 2014. Murat Kurnaz was transferred to Germany on August 24, 2006; ODIHR interview with David Hicks, *op. cit.*, note 228; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217.

⁴⁰¹ “Interrogation Log, Detainee 063”, <<http://content.time.com/time/2006/log/log.pdf>>; *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, (New York: Human Rights Watch, 2011), pp. 79-80, <<http://www.hrw.org/sites/default/files/reports/us0711webcover.pdf>>.

⁴⁰² Bob Woodward, “Guantanamo detainee was tortured, says official overseeing military trials”, The Washington Post website, 14 January 2009, <<http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>>.

⁴⁰³ United States Military Commission, *United States of America v. Mohammed Jawad*, D-008, “Ruling on Defense Motion to Dismiss - Torture of the Detainee”, 24 September 2008, p. 2, where the military judge found that subjecting Jawad to the frequent flyer programme constituted “abusive conduct and cruel and inhuman treatment”; “USA: Remedy and accountability still absent, Mohammed Jawad subjected to cruel and inhuman treatment in Guantánamo, military judge finds”, Amnesty International, 1 October 2008, p. 2, <<http://www.amnesty.org/fr/library/info/AMR51/109/2008/en>>. The use of the “frequent flyer” programme was also described in “Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody”, United States Senate Armed Services Committee, 11 December 2008, p. 148, <<http://s3.amazonaws.com/nytdocs/docs/211/211.pdf>>.

⁴⁰⁴ Scott Higham, “A Look Behind the ‘Wire’ at Guantanamo”, The Washington Post website, 13 June 2004, <<http://www.washingtonpost.com/wp-dyn/articles/A37364-2004Jun12.html>>; UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 53: referring to a memorandum of the Department of Defense, prepared after an ICRC meeting with Major General Geoffrey D. Miller, then commander of detention operations at Guantánamo, on 9 October 2003, where the ICRC reportedly stated that it “feels that interrogators have too much control over the basic needs of detainees. That the interrogators attempt to control the detainees through use of isolation. Mr. Cassard stated that the interrogators have total control of the level of isolation in which the detainees were kept; the level of comfort items detainees can receive; and also the access of basic needs to the detainees.” See, also, “Senate Armed Services Committee Inquiry into the Treatment of Detainees in

fresh air.⁴⁰⁵ Co-operation with interrogators, or lack thereof, allegedly had a critical impact on the well-being of detainees, as those who did not provide information or were seen as breaking the constantly-changing prison rules were punished, whereas those who co-operated were sometimes “rewarded”.⁴⁰⁶ Former detainees described to ODIHR the forms such punishment could take depending on a particular detainee’s compliance, including the removal of basic items that were considered comfort items,⁴⁰⁷ and prolonged isolation. They explained that different levels of compliance were associated with the number of comfort items they were allowed to have in their cells. The highest level allowed them to keep all of their items, whereas the lowest level only allowed them to wear shorts and forced them to sleep on a concrete block.⁴⁰⁸ In relation to solitary confinement, they mentioned being taken out and put back in isolation after very short breaks. They reported being in quasi-isolation for months, even years in some cases, in cells in which they felt the temperature was either freezing cold or suffocatingly hot.⁴⁰⁹

221. Documented cases dating from the Bush administration point to the routine use of excessive force against detainees by the Initial Reaction Forces (IRF)⁴¹⁰ and during the force-feeding of hunger strikers.⁴¹¹ Testimonies of former detainees about the IRF corroborate previous reports indicating that during transportation and other operations led by the IRF, detainees were pepper-sprayed, shackled, chained, beaten, kicked and/or punched.⁴¹² Mustafa Ait Idir explained that, on one occasion, he was so severely beaten

U.S. Custody”, United States Senate Armed Services Committee, *op. cit.*, note 403, p. 52: ““all aspects of the [detention] environment should enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest extent possible.”

⁴⁰⁵ During the June-July 2005 hunger strike, detainees formulated some demands, including having “proper human food and clean water. We are not given adequate amounts of food and the food is often old and inedible. The water is frequently dirty and tastes contaminated [and] (...) to see sunlight, and not be forced to go months without seeing daylight.” “The Guantánamo Prisoner Hunger Strikes and Protests: February 2002 - August 2005”, Center for Constitutional Rights, September 2005, p. 10, <<http://ccrjustice.org/files/Final%20Hunger%20Strike%20Report%20Sept%202005.pdf>>. This is consistent with the testimonies of former detainees interviewed by ODIHR.

⁴⁰⁶ ODIHR interview with David Hicks, *op. cit.*, note 228: “Everything was turned into a form of punishment”; ODIHR interview with Murat Kurnaz, *op. cit.*, note 400: “They punished me and put me in isolation [when I refused to talk], where I was anyway coming from. (...) They didn’t have anything more to take away (...). They took my clothes, they took everything away”; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216. Boumediene explained that interrogators offered him food in exchange for information: “The food was bad and the interrogators would of course play on this weak point”; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217. Ait Idir mentioned that medical personnel would tell him to co-operate with interrogators to be given water. See, also, *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 28.

⁴⁰⁷ These included, for instance, toothpaste, toothbrushes, deodorant, soap, and blankets.

⁴⁰⁸ ODIHR interview with David Hicks, *op. cit.*, note 228; ODIHR interview with Murat Kurnaz, *op. cit.*, note 400; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216.

⁴⁰⁹ *Ibid.*; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217. See, also, UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 53.

⁴¹⁰ The standard operating procedure for Camp Delta adopted in March 2003 describes IRF (also called Immediate Reaction Force, Instant Reaction Force or Extreme Reaction Force) as a team of five military police officers in riot gear who were “intended to be used primarily as a forced cell extraction team, specializing in the extraction of a detainee who is combative, resistive, or if the possibility of a weapon is in the cell at the time of the extraction”. “Camp Delta Standard Operating Procedures”, Joint Task Force Guantánamo, 28 March 2003, pp. 3.3, 24.1-24.2, <<http://www1.umn.edu/humanrts/OathBetrayed/SOP%201-238.pdf>>.

⁴¹¹ The force-feeding of hunger strikers and the process in which it occurs remains of concern to this day. This issue will be further explored in the sub-section on “Management of hunger strikes and force-feeding at Guantánamo” below.

⁴¹² ODIHR interview with Murat Kurnaz, *op. cit.*, note 400; ODIHR interview with David Hicks, *op. cit.*, note 228; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216. See, also, UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 54.

that he lost consciousness and one side of his face subsequently remained paralyzed for 10 days.⁴¹³

222. ODIHR considers that such practices contravene the prohibition of torture or ill-treatment as understood by international law.⁴¹⁴ They appear to have been inflicted intentionally by government officials in order to extract a confession, obtain information or punish detainees.⁴¹⁵ Several of the techniques, at minimum, were reportedly perceived by the detainees as a source of severe pain or suffering.⁴¹⁶ Detainees' treatment ultimately led to the deterioration of their mental health, reportedly placing them "under a constant state of stress, [suffering] from garbled conversation, disorientation, hallucination, irritability, anger, delusions, and sometimes paranoia".⁴¹⁷ Former detainees interviewed by ODIHR also mentioned sustaining physical injuries from their treatment in detention, including with long term consequences.⁴¹⁸
223. Additionally, depriving Guantánamo detainees of access to their basic rights and needs over a prolonged period of time violated their right to be treated with humanity and respect for the inherent dignity of the human being.⁴¹⁹ As the techniques were specifically aimed at causing stress and pressuring detainees into obtaining their co-operation, ODIHR concludes that these restrictive and punitive conditions of detention, combined with the use of prolonged solitary confinement, caused severe psychological or physical pain or suffering to the detainees and amounted to cruel or inhuman treatment.⁴²⁰
224. ODIHR welcomes the commitment of the current administration to respect the prohibition of torture and ill-treatment,⁴²¹ and notes that the 2009 review of the conditions of confinement at Guantánamo, known as the Walsh Report, concluded that detention conditions were in conformity with Common Article 3.⁴²² However, it is concerned that any executive order, including Executive Order 13491, can be rescinded or overridden by subsequent administrations.⁴²³ Furthermore, concurring testimonies and reports lead

⁴¹³ ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *ibid.*

⁴¹⁴ See, also, UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, paras. 51-54.

⁴¹⁵ *Ibid.*, para. 51.

⁴¹⁶ *Ibid.*, para. 52.

⁴¹⁷ *Break Them Down: Systematic Use of Psychological Torture by US Forces* (Cambridge: Physicians for Human Rights, 2005), p. 52, <http://humanrights.ucdavis.edu/resources/library/documents-and-reports/physicians_for_human_rights>.

⁴¹⁸ ODIHR interview with David Hicks, *op. cit.*, note 228; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217.

⁴¹⁹ See, also, UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, para. 53.

⁴²⁰ *Ibid.*

⁴²¹ Barack H. Obama, Executive Order 13491, *op. cit.*, note 351; UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 13; "Opening Statement, Mary E. McLeod, Acting Legal Adviser, U.S. Department of State, Committee Against Torture, November 12-13, 2014 – Geneva", *op. cit.*, note 361, p. 2.

⁴²² "Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement", 2009 (hereinafter, "Walsh Report"), p. 72,

<http://www.defense.gov/pubs/pdfs/review_of_department_compliance_with_presidents_executive_order_on_detainee_conditions_of_confinementa.pdf>. This review was conducted pursuant to Section 6 of Executive Order 13492.

⁴²³ As executive orders can be rescinded or overridden, ODIHR welcomes the Senate amendment to the NDDA for the Fiscal Year 2016, which reaffirms the prohibition of torture. At the time of writing, the 2016 NDAA had not been adopted. The bill was passed in a vote in the House (May 2015) and subsequently passed in the Senate with changes (June 2015), but has yet to be passed by both chambers in identical form. "H.R. 1735: National Defense Authorization Act for Fiscal Year 2016", Govtrack.us, <<https://www.govtrack.us/congress/bills/114/hr1735>>; "Text of the National Defense Authorization Act for Fiscal Year", Govtrack.us, 18 June 2015, Section 1040, <<http://www.gpo.gov/fdsys/pkg/BILLS-114hr1735eas/pdf/BILLS-114hr1735eas.pdf>>;

ODIHR to believe that the conditions of confinement deteriorated in 2011 and even further in 2013 following a mass hunger strike.⁴²⁴ These allegations call into serious question the conclusions of the Walsh Report and other US statements on the compliance of the conditions of detention with Common Article 3. ODIHR is also troubled by the continued use of solitary confinement and the decision to force-feed detainees on hunger strike as well as the process of doing so.

225. Single-cell confinement at Guantánamo remains the norm for a number of detainees in Camps 5 and 7,⁴²⁵ as confirmed by an official report of November 2012.⁴²⁶ The report specifies that detainees held in isolation in Camp 5 have access to two to four hours of recreation per day with one other detainee, whereas Camp 7 detainees are allowed up to four hours of recreation per day that they would usually spend alone or with another detainee in a separate but adjacent area.⁴²⁷ Segregation of detainees is the default practice in Camp 7, and standard operating procedures have provided for the use of solitary confinement in other camps for periods up to 90 days, depending on the reason for the segregation. To ODIHR's knowledge, such confinement can be aimed at gathering intelligence, ensuring detainees' own protection, for security or safety reasons, or for punishing detainees for infringing prison rules.⁴²⁸

226. US officials maintain that single-cell confinement does not amount to solitary confinement, and that the latter is not allowed at Guantánamo.⁴²⁹ However, ODIHR remains concerned

Ali Watkins, "Senate Votes to Outlaw Torture", Huffington Post website, 16 June 2015, <http://www.huffingtonpost.com/2015/06/16/senate-cia-torture_n_7595230.html>.

⁴²⁴ ODIHR interview with Matthew O'Hara, *op. cit.*, note 255; ODIHR interview with Brent Rushforth, *op. cit.*, note 207; United States Military Commission, *United States of America v. Khalid Shaikh Mohammad et al.*, AE 108 (MAH, AAA, RBS, WBA), "Defense motion for appropriate relief to compel defense examination of the accused's conditions of confinement", 5 December 2012, Attachment G, "Request for changes in [redacted] procedures, Letter from Military Counsel for High Value Detainees", 10 May 2011, p. 119: "Changes implemented [in Camp 7] since January 2011 have been arbitrary and capricious in that they are not grounded in any institutional need, or on behavioural issues with our clients (...) [and resulted] in unacceptable detention conditions for the prisoners"; "Requests to Improve the Conditions of Confinement in Guantánamo", Office of the Chief Defense Counsel, 20 May 2013, p. 3, <<https://s3.amazonaws.com/s3.documentcloud.org/documents/703318/2013-05-20-joint-letter-to-sec-hagel-pii-redacted.pdf>>: "There has been a serious degradation in the quality of life for detainees in Guantánamo Bay over the past year. This change appears to have coincided with the arrival of the new Joint Detention Group Commander, [Colonel] John V. Bogdan". In relation to the deterioration of conditions of confinement in 2013 for non-high value detainees, see the subsection on "Management of hunger strikes and force-feeding at Guantánamo" below.

⁴²⁵ Over the years, a series of facilities have been built and used to hold Guantánamo detainees. Camps 5 and 7 are among the camps which are still in use to date. Camp 5 has been described as "a maximum-security facility consisting of 100 indoor climate-controlled cells divided among four individual cell blocks, each with two tiers, and 24 open-air cells. Most of the cell blocks in Camp 5 are operated as segregated housing. One block currently serves as shared housing (...). Most of the detainees in Camp 5 are held in segregated cells on a temporary basis to encourage compliance with facility rules." Camp 7 is a "segregated single-cell facility, used for high-value detainees." "Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United States", Government Accountability Office, November 2012 (hereinafter, "GAO November 2012 Report"), pp. 15-16, <<http://www.gao.gov/assets/660/650032.pdf>>.

⁴²⁶ GAO November 2012 Report, *ibid.*

⁴²⁷ *Ibid.*, pp. 17-18, 21. Counsel for "high-value detainees" mentioned that until very recently there was no social interaction for detainees in Camp 7. Now, two detainees are taken out in the backyard for one or one and a half hour a day, at the same time. Previously, they spent this time separately. ODIHR interview with Navy Lieutenant Commander Kevin B. Bogucki, JAGC, *op. cit.*, note 255.

⁴²⁸ See, for instance, *Buried Alive: Solitary Confinement in the US Detention System* (Cambridge: Physicians for Human Rights, 2013), pp. 19-21, <https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf>; Department of Defense Directive 2310.01E, *op. cit.*, note 14, para. k.

⁴²⁹ US comments to the draft report; Walsh Report, *op. cit.*, note 422, p. 45. On the other hand, ODIHR was informed that all detainees in Camp 7 are held in solitary confinement. ODIHR interview with Navy Lieutenant Commander Kevin B. Bogucki, JAGC, *op. cit.*, note 255.

about the ability of detainees to maintain meaningful contact and communication with other detainees which appears to be limited to yelling across their cells and talking to each other during short periods of recreation.⁴³⁰ These practices cannot be considered as allowing meaningful contact with other detainees. At a minimum, all detainees who spend 22 hours a day in segregated cells are thus undoubtedly held in solitary confinement.

227. Solitary confinement can have a negative impact on detainees' health after just a few days. These harmful effects then dramatically increase with each additional day spent in isolation.⁴³¹ Prolonged solitary confinement can lead to severe mental distress,⁴³² and its harmful effects can be even more pronounced among vulnerable individuals who suffer from pre-existing mental disorders or other mental health problems such as the ones caused by past abuses, including post-traumatic stress disorder.⁴³³ The Special Rapporteur on torture explained that combined with the prospect of indefinite detention, its use at Guantánamo is even more likely to amount to torture or ill-treatment. Moreover, where solitary confinement is imposed as punishment for breaching prison discipline and leads to severe pain or suffering, or where it is used to extract information or a confession, it always violates the prohibition of torture and ill-treatment.⁴³⁴
228. Moreover, in the course of the ongoing proceedings against him, Al-Nashiri has complained about the use of a form of body restraint known as "belly chains" while being transported within the detention facility.⁴³⁵ ODIHR welcomes the information that the United States would no longer use belly chains as a matter of policy,⁴³⁶ and wishes to re-emphasize that the use of restraints during transportation should be strictly limited to what is necessary under particular circumstances. Moreover, Ramzi Bin al Shibh has alleged that he has been deliberately subjected to exposure to sounds and vibrations.⁴³⁷ If al Shibh's allegations are substantiated, his intentional exposure to sounds and vibrations may amount to cruel or inhuman treatment, also because such treatment may have caused additional

⁴³⁰ *Ethics Abandoned: Medical Professionalism and Detainee Abuse in the "War on Terror"* (New York: Institute on Medicine as a Profession, 2013), p. 45, <<http://www.imapny.org/File%20Library/Documents/IMAP-EthicsTextFinal2.pdf>>. See, also, GAO November 2012 Report, *op. cit.*, note 425, pp. 17-18, 21.

⁴³¹ UN Special Rapporteur on torture, Interim report to the General Assembly, A/66/268, *op. cit.*, note 306, para. 62.

⁴³² *Ibid.*; *Ethics Abandoned*, *op. cit.*, note 430, p. 44.

⁴³³ *Buried Alive*, *op. cit.*, note 428, p. 32. See, also, UN Special Rapporteur on torture, Interim report to the General Assembly, A/66/268, *op. cit.*, note 306, para. 63.

⁴³⁴ UN Special Rapporteur on torture, Interim report to the General Assembly, A/66/268, *ibid.*, paras. 71-76; UN Special Rapporteur on Torture, Interim report to the General Assembly, A/63/175, *op. cit.*, note 307, para. 80.

⁴³⁵ United States Military Commission, *United States of America v. Abd Al-Rahim Hussein Muhammed Al-Nashiri*, AE 118, "Defense motion to cease the use of belly chains on the accused by JTF-GTMO", 24 September 2012, pp. 6-7. In this motion, the defence complained that a middle restraint (or belly chain) was used to restrain Al-Nashiri during transportation within the camp. Because the restraints were used to torture him in the past, his attorneys argued that the use of such chains would likely re-traumatize him. See, also, United States Military Commission, *United States of America v. Al-Nashiri*, "Unofficial/unauthenticated transcript of motions hearing dated 6/11/2013 from 9:03 AM to 10:30 AM", p. 1775.

⁴³⁶ United States Military Commission, *United States of America v. Al-Nashiri*, "Unofficial/unauthenticated transcript of motions hearing dated 6/11/2013 from 9:03 AM to 10:30 AM", *ibid.*

⁴³⁷ United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of motions hearing dated 12/17/2013 from 9:04 AM to 11:50 AM", pp. 7272-7273; United States Military Commission, *United States of America v. Mohammad et al.*, AE 152J, "Government Motion for R.M.C. 909 Hearing in April 2014 and Direct Inquiry by the Military Judge to Mr. BinalShibh Regarding his Capacity to Stand Trial by Military Commission", 4 February 2014, p. 2; ODIHR interview with Navy Lieutenant Commander Kevin B. Bogucki, JAGC, *op. cit.*, note 255.

distress to an individual who was presumably subjected to ill-treatment in the CIA RDI programme.⁴³⁸

MANAGEMENT OF HUNGER STRIKES AND FORCE-FEEDING AT GUANTÁNAMO

229. Since 2002, detainees have reportedly participated in several hunger strikes to protest their treatment and detention without trial.⁴³⁹ During the most recent mass hunger strike, which is said to have started in February 2013,⁴⁴⁰ detainees who lived communally were all moved back to single cells. Several detainees and attorneys reported that a substantial deterioration of confinement conditions followed this move and that deliberate measures were put in place that specifically targeted the hunger strikers. Complaints have related to: noise disturbances during sleep and at prayer times; manipulation of temperature in cell blocks to produce cold; removal of basic necessities such as toothbrushes, toothpaste, soap, towels and blankets; invasive and humiliating body-cavity searches; offers to take showers or recreation in the middle of the night; the limitation of recreation to only one hour per day; and the withholding of drinkable water and medication.⁴⁴¹ A few months after the start of the hunger strike, it was also reported that US authorities promised detainees a return to communal detention if they gave up their protest, and that the official number of hunger strikers dropped from 106 to 70 in 10 days.⁴⁴² Such practices seem to constitute a system of punishment or reward implemented to break the hunger strike and discourage detainees from continuing to protest. Such a system would be unjustifiable and would violate a

⁴³⁸ See, for example, Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 75-81. See, also, the findings of the ECtHR that “CIA documents give a precise description of the treatment to which High Value Detainees were being subjected in custody as a matter of precisely applied and predictable routine, starting from their capture through rendition and reception at the black site, to their interrogations”. ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 512.

⁴³⁹ Widespread early hunger strikes have reportedly included one from February to May 2002, with a peak of 194 participants, and one in June-July 2005 in which approximately 200 detainees participated. “The Guantánamo Prisoner Hunger Strikes and Protests”, Center for Constitutional Rights, *op. cit.*, note 405, pp. 7-11.

⁴⁴⁰ “IACHR, UN Working Group on arbitrary detention, UN Rapporteur on torture, UN Rapporteur on human rights and counter-terrorism, and UN Rapporteur on health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis”, OHCHR website, *op. cit.*, note 107. The 2013 hunger strike started following what has been described as invasive and dehumanizing cell searches. Reportedly, detainees covered the surveillance cameras and windows of their cells, and the decision was taken to move all detainees to individual cells. Participation in the hunger strike would have increased substantially at that point. See, for instance, “Hunger-Striking Detainees At Guantanamo Are Force-Fed”, transcript of an interview with Carol Rosenberg, NPR website, 2 May 2013, <<http://www.npr.org/2013/05/02/180491232/hunger-striking-detainees-at-guantanamo-are-force-fed>>; “I Am Fallen into Darkness”, Amnesty International, *op. cit.*, note 247, p. 10.

⁴⁴¹ United States District Court for the District of Columbia, *In re: Guantánamo Bay Detainee Continued Access to Counsel*, Case No. 12-398, “Emergency motion concerning access to counsel”, 22 May 2013, Exhibit G, “Declaration of Anne Richardson”, <<http://www.lawfareblog.com/wp-content/uploads/2013/05/secondsetoffiles.zip>>; United States District Court for the District of Columbia, *Suhail Abdu Anam, et al. v. Barack Obama*, Case No. 04-1194, “Memorandum of law in support of emergency motion of petitioner Musa’ab Omar al Madhwani for humanitarian and life-saving relief”, 10 April 2013, <<http://big.assets.huffingtonpost.com/GuantanamoWaterFiling.pdf>>; “Arbitrary Detention at Guantánamo”, Center for Constitutional Rights, 11 September 2013, pp. 6-7, <http://www.ccrjustice.org/files/Guantanamo_CCR_9-11-13%20%28A4%29.pdf>; Mark Townsend, “Guantánamo guards ‘forcing inmates to stay awake’”, The Guardian website, 7 July 2013, <<http://www.theguardian.com/world/2013/jul/07/guantanamo-guards-inmates-stay-awake>>; Moath al-Alwi, “My life at Guantanamo”, Al Jazeera website, 7 July 2013, <<http://www.aljazeera.com/indepth/opinion/2013/07/201373145723725101.html>>; Matt Williams, “Guantánamo hunger-strike inmates forced to drink dirty water, court hears”, The Guardian website, 15 April 2013, <<http://www.theguardian.com/world/2013/apr/15/guantanamo-bay-hunger-strike-dirty-water>>; ODIHR interview with Brent Rushforth, *op. cit.*, note 207.

⁴⁴² “I Am Fallen into Darkness”, Amnesty International, *op. cit.*, note 247, p. 11.

number of international human rights standards, including prison standards,⁴⁴³ and the rights of detainees to peacefully protest.⁴⁴⁴ It may also violate the prohibition of torture or ill-treatment.⁴⁴⁵

230. Additionally, ODIHR is concerned by both the decision of the administration to force-feed detainees and the force-feeding process itself as reportedly carried out at Guantánamo.⁴⁴⁶ With regard to the decision to force-feed detainees, Defense Department representatives explained to ODIHR the US government policy of force-feeding those detainees whose life or health is in danger. They also specified that the procedures in place aim to maintain good order and discipline throughout the prison as well as help ensure that detainees are not pressured by others to participate in hunger strikes⁴⁴⁷ which the United States believes to be an “organized act of asymmetrical warfare”.⁴⁴⁸
231. In this regard, international bodies and experts have reiterated that the decision to force-feed mentally competent hunger strikers who voluntarily take part in a hunger strike and refuse treatment contradicts rules of ethics and the right to health, *inter alia*, irrespective of the danger caused to their life or health. The American Medical Association also stressed on several occasions that the force-feeding of detainees violates “core ethical values of the medical profession”, underlining that “every competent patient has the right to refuse medical intervention, including life-sustaining interventions”.⁴⁴⁹
232. In light of the above, ODIHR notes the first-known case of refusal by a US Navy nurse to force-feed detainees in July 2014.⁴⁵⁰ ODIHR is deeply troubled by potential retaliation against the nurse for this decision, as he is reportedly facing possible discharge from the Navy for nearly a year, and may now see his security clearance revoked.⁴⁵¹ ODIHR supports the US Defense Health Board’s⁴⁵² recommendation issued in March 2015 that the Defense Department leadership excuse healthcare professionals from performing medical

⁴⁴³ See, for instance, “Standard Minimum Rules for the Treatment of Prisoners”, *op. cit.*, note 280, Rules 10, 15, 20, 27;

“Declaration of Malta on Hunger Strikers”, World Medical Association, *op. cit.*, note 315, para. 6.

⁴⁴⁴ ICCPR, Art. 19; OSCE Copenhagen Document, *op. cit.*, note 80, paras. 9.1, 10.1; OSCE Budapest Document, *op. cit.*, note 3, para. 36; OSCE Istanbul Document, *op. cit.*, note 279, para. 26.

⁴⁴⁵ As mentioned above, solitary confinement for disciplinary purposes violates the prohibition of torture and ill-treatment when it causes severe pain or suffering to the detainees.

⁴⁴⁶ The first reported occurrences of force-feeding detainees in hunger strike would have taken place in May 2002, under the previous administration. *The Report of The Constitution Project’s Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 227.

⁴⁴⁷ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194. US representatives stressed that peer pressure and coercion have played an important role in the escalation of the number of hunger strikers. Some hunger strikers, they said, thank the soldiers for the feedings. These allow them to pretend they are continuing to strike and taking “part in the fight”.

⁴⁴⁸ IACHR, “Towards the Closure of Guantanamo”, *op. cit.*, note 245, para. 140.

⁴⁴⁹ Jeremy A. Lazarus, Letter to the Secretary of Defense, American Medical Association, 25 April 2013, <<http://media.miamiherald.com/smedia/2013/04/30/07/58/FRs25.S0.56.pdf>>

⁴⁵⁰ “Guantánamo Nurse Refuses To Force-Feed Prisoners”, The Guardian Website, 16 July 2014, <<http://www.theguardian.com/world/2014/jul/16/guantanamo-nurse-refuses-force-feed-prisoners>>.

⁴⁵¹ “U.S. Department of Defense Considers New Retaliation Against Guantánamo Navy Nurse”, Physicians for Human Rights website, 23 July 2015, <<http://physiciansforhumanrights.org/press/press-releases/us-department-of-defense-considers-new-retaliation-against-guantanamo-navy-nurse.html?referrer=https://www.google.pl/#sthash.2YwQzvEu.dpuf>>

⁴⁵² The Defense Health Board is a Federal Advisory Committee to the Secretary of Defense that provides independent advice and recommendations on matters relating to operational programs, health policy development, health research programs, and requirements for the treatment and prevention of disease and injury, promotion of health and the delivery of health care to Department of Defense beneficiaries. “Defense Health Board – Federal Advisory Committee to the Secretary of Defense”, Health.mil website, <<http://www.health.mil/About-MHS/Other-MHS-Organizations/Defense-Health-Board>>.

procedures that would violate their profession's code of ethics, or their religious and moral beliefs.⁴⁵³ It also welcomes the statement that should a medical procedure be illegal, "every military member of every specialty has an obligation to do all in his or her power to stop it or refuse participation".⁴⁵⁴

233. Furthermore, ODIHR is troubled by reports indicating that the current force-feeding process at Guantánamo inflicts "gratuitous pain and suffering" on hunger strikers. It has been alleged that "extraction teams" forcibly taking detainees from their cells to feeding sessions use disproportionate force and violence to overpower detainees and illustrate "who is in control", that feeding tubes are too thick and are forcibly and painfully reinserted for each feeding, as well as that fluids are forced into detainees at excessive speed, causing severe enteral pain, *inter alia*.⁴⁵⁵ A restraint chair is also used for enteral feedings as a matter of policy since late 2005.⁴⁵⁶
234. US Department of Defense representatives indicated to ODIHR that the use of force, if needed, is kept to a minimum, further explaining that extraction teams are used to transport detainees to enteral feedings when they refuse to freely do so.⁴⁵⁷ The force-feeding of Guantánamo detainees has also been the subject of extensive debate in US federal courts, as reflected for instance by the *Dhiab v. Obama* case. The judge in this particular case successively denied a request to end the force-feeding of Abu Wa'el Dhiab on jurisdictional grounds,⁴⁵⁸ decided a temporary ban on his force-feeding which was

⁴⁵³ "Ethical Guidelines and Practices for U.S. Military Medical Professionals", Defense Health Board, 3 March 2015, p. ES7, <<http://www.health.mil/Reference-Center/Reports/2015/03/03/Ethical-Guidelines-and-Practices-for-US-Military-Medical-Professionals>>.

⁴⁵⁴ *Ibid.*, p. ES5.

⁴⁵⁵ The force-feeding protocol at Guantánamo is being litigated before US federal courts. The allegations mentioned above have been made by detainees and their counsel on several occasions. See, for instance, United States District Court for the District of Columbia, *Imad Abdullah Hassan v. Barack H. Obama*, Case No. 04-cv-1194 (UNA), "Statement of Points and Authorities in Support of Petitioner's Application for Preliminary Injunction", 11 March 2014, <http://www.reprive.org/uploads/2/6/3/3/26338131/2014.03.11_-_hassan_brief_and_exhibits_-_compressed.pdf>; United States District Court for the District of Columbia, *Abu Wa'el (Jihad) Dhiab v. Barack H. Obama*, Case No. 05-1457, "Petitioner's notice of filing of expert report of Stephen N. Xenakis, M.D., LLC", 15 September 2014, <http://www.reprive.org/uploads/2/6/3/3/26338131/2014_09_15_pub_expert_report_-_xenakis.pdf>. See, also, "Statement of the UN Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay - Inter-American Commission on Human Rights", OHCHR website, *op. cit.*, note 108; *Ethics Abandoned*, *op. cit.*, note 430, p. xxvi. ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216. Lakhdar Boumediene described to ODIHR the procedure used when he was force-fed prior to his release in May 2009: "The normal procedure is that you are taken to the chair (...) There are eight belts, wrists, head, legs, waist (...) [If you refused to do what they said] they would bring (...) the IRF team (...) [and sometimes] use pepper spray (...) Literally all seven would come at me (...) they would take you regardless of how many bones would be fractured. They would just grab you and throw you on the chair. (...) They would tighten the belts so much on my stomach [that my stomach could not keep anything]. (...) Only very few people persist [with their hunger strike] in spite of this torture".

⁴⁵⁶ United States District Court for the District of Columbia, *Dhiab v. Obama*, Exhibit 33A, "Health Declaration", "Declaration of Colonel David E. Heath", 26 September 2014, para. 8, <<https://s3.amazonaws.com/s3.documentcloud.org/documents/1309854/guantanamo-hunger-strike-tps-and-sops.pdf>>; United States District Court for the District of Columbia, *Dhiab v. Obama*, 7 November 2014, p. 13, <http://www.reprive.org/uploads/2/6/3/3/26338131/2014_11_07_pub_kessler_opn_denying_mot_prelim_injunction.pdf>; *Ethics Abandoned*, *op. cit.*, note 430, p. xxvi.

⁴⁵⁷ ODIHR Meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194.

⁴⁵⁸ United States District Court for the District of Columbia, *Dhiab v. Obama*, 8 July 2013, <http://legaltimes.typepad.com/files/gitmo-order.pdf?utm_source=Press+mailing+list&utm_campaign=8f48b17516-2013_07_08_Gtmo_forcefeeding_controls&utm_medium=email&utm_term=0_022da08134-8f48b17516-285915546>.

subsequently lifted,⁴⁵⁹ ordered the US government to “preserve and maintain all relevant videotapes” of his force-feedings and forcible cell extractions⁴⁶⁰ and denied another preliminary injunction seeking to enjoin several alleged practices and protocols related to the force-feeding process, after the US government took positive steps to address some of the detainee’s complaints.⁴⁶¹ In a November 2014 ruling, the judge concluded that the petitioner “failed to show that continued daily insertion [of the feeding tubes] would lead to irreparable harm”, and noted that the force-feeding process may have caused pain to the detainee only in “isolated incidents”.⁴⁶² She nonetheless pointed out that “common sense and compassion should have dictated a much earlier” action to avoid “numerous painful and humiliating forced cell extractions”.⁴⁶³ The potential use of force to extract detainees from their cells for the purpose of force-feeding was litigated in another case in which the judge concluded being “unconvinced that Guantanamo Bay guards exceed their authority by forcibly extracting a detainee who (...) refuses to leave his cell”.⁴⁶⁴

235. Nevertheless, ODIHR wishes to underline that force-feeding mentally competent detainees may amount to torture and ill-treatment when the medical necessity of such treatment is not convincingly demonstrated, the force-feeding process does not comply with procedural safeguards and “trespass the threshold of a minimum level of severity”.⁴⁶⁵ It was reported that up to 46 detainees were force-fed during the hunger strike of 2013.⁴⁶⁶ ODIHR notes with concern reports indicating that the force-feeding of Guantánamo detainees has, in practice, and at least in the past, started “long before their lives was in serious danger”.⁴⁶⁷ Moreover, force-feeding “causes psychological scars and places the striker at risk of major infections, pneumonia, and collapsed lungs”.⁴⁶⁸ In the Guantánamo context, it can reasonably be assumed that the psychological impact of such feedings is even worse for individuals who experienced severe pain or suffering as part of a system of detention which had been created to show them that they had no control over their fate or treatment. Force-feeding a detainee who asserts autonomy over the last thing he has control over⁴⁶⁹ (whether or not to eat) can cause great distress. Finally, force-feeding should never be used

⁴⁵⁹ United States District Court for the District of Columbia, *Dhiab v. Obama*, 16 May 2014, <http://www.reprive.org/uploads/2/6/3/3/26338131/2014_05_16_dhiab_court_order.pdf>.

⁴⁶⁰ *Ibid.*, p. 2. The litigation over the release of the force-feeding videos is ongoing at the time of drafting.

⁴⁶¹ The ruling mentioned, *inter alia*, that Dhiab would now be allowed to use a wheelchair to go to the feedings, that the forcible cell extractions would no longer be used so long as he walked from his cell to the wheelchair a few steps away, and that the Defense Department would no longer use olive oil to insert the feeding tubes. United States District Court for the District of Columbia, *Dhiab v. Obama*, 7 November 2014, *op. cit.*, note 456, p. 5.

⁴⁶² *Ibid.*, pp. 10-12: explaining that there had been past incidents of violence when the nasogastric tubes were kept in place for longer periods of time during the 2005 hunger strike, that “if a detainee was psychotic, combative, suicidal, or generally causing risk to himself or others, removing the tube between the feedings would be appropriate and safer”, and that Dhiab “often tolerates the [force-feeding] procedure without complaints of pain or significant discomfort”.

⁴⁶³ *Ibid.*, p. 20.

⁴⁶⁴ United States District Court for the District of Columbia, *Mohammad Ahmad Ghulam Rabbani v. Barack H. Obama*, Case No. 05-1607 (RCL), 19 December 2014, <<https://casetext.com/case/rabbani-v-obama-3>>.

⁴⁶⁵ ECtHR, *Nevmerzhiysky v. Ukraine*, *op. cit.*, note 317, para. 94; ECtHR, *Ciorap v. Moldova*, *op. cit.*, note 317, para. 77.

⁴⁶⁶ “Tracking the hunger strike”, Miami Herald website, <http://media.miamiherald.com/static/media/projects/gitmo_chart/>.

⁴⁶⁷ *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 231.

⁴⁶⁸ *Punishment before Justice*, *op. cit.*, note 231, p. 26. In the case of the force-feeding process used in Guantánamo, concerns have also been raised that the use of olive oil to lubricate feeding tubes “for cultural preference” involved risks of developing a chronic inflammatory disease called lipid pneumonia. Carol Rosenberg, “Doctor: Guantánamo erred by lubing forced-feeding tubes with olive oil”, Miami Herald website, 7 October 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2564288.html>>.

⁴⁶⁹ ODIHR interview with Scott Allen, *op. cit.*, note 231.

to pressure detainees to put an end to their protest.⁴⁷⁰ For these reasons, ODIHR believes that the force-feeding of mentally competent Guantánamo detainees on hunger strike amounts to ill-treatment.⁴⁷¹ As noted by the Special Rapporteur on torture, US authorities have a duty to look for solutions other than force-feeding, including discussing detainees' grievances in good faith.⁴⁷²

236. ODIHR regrets not having been granted access to interview in private current detainees who have been force-fed under the current procedure or medical personnel carrying out the force-feedings. It therefore urges the US government to disclose the videotape recordings of Dhiab's forcible cell extractions and subsequent force-feedings to the public in an effort to be more transparent and testify to the accuracy or inaccuracy of the allegations mentioned above.⁴⁷³ Should these allegations be accurate, the force-feeding process in itself would inflict severe pain and suffering to the detainees and therefore amount to cruel and inhuman treatment and potentially to torture. Moreover, ODIHR wishes to reiterate that the use of force should always remain proportionate and that, in itself, the use of restraint chairs has been condemned by international bodies as "inherently inhuman, degrading or painful".⁴⁷⁴

INVOLVEMENT OF MEDICAL STAFF IN THE TREATMENT OF DETAINEES

237. Some of the legal memoranda drafted by the Department of Justice under the Bush administration, in particular those addressed to the CIA, indicate the involvement of medical and psychological personnel in interrogations, referring, for instance, to the "need for [their] close and ongoing monitoring (...) and active intervention if necessary" and to the fact that a "Survival, Evasion, Resistance [and] Escape ('SERE') training psychologist [had] been involved with the interrogations since they began".⁴⁷⁵ The Senate Study on the

⁴⁷⁰ "Declaration of Malta on Hunger Strikers", World Medical Association, *op. cit.*, note 315, para. 13.

⁴⁷¹ See, also, UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 14.

⁴⁷² "Statement of the UN Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay – Inter-American Commission on Human Rights", OHCHR website, *op. cit.*, note 108. See, also, ODIHR interview with Physicians for Human Rights, 26 February 2014.

⁴⁷³ On October 3, 2014, a district judge ordered the Obama administration to prepare for public release the redacted video footage of Dhiab being forcibly extracted of his cell and force-fed. The decision came following the intervention in the litigation of 16 major US media organizations to unseal the approximately 30 videotapes that had been entered into the record. The government appealed the ruling. In July 2015, the district judge ordered the Obama administration to complete the redaction process of the first eight videos by 31 August 2015. Reportedly, all parties are to return to the court in mid-October to review the tapes. The Obama administration is said to have filed a motion for reconsideration of the judge's order. See, for example, "Judge orders release of Guantánamo force-feeding footage", Reprieve website, 3 October 2014, <<http://www.reprieve.org/judge-orders-force-feeding-tapes-released.html>>; "Judge orders US government to prepare Guantánamo force-feeding tapes for public release", Reprieve website, 10 July 2015, <<http://www.reprieve.org/judge-orders-us-government-to-prepare-guantanamo-force-feeding-videos-for-release.html>>; "Judge Orders Pentagon to Get Guantanamo Force-Feeding Videos Ready for Release", The Intercept website, 11 July 2015, <<https://theintercept.com/2015/07/10/judge-orders-pentagon-get-guantanamo-force-feeding-videos-ready-release/>>; "Obama administration moves to block release of Guantanamo force feeding tapes", Reprieve website, 23 July 2015, <<http://www.reprieve.org.uk/press/obama-administration-moves-to-block-release-of-guantanamo-force-feeding-tapes/>>.

⁴⁷⁴ UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 58. See, also, UN CAT, Report of the Committee against Torture, Twenty third session, Twenty fourth session, A/55/44, *op. cit.*, note 304, para. 180(c).

⁴⁷⁵ Bradbury, "Memorandum: 'Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees'", No. 12, *op. cit.*, note 371, p. 11; Bybee, "Memorandum: 'Interrogation of Al Qaeda Operative'", *op. cit.*, note 344, p. 1. See, also, Bradbury, "Memorandum: 'Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee'", No. 13, *op. cit.*, note 371, p. 4:

CIA RDI Programme also indicates that two psychologists contracted by the CIA “devised the CIA’s enhanced interrogation techniques and played a central role in the operation, assessments, and management” of the programme.⁴⁷⁶ The psychologists were consulted in the development of the interrogation methods by transforming into interrogation techniques training methods used by the US military in the SERE programme to resist torture. They are said to have “personally conducted interrogations of some of the CIA’s most significant detainees using these techniques”, and evaluated the psychological state of detainees to clear them for their continued interrogation.⁴⁷⁷ In general, while medical officers were to be present during certain interrogations in order to ensure that “the procedures [would] be stopped if deemed medically necessary to prevent severe (...) harm”,⁴⁷⁸ reports state that the interrogation process took “precedence” over detainees’ medical care.⁴⁷⁹

238. At Guantánamo, behavioural science consultants⁴⁸⁰ played a key role in the development of SERE-based abusive interrogation methods and provided advice on detention conditions that would enhance the shock of capture and foster the dependence of the detainees on their interrogators.⁴⁸¹ Reports indicate that their main role was also to assess detainees’ vulnerabilities, review their medical records, advise interrogators on how to best exploit these elements in interrogations and participate in or be present in interrogations.⁴⁸² A log of the interrogation of al Qahtani, for instance, shows that medical personnel treated detainees during periods of interrogations.⁴⁸³

noting that “prior to interrogation, each detainee is evaluated by, medical and psychological professionals”, that “subsequent medical rechecks during the interrogation period should be performed on a regular basis”, and that medical and psychological professionals’ “function is to monitor interrogations and the health of the detainee”, *inter alia*. See, also, Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, p. 490.

⁴⁷⁶ Senate Study on the CIA RDI Programme, Findings and Conclusions, *op. cit.*, note 388, p. 11.

⁴⁷⁷ *Ibid.*; Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, p. 32. See, also, ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 401.

⁴⁷⁸ Bybee, “Memorandum: ‘Interrogation of Al Qaeda Operative’”, *op. cit.*, note 344, p. 4.

⁴⁷⁹ See, for instance, Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 111-113, 490-493.

⁴⁸⁰ It has been reported that, since the end of 2002, a team of behavioural science consultants (BSCT) has usually been composed of a clinical psychologist, a psychiatrist and a mental health specialist. The first BSCT at Guantánamo however reportedly consisted of a psychiatrist, clinical psychologist, and a psychological technician (non-physician). Contrary to healthcare professionals assigned to the Joint Medical Group, they were not supposed to “conduct medical evaluation or treatment of detainees”. *Ethics Abandoned*, *op. cit.*, note 430, p. 29; “Memorandum for record – BSCT Standard Operating Procedures”, Joint Task Force Guantánamo, 11 November 2002, paras. 2, 6, <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/bsct_sop_2002.pdf>. For more information about behavioural science consultants, see, also, Walsh Report, *op. cit.*, note 422, pp. 59-60.

⁴⁸¹ “Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody”, United States Senate Armed Services Committee, *op. cit.*, note 403, pp. 50-52: “According to [Major] Burney, the BSCT psychiatrist, (...) ‘there was increasing pressure to get ‘tougher’ with detainee interrogations (...). According to [Major] Burney, he and [redacted] wrote a memo of suggested detention and interrogations policies. (...) [T]he BSCT psychologist, also told the Committee that the BSCT used information from the [Joint Personnel Recovery Agency] training (...) to draft the memo (...). In addition to suggesting interrogation techniques, the BSCT memo made recommendations for the treatment of detainees in the cell blocks (...). [It] advocated that ‘all aspects of the [detention] environment should enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest extent possible’”. The Joint Personnel Recovery Agency operates the SERE programme. See, also, *Ethics Abandoned*, *op. cit.*, note 430, pp. 28-31.

⁴⁸² UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 75; *Ethics Abandoned*, *ibid.*, pp. xvii-xviii, 30-31.

⁴⁸³ “Interrogation Log, Detainee 063”, *op. cit.*, note 401, pp. 5, 6, 9-10, 16-17, 25, 31, 35, *inter alia*; *Ethics Abandoned*, *ibid.*, p. 42.

239. Such practices contradict standards that forbid medical personnel from taking part in torture, directly or indirectly, by certifying detainees' fitness for interrogations, assisting or even merely being present during abusive interrogations for the purpose of stepping in, if necessary, and providing knowledge to facilitate ill-treatment, such as information contained in detainees' medical records.⁴⁸⁴
240. In this regard, ODIHR takes note of the independent review launched in November 2014 to determine whether American Psychological Association (APA) officials had colluded with the Department of Defense, the CIA and/or other government officials "to support torture" during the Bush administration. The report, published in July 2015, determined that "key APA officials" did in fact collude with "important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines" and "to defeat efforts (...) to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad". It also concluded that "current and former APA officials had very substantial interactions with the CIA in the 2001 to 2004 time period, including on topics relating to interrogations, and were motivated to curry favor with the CIA in a similar fashion to DoD."⁴⁸⁵
241. Following the publication of the report, the APA Board recommended, among other things, the adoption by its Council of Representative of a policy prohibiting psychologists from taking part in the interrogation of detainees held in custody by military and intelligence authorities, whether in the United States or elsewhere, but "allowing training of military personnel on recognizing and responding to persons with mental illnesses, on the possible effects of particular techniques and conditions of interrogation and other areas within their expertise".⁴⁸⁶

INVOLVEMENT OF OTHER OSCE PARTICIPATING STATES IN ACTS OF TORTURE AND ILL-TREATMENT

242. While the CIA RDI programme was developed by the United States, its implementation was only possible through collaboration with other states. As many as 54 countries,

⁴⁸⁴ *Istanbul Protocol*, *op. cit.*, note 313, paras. 52-53; UN Special Rapporteur on Torture, "General Recommendations of the Special Rapporteur on torture", *op. cit.*, note 313, para. n; UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, paras. 73-75. See, also, "Principles of Medical Ethics", *op. cit.*, note 313; "Declaration of Tokyo", World Medical Association, *op. cit.*, note 313.

⁴⁸⁵ "Report to the Special Committee of the Board of Directors of the American Psychological Association, Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture", Sidley Austin LLP, 2 July 2015, pp. 1, 9-10, <<https://assets.documentcloud.org/documents/2160985/report.pdf>>. See, also, *ibid.*, p. 70: "By explicitly declaring it ethical for psychologists to be involved in interrogations of detainees in DoD or CIA custody, while not setting strict and explicit limits on a psychologist's involvement in the intentional infliction of psychological or physical pain in these situations, APA officials were intentionally setting up loose and porous constraints, not tight ones, on this particular use of a psychologist's skill. This was especially true in the context of the time, which included (i) the government's known legal contortions that sliced the definition of torture down to a fragment, (ii) the widespread and credible claims that this kind of abuse had occurred, and (iii) the existence of a large loophole in the Ethics Code that allowed CIA and DoD psychologists to follow explicitly unethical orders and still be considered ethical as long as they tried to "resolve" the conflict."

⁴⁸⁶ "Press Release and Recommended Actions: Independent Review Cites Collusion Among APA Individuals and Defense Department Officials in Policy on Interrogation Techniques", APA website, 10 July 2015, <<http://www.apa.org/news/press/releases/2015/07/independent-review-release.aspx>>.

including several OSCE participating States, reportedly participated in the programme.⁴⁸⁷ Their collaboration is said to have taken various forms,⁴⁸⁸ including hosting secret CIA detention facilities on their territory; detaining, interrogating, and subjecting detainees to torture and ill-treatment; and interrogating individuals who were secretly held in the custody of other governments. Poland provided a secret detention facility to the CIA on its territory.⁴⁸⁹ Romania and Lithuania are also believed to have allowed the CIA to use facilities on their territory as secret detention sites.⁴⁹⁰ Existing military bases would also have been used in the Balkans, in Kosovo and Bosnia and Herzegovina.⁴⁹¹ It is also alleged that Diego Garcia, a territory under the international legal responsibility of the United Kingdom, may have been used to process “high-value detainees”.⁴⁹² It is further alleged that the United States sent detainees to Uzbekistan for detention and interrogation.⁴⁹³

243. In many cases, the countries are said to have collaborated by willingly and knowingly providing their airspace and airports for illegal rendition flights, providing assistance to apprehend and/or transfer detainees and providing intelligence leading to the secret detention and extraordinary rendition of individuals.⁴⁹⁴ In this regard, it has been alleged that at least 1,245 flights operated by the CIA flew into European airspace or stopped over at European airports between the end of 2001 and the end of 2005.⁴⁹⁵ Reports also indicate that, at least until May 2007, states such as Bosnia and Herzegovina, Canada, Croatia, Georgia, the former Yugoslavia Republic of Macedonia and the United Kingdom provided intelligence or conducted the initial seizure of an individual before his transfer as part of

⁴⁸⁷ To ODIHR's knowledge, participating States that were involved in the programme, to a varying degree, are Albania, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Finland, Georgia, Germany, Greece, Iceland, Ireland, Italy, Lithuania, the former Yugoslav Republic of Macedonia, Poland, Portugal, Romania, Spain, Sweden, Turkey, the United Kingdom and Uzbekistan. See *Globalizing Torture*, *op. cit.*, note 170, p. 6.

⁴⁸⁸ The framework for such assistance would have been developed around North Atlantic Treaty Organization (NATO) authorizations agreed on 4 October 2001. These would have provided, for instance, blanket overflight clearances and access to airfields on NATO territory. Marty, “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report”, *op. cit.*, note 174, Explanatory Memorandum, p. 8, para. 10.

⁴⁸⁹ ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 415; “Aleksander Kwaśniewski w ‘Kropce nad I’: nie było tajnych więzień CIA”, *Wiadomosci* website, 11 December 2014, <<http://wiadomosci.wp.pl/kat,89914,opage,6,title,Aleksander-Kwasniewski-w-Kropce-nad-i-nie-bylo-tajnych-wiezien-CIA,wid,17093682,wiadomosc.html?ticaid=113fc1>>; “Poland’s secret CIA prisons: Kwasniewski admits he knew”, *BBC News* website, 10 December 2014, <<http://www.bbc.com/news/world-us-canada-30418405>>.

⁴⁹⁰ Cases against Lithuania and Romania are also pending at the European Court of Human Rights. See, ECtHR, *Abu Zubaydah v. Lithuania*, Application No. 46454/11, lodged on 14 July 2011, “Statement of Facts”, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115816>>; ECtHR, *Abd al Rahim Husseyn Muhammad Al Nashiri v. Romania*, Application 33234/12, lodged on 1 June 2012, “Statement of Facts”, <<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-113814>>. See, also, UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, paras. 112-121; *Globalizing Torture*, *op. cit.*, note 170, p. 16; “Accountability for European Complicity in CIA Torture and Enforced Disappearance: An Update on Developments in Europe, 2013-2014”, *Amnesty International*, September 2014, p. 5, <<http://www.osce.org/odihr/124110?download=true>>.

⁴⁹¹ However, it is unclear whether these bases were used for CIA (as opposed to United States Defense Department) operations. See, *Globalizing Torture*, *ibid.*, p. 70; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 126.

⁴⁹² Marty, “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report”, *op. cit.*, note 174, p. 16, para. 70.

⁴⁹³ UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 143.

⁴⁹⁴ See, for instance, *CIA - “Extraordinary Rendition” Flights, Torture and Accountability*, *op. cit.*, note 180, pp. 10, 17.

⁴⁹⁵ Resolution P6_TA(2007)0032, “Transportation and illegal detention of prisoners”, *European Parliament*, *op. cit.*, note 207, para. 42.

the RDI programme.⁴⁹⁶ In the same vein, Sweden was, in 2005 and 2006, found to have acted in violation of the CAT and ICCPR for handing over two individuals to CIA agents in the course of their rendition to Egypt.⁴⁹⁷

244. While it is possible that the governments of OSCE participating States that co-operated with the United States in the framework of this programme may not have been aware of the full details of the CIA activities at the early stages of the programme, information available in the public domain, including media articles from 2002 and 2003, was “capable of proving that there were serious reasons to believe that if [detainees were] to be transferred into US custody under the ‘rendition’ programme, [they] would be exposed to a real risk of being subjected to [torture or ill-treatment]”.⁴⁹⁸ At least from that period onwards, authorities of participating States “knew or ought to have known”⁴⁹⁹ that the detainees faced a real risk of torture, ill-treatment or arbitrary detention. This engages their responsibility as accomplice under international law, as will be explored further in Part 3-II-A of this report.
245. Concurring information from various sources, including former detainees interviewed by ODIHR, indicates that a number of OSCE participating States, including Canada, France, Germany, Italy, Spain, Tajikistan, Turkey, the United Kingdom and Uzbekistan are likely

⁴⁹⁶ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 52.

⁴⁹⁷ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 38. See, also, UN CAT, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, 20 May 2005, paras. 10.2, 11.13, 12.29, 12.30, 13.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f34%2fD%2f233%2f2003&Lang=en>: “10.2. [A] Swedish television broadcast (...) examining the circumstances of the expulsion of the complainant (...) stated that [he] had been handcuffed when brought to a Stockholm airport, (...) and that [he was] handed over to a group of special agents [of the United States] by Swedish police. (...) 11.13. [It was] contended that [this transfer] was carried out by members of the Special Access Program of the US Department of Defense who were engaged in returning terrorist suspects to their countries of origin utilising ‘unconventional methods’. (...) 13.4. (...) [A]ccording to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, (...). In the Committee’s view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party’s territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party’s police. It follows that the State party’s expulsion of the complainant was in breach of article 3 of the Convention.” UN HRC *Mohammed Alzery v. Sweden*, Communication No. 1416/2006, 10 November 2006, paras 3.10, 4.12, 11.2, 11.4, <<http://www1.umn.edu/humanrts/undocs/1416-2005.html>>: “3.10. [Alzery] was then escorted to the police station at the airport, where he was handed over to some ten foreign agents in civilian clothes and hoods. Later investigations by the Swedish Parliamentary Ombudsman, disclosed that the hooded individuals were United States’ [CIA] and Egyptian security agents. (...) 11.2. [T]he State party concedes [a number of] violations of the Covenant or the Optional Protocol, on the basis of parallel findings of the Committee against Torture in the case of *Agiza v Sweden* (...) “11.4. The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that – without more – would have prevented the expulsion of the author consistent with its international human rights obligations.”

⁴⁹⁸ ECtHR, *El-Masri v. The former Yugoslav Republic of Macedonia*, *op. cit.*, note 300, paras. 218, 126-127.

⁴⁹⁹ *Ibid.*, para. 218: “[T]he Court attaches importance to the reports and relevant international and foreign jurisprudence, and – given the specific circumstances of the present case – to media articles, (...) which constitute reliable sources reporting practices that have been resorted to or tolerated by the US authorities and that are manifestly contrary to the principles of the Convention. (...) This material was in the public domain before the applicant’s actual transfer into the custody of the US authorities. It is capable of proving that there were serious reasons to believe that if the applicant was to be transferred into US custody under the ‘rendition’ programme, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Consequently, it must be concluded that the Macedonian authorities knew or ought to have known, at the relevant time, that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention.”

to have sent interrogators to Guantánamo.⁵⁰⁰ If these allegations prove to be true, their participation or mere presence during the interrogation of an individual when they knew or ought to have known that the detainees faced a real risk of torture, ill-treatment or arbitrary detention “[could] be reasonably understood as implicitly condoning such practices”⁵⁰¹ and would therefore violate international law.

d. Recommendations

- To review US reservations and understandings concerning the definition of torture and other forms of ill-treatment made upon ratification of international treaties, with a view to promptly withdrawing them;
- To clearly acknowledge that the prohibition of torture and ill-treatment provided for in the CAT and the ICCPR applies to all areas over which the United States exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control including, where applicable, detention facilities and military bases outside its sovereign territory;
- To take steps necessary to prevent the recurrence of acts of torture and ill-treatment, including by strengthening existing prohibitions in domestic law. All elements of the definitions of torture and ill-treatment set out in the CAT and clarified by the Committee against Torture should be reflected in domestic law;
- To ensure that the practice of extraordinary rendition of terrorist suspects to third countries for the purpose of interrogation and detention is immediately and expressly terminated, including on any short-term or transitory basis. Any such matters should be forbidden by law;
- To amend the provisions of the Army Field Manual on interrogation in order to clarify that stress positions, sleep deprivation and improper use of restraints are forbidden techniques. The Manual should, in this regard, clearly stipulate that only enumerated techniques are allowed. Appendix M should be reviewed to ensure its compliance with the international prohibition of torture and ill-treatment;
- Pending the closure of the Guantánamo Bay detention facility, to ensure that conditions of detention meet international human rights standards;
- Concerning the detention of any Guantánamo detainee, to promptly abolish and immediately terminate the use of solitary confinement to punish breaches of discipline, to extract information or a confession, and in respect of detainees with mental health issues; to immediately terminate the use of prolonged and indefinite solitary confinement for any purpose. Solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. Safeguards should be put in place to ensure that solitary confinement is immediately interrupted where it results in severe pain or suffering. Human contact between detainees should be increased and maximized to the extent possible for detainees held in segregated cells, in particular in Camp 7. Alternative disciplinary sanctions to avoid the use of solitary confinement should be developed;
- To strictly limit the use of restraints during the transportation of Guantánamo detainees, including within the detention facility, to what is necessary and proportionate;

⁵⁰⁰ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 54; ODIHR interview with Murat Kurnaz, *op. cit.*, note 400.

⁵⁰¹ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *ibid.* See, also, “Draft articles on responsibility of States for internationally wrongful acts”, *op. cit.*, note 324, Art. 41.

- To abandon the policy of force-feeding mentally competent detainees who do not wish to be force-fed, irrespective of whether their life is in danger. Alternatives solutions should be sought, and detainees' grievances should be discussed with them in good faith;
- To publicly disclose the videotape recordings of Dhiab's forcible cell extractions and subsequent force-feedings.

B. FREEDOM OF RELIGION OR BELIEF

a. International Standards

246. The right to freedom of religion or belief is protected under Article 18 of the ICCPR as well as OSCE commitments, such as Helsinki 1975 and Vienna 1989.⁵⁰² It includes the freedoms "to have or adopt a religion or belief of [one's] choice" and to manifest such religion or belief.⁵⁰³ The former is absolute and can suffer no limitations. The latter, which can be exercised individually or communally, in public or in private, in worship, observance, practice and teaching, may be restricted under certain conditions.⁵⁰⁴
247. Limitations to the exercise of one's freedom of religion or belief must always be prescribed by law, proportionate, non-discriminatory and necessary "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".⁵⁰⁵ National security is not a legitimate ground to restrict the practice of religion.⁵⁰⁶ Furthermore, the right to freedom of religion or belief may in no circumstances be subject to derogation.⁵⁰⁷
248. Detainees should not be deprived of their right to freedom of religion or discriminated against on the basis of their religion. Instead, they should "continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint".⁵⁰⁸ While maintaining security and order in detention facilities can justify certain limitations, it should not result in disproportionate restrictions.⁵⁰⁹ Additionally, prison authorities should never use detainees' religious beliefs against them to specifically injure their feelings and/or extract information from them.⁵¹⁰ Forcibly shaving off detainees' beards, taking away prayer books or not allowing detainees to take part in

⁵⁰² OSCE Conference on Security and Co-operation in Europe, Final Act, "Questions Relating to Security in Europe: 1(a) Declaration on Principles Guiding Relations between Participating States – Principle VII", Helsinki, 1975 (hereinafter, "OSCE Helsinki 1975 Document"), <<http://www.osce.org/mc/39501?download=true>>; OSCE Vienna Document, *op. cit.*, note 90, paras. 11, 16; OSCE Copenhagen Document, *op. cit.*, note 80, para. 9.4. This right is also enshrined in: UDHR, Art. 18; ADRDM, Art. III; ACHR, Art. 12; "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief", New York, 25 November 1981, <<http://www.un.org/documents/ga/res/36/a36r055.htm>>.

⁵⁰³ ICCPR, Art. 18.

⁵⁰⁴ *Ibid.*; UN HRC, General Comment No. 22, Article 18: The right to freedom of thought, conscience and religion, CCPR/C/21/Rev.1/Add.4, 30 July 1993, paras. 3-4, <<http://www.un.org/Docs/journal/asp/ws.asp?m=CCPR/C/21/Rev.1/Add.4>>.

⁵⁰⁵ ICCPR, Art. 18, *ibid.*; UN HRC, General Comment No. 22, *ibid.*, para. 8; OSCE Vienna Document, *op. cit.*, note 90, para. 17; OSCE Copenhagen Document, *op. cit.*, note 80, para. 9.4.

⁵⁰⁶ UN HRC, General Comment No. 22, *ibid.*

⁵⁰⁷ ICCPR, Art. 4; UN HRC, General Comment No. 22, *ibid.*, para. 1.

⁵⁰⁸ UN HRC, General Comment No. 22, *ibid.*, para. 8.

⁵⁰⁹ UN Special Rapporteur on freedom of religion or belief, Asma Jahangir, Interim report to the General Assembly, A/64/159, 17 July 2009, para. 20, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/64/159>>.

⁵¹⁰ *Ibid.*; UN Special Rapporteur on freedom of religion or belief, Asma Jahangir, Interim report to the General Assembly, A/60/399, 30 September 2005, paras. 71-72, 90, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/60/399>>.

religious services have been considered by international bodies as violations of the freedom of religion.⁵¹¹

249. International standards further dictate that states should adopt positive measures to facilitate the practice of religion in prisons. They should, for instance, appoint a qualified religious representative when a sufficient number of persons of that religion are detained together, as is the case in Guantánamo. Detainees' access to this representative should not be hindered if they wish to meet with him or her.⁵¹²
250. Moreover, OSCE commitments firmly reject identification of terrorism with any nationality or religion and reaffirm that action against terrorism is not aimed against any religion, nation or people.⁵¹³
251. The right to freedom of religion or belief is also protected under international humanitarian law. It is a norm of customary international humanitarian law enshrined in Common Article 3,⁵¹⁴ Article 75(1) of API, as well as other specific provisions of the Third and Fourth Geneva Conventions.⁵¹⁵ The right to freedom of religion or belief therefore applies to all Guantánamo detainees, including those apprehended in the context of any armed conflict, irrespective of its nature.

b. Domestic Standards

252. Freedom of religion or belief is enshrined in the First Amendment to the US Constitution and the Religious Freedom Restoration Act (RFRA). These legal provisions have been interpreted as prohibiting religious discrimination⁵¹⁶ and disproportionate restrictions on individuals' ability to practise their religion.⁵¹⁷
253. US courts have not definitively ruled on the applicability of the First Amendment's free-exercise clause to Guantánamo detainees. The Court of Appeals for the District of Columbia Circuit has, however, held that Guantánamo detainees are not protected

⁵¹¹ UN HRC, *Clement Boodoo v. Trinidad and Tobago*, Communication No. 721/1996, 15 April 2002, para. 6.6, <<http://www.un.org/Docs/journal/asp/ws.asp?m=CCPR/C/74/D/721/1996>>.

⁵¹² "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rule 41. See, also, UN Special Rapporteur on freedom of religion or belief, Interim report to the General Assembly, A/64/159, *op. cit.*, note 509, para. 20; UN Special Rapporteur on freedom of religion or belief, Interim report to the General Assembly, A/60/399, *op. cit.*, note 510, paras. 80-82.

⁵¹³ OSCE, "OSCE Charter on Preventing and Combating Terrorism", *op. cit.*, note 4, para. 2.

⁵¹⁴ Common Article 3 refers to the prohibition of discrimination based on religious grounds. It also stipulates that "outrages upon personal dignity" are prohibited conduct. It should be noted that the Elements of Crimes of the ICC specify that "outrages upon personal dignity" take into account aspects of the cultural background of the victim in order to include, as a war crime, forcing persons to act against their religious beliefs. See, for example, "Customary International Humanitarian Law, Rule 104: Respect for Convictions and Religious Practices", ICRC website, <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule104#Fn_48_22>.

⁵¹⁵ The provisions in question include, *inter alia*: Third Geneva Convention, Arts. 34-35; Fourth Geneva Convention, Arts. 76, 86, 93. International humanitarian law guarantees detainees' right to practice their religion and to have access to a qualified representative of their religion, and forbids discrimination based on religious grounds, among others. See, also, APII, Arts. 4-5.

⁵¹⁶ United States Supreme Court, *Sherbert v. Verner*, Case No. 526, 17 June 1963, <http://www.law.cornell.edu/supremecourt/text/374/398#writing-USSC_CR_0374_0398_ZO>; United States Supreme Court, *Torcaso v. Watkins*, Case No. 373, 19 June 1961, <<https://supreme.justia.com/cases/federal/us/367/488/case.html>>.

⁵¹⁷ Authorities should not "substantially burden a person's exercise of religion" without a compelling justification and unless it is the least restrictive means to further this compelling interest. RFRA, 16 November 1993, § 3, <<http://www.gpo.gov/fdsys/pkg/BILLS-103hr1308enr/pdf/BILLS-103hr1308enr.pdf>>.

“person[s]” within the meaning of the RFRA, and therefore not subject to its protection.⁵¹⁸ Attorneys for Guantánamo detainees argue that their clients should not be deprived of the right to freedom of religion or belief as guaranteed in the First Amendment and the RFRA.⁵¹⁹

254. The Department of Defense Directive 2310.01E on the DoD Detainee Program stipulates that all detainees should be treated humanely, and therefore be able to exercise their religion freely, “consistent with the requirements of detention”. It also forbids religious discrimination against detainees.⁵²⁰

c. Findings and Analysis

255. Multiple violations of the freedom of religion or belief have been reported at Guantánamo. In the past, these are said to have included the use of discriminatory detention and interrogation techniques allegedly intended to offend detainees’ religious sensitivities,⁵²¹ such as the use of female interrogators performing acts aimed at taking advantage of their gender and the removal of religious items.⁵²² Some detainees also complained that they were not allowed to have prayer mats and that they were not provided with Korans in their cells at the beginning of their detention.⁵²³ It has also been alleged that there was no imam or other Muslim chaplain assigned to Guantánamo between 2003 and 2009, thereby denying all detainees the opportunity of religious counselling.⁵²⁴ Other reported violations included being subjected to unnecessary forced nudity⁵²⁵ and forced grooming, including

⁵¹⁸ United States Court of Appeals for the District of Columbia Circuit, *Shafiq Rasul et al. v. Richard Myers*, Case Nos. 06-5209, 06-5222, 11 January 2008, <<http://caselaw.findlaw.com/us-dc-circuit/1078633.html>>; United States Court of Appeals for the District of Columbia Circuit, *Rasul v. Myers*, Case Nos. 06-5209, 06-5222, 24 April 2009, <<http://caselaw.findlaw.com/us-dc-circuit/1422220.html>>; United States Court of Appeals for the District of Columbia Circuit, *Sami Abdulaziz Allaihi v. Donald H. Rumsfeld*, Case Nos 13-5096, 13-5097, 10 June 2014, <<http://www.lawfareblog.com/wp-content/uploads/2014/06/2014-06-10-Allaihi-v.-Rumsfeld-Opinion-1.pdf>>.

⁵¹⁹ United States District Court for the District of Columbia, *Hassan v. Obama*, “Statement of Points and Authorities in Support of Petitioner’s Application for Preliminary Injunction”, *op. cit.*, note 455; United States Court of Appeals for the District of Columbia Circuit, *Allaihi v. Rumsfeld*, “Petition of Plaintiffs-Appellants for Rehearing En Banc”, 25 August 2014, <<http://www.lawfareblog.com/wp-content/uploads/2014/08/8-25-14-Allaihi-Petition.pdf>>.

⁵²⁰ Department of Defense Directive 2310.01E, *op. cit.*, note 14, paras. 3.b(1)(e) and 3.b(2).

⁵²¹ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, paras. 60, 91.

⁵²² *Ibid.*, paras. 60-61. According to this 2006 joint report of several United Nations Special Procedures mandate-holders, treatments such as the use of female interrogators performing, *inter alia*, lap dances during interrogations and other treatments aimed at offending detainees’ religious sensitivities were “repeatedly used”. A 2005 investigation by two general officers into FBI allegations of detainee abuse at Guantánamo found that acts designed to take advantage of female interrogators’ gender to offend Muslim males were authorized techniques. These acts included, for example, rubbing perfume on a detainee, invading their private space, leaning over them and whispering in their ears, and the wiping of fake menstrual blood on a detainee. The report however did not find evidence of a lap dance. “Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility”, 1 April 2005, amended 9 June 2005 (hereinafter, “Schmidt Report”), pp. 7-8, 15-16, <http://humanrights.ucdavis.edu/resources/library/documents-and-reports/schmidt_furlow_report.pdf>.

⁵²³ “Guantanamo: Detainee Accounts”, Human Rights Watch, October 2004, p. 7,

<<http://www.hrw.org/legacy/backgrounders/usa/gitmo1004/gitmo1004.pdf>>; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217.

⁵²⁴ *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo* (New York: Human Rights Watch, 2008), p. 18, <http://www.hrw.org/sites/default/files/reports/us0608_1.pdf>; “Current Conditions of Confinement at Guantánamo: Still in Violation of the Law”, Center for Constitutional Rights, 23 February 2009, p. 12,

<https://ccrjustice.org/files/CCR_Report_Conditions_At_Guantanamo.pdf>. See, also, UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 64.

⁵²⁵ See, for instance, “Current Conditions of Confinement at Guantánamo”, Center for Constitutional Rights, *ibid.*, p. 12.

shaving of beards, heads and eyebrows.⁵²⁶ Further, numerous reports and testimonies have alleged that guards and interrogators have mishandled the Koran and disrespected detainees' religious beliefs while they prayed.⁵²⁷

256. Former detainees described how guards and interrogators reportedly used to interfere with their religious freedom. They explained that “guards have screamed insults and obscenities at [them] during [their] daily prayers and imitated howling dogs during the distinctive Muslim call to prayer”.⁵²⁸ They also told ODIHR that guards turned music on very loud and made noise to disturb them while they were praying.⁵²⁹ Mustafa Ait Idir recalled a particular instance where a detainee in a cell next to his was allegedly told to stand up during his prayer and was beaten while he continued to pray, to the point where he fainted.⁵³⁰
257. Reports also document cases of desecration of religious items, including in the form of guards and interrogators kicking and stepping on the Koran.⁵³¹ These practices would have offended detainees' religious sensitivities to the extent that many individuals preferred not to keep the Muslim holy book in their cells to avoid further incidents.⁵³² The mishandling of Korans and other religious items is also said to have triggered a number of hunger strikes.⁵³³
258. Additionally, there have been indications that US authorities have “implicitly or explicitly, encouraged or tolerated the association of Islam and terrorism” by, for example, “interrogating detainees on the extent of their faith in Islamic teachings”,⁵³⁴ in apparent contravention of OSCE commitments.
259. In 2009, the Walsh Report concluded that “considerable efforts were undertaken to avoid actions that could be construed as disrespectful [to detainees' religion]” and that “no

⁵²⁶ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 63.

⁵²⁷ See, for example, *ibid.*, para. 62; IACHR, *Djamel Ameziane v. United States*, “Petition and request for precautionary measures”, 6 August 2008, para. 182,

<[https://ccrjustice.org/files/Petition%20and%20Request%20for%20Precautionary%20Measures_Ameziane%20v%20United%20States%20\(2\).pdf](https://ccrjustice.org/files/Petition%20and%20Request%20for%20Precautionary%20Measures_Ameziane%20v%20United%20States%20(2).pdf)>.

⁵²⁸ IACHR, *Ameziane v. United States*, “Petition”, *ibid.*, para. 182; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217.

⁵²⁹ ODIHR interview with Murat Kurnaz, *op. cit.*, note 400; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *ibid.*; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216.

⁵³⁰ ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *ibid.*; ODIHR interview with Lakhdar Boumediene, *ibid.*: Boumediene also explained that soldiers would ask any question to detainees while they were praying in an attempt to disrupt their prayer and justify the use of IRF teams to take them by force for interrogation.

⁵³¹ See, for instance, UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 62.

⁵³² ODIHR interview with Murat Kurnaz, *op. cit.*, note 400: “we actually didn't want the Koran in our cells because every time they took us out of the cells to search us (...) they also searched the Koran, and most of the time, after they searched it they threw it on the floor. Many times they took off pages and threw them in the toilets. (...) we didn't want to have the Koran in our cells anymore because it was mistreated by the guards”; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217.

⁵³³ It has been reported that the first large-scale hunger strike, which began in February 2002, started after a military officer removed the homemade turban of a detainee while he was praying. A hunger strike of December 2002 may also have been triggered by the mishandling of Korans. Moreover, during the hunger strike of June-July 2005, detainees demanded, *inter alia*, that religious abuses, including the desecration of the Koran, and religious discrimination stop. “The Guantánamo Prisoner Hunger Strikes and Protests”, Center for Constitutional Rights, *op. cit.*, note 405, pp. 6-10; ODIHR interview with Murat Kurnaz, *ibid.*

⁵³⁴ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 65.

prohibited acts were found”.⁵³⁵ In 2013, the United States further described measures taken to protect the freedom of religion or belief of Guantánamo detainees. These included providing halal meals and special menus for celebrations; adapting the meal schedule during Ramadan; allowing for daily prayer and worship; providing detainees with copies of the Koran, and with prayer beads, rugs and caps; playing the call to prayer on loudspeakers five times a day and allowing detainees to receive 20 minutes of uninterrupted time to practise their faith after such calls. The United States has also asserted that guards “strive to ensure that detainees are not interrupted during prayer times”.⁵³⁶ Further, in September 2014, a United States official conveyed to ODIHR that there have been no accusations of religious abuse in recent years and that a standard operating procedure on how to handle the Koran had been developed to allow guards to check for weapons and coded messages in the religious book without disrespecting detainees’ religion.⁵³⁷

260. ODIHR welcomes these positive measures to accommodate detainees’ religious needs. However, various sources indicate that detainees’ right to practise their religion may still be unduly restricted. An illustration of these restrictions is the inability of many Guantánamo detainees to pray communally. While detainees held communally in Camp 6 can pray together, detainees held in segregated cells in Camps 5 and 7 have not been provided with the same opportunity.⁵³⁸ The freedom to manifest one’s religion can only be subject to proportional and non-discriminatory limitations prescribed by law that are necessary to protect public safety, public order, public health, public morals or the rights and freedoms of others.⁵³⁹ US officials hold the view that praying in unison through the slots in cell doors constitutes communal prayer.⁵⁴⁰ ODIHR is concerned that such practice does not enable “communal” prayer in the way that this is conceived of and prescribed by some schools of Islam, and that this may therefore be contrary to an essential element of the manifestation of detainee’s religion.⁵⁴¹ US authorities should review this practice to ensure that the grounds for interfering with detainees’ freedom to manifest their religion, as

⁵³⁵ Walsh Report, *op. cit.*, note 422, p. 26.

⁵³⁶ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 219.

⁵³⁷ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194.

⁵³⁸ *Ibid.*

⁵³⁹ ICCPR, Art. 18(3); UN HRC, General Comment No. 22, *op. cit.*, note 504, para. 8; OSCE Vienna Document, *op. cit.*, note 90, para. 17; OSCE Copenhagen Document, *op. cit.*, note 80, para. 9.4.

⁵⁴⁰ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194. During this interview, US representatives argued that “high-value detainees” can practise their religion, as their door slot is left open during the calls to prayer; they are able to hear the call and speak to each other. They indicated that it is similar to the practice in Camp 5.

⁵⁴¹ See, for instance, United States District Court of Southern District of Indiana, Terre Haute Division, *John Lindh v. Warden, Federal Correctional Institution, Terre Haute, Indiana*, Case No. 2:09-cv-00215-JMS-MJD, “Finding of fact and conclusions of law”, 11 January 2013, paras. 25, 54, <<http://indianalawblog.com/documents/JWLindhDecision.pdf>>: “25. Depending on the school of Islam to which an adherent belongs, making these prayers in congregation, if possible, is either considered to be theologically preferable or required. (...) 54. Due to the specific requirements of group prayer, the need to be aligned properly and the need to have visual or aural contact with the Imam, group prayer can only occur while Muslims are physically together and it cannot be accomplished (...) while the prisoners are confined separately to their individual cells.” The Center for Constitutional Rights also reported that detainees consider that their ability to pray at the same time in their cells in Camp 5 “do[es] not sufficiently allow for communal prayer as prescribed by Islam”. “Current Conditions of Confinement at Guantánamo”, Center for Constitutional Rights, *op. cit.*, note 524, p. 13. Attorneys for “high-value detainees” also stated in 2011 that the previous prayer rules, where detainees’ cell doors were open and they would pray from their cells was “not genuine communal prayer”. The new rules are even more restrictive, as explained above. United States Military Commission, *United States of America v. Mohammad et al.*, AE 108 (MAH, AAA, RBS, WBA), *op. cit.*, note 424, Attachment G, pp. 119-120.

permitted by Article 18(3) of the ICCPR and OSCE commitments, are fully met and, if they are not met, should adapt their practice concerning communal prayer in Camps 5 and 7.

261. Recent reports also allege that hunger strikers have been deprived of the possibility of communal prayer, including during Ramadan.⁵⁴² ODIHR reiterates that the deprivation of communal prayer should never be used as a means to break a hunger strike as it appears to constitute a form of punishment used to pressure detainees to end their protest. Furthermore, ODIHR is concerned that it may also amount to an unnecessary or disproportionate restriction on hunger strikers' freedom of religion or belief. This is of particular concern during the month of Ramadan, where preventing Muslims from collectively performing traditional extra prayers "would truly create a great sense of deprivation and distress".⁵⁴³
262. "High-value detainees" held in Camp 7 appear to face greater restrictions on the exercise of their religious freedom. Defence counsel stated in 2011 that their clients were no longer allowed to give lessons to other detainees on interpretation of the Koran.⁵⁴⁴ In 2013, they reported that contrary to the detainees in other camps, their clients' access to religious materials had been restricted without further explanation.⁵⁴⁵ Attorneys for Khalid Shaikh Mohammad also indicated to ODIHR, in February 2014, that their client did not have access to a Muslim chaplain.⁵⁴⁶ Compliance with international standards on freedom of religion or belief requires that all detainees can have access to a religious representative if they wish.⁵⁴⁷ Moreover, ODIHR wishes to reiterate that, under international law, all restrictions on the right of detainees to manifest their religion or belief should be prescribed by law, guided by a legitimate aim as well as remain proportionate and non-discriminatory.

⁵⁴² United States District Court for the District of Columbia, *Hassan v. Obama*, "Statement of Points and Authorities in Support of Petitioner's Application for Preliminary Injunction", *op. cit.*, note 455, pp. 13-14; ODIHR interview with Marine Corps Major Derek Poteet and Army Major Jason Wright, 25 February 2014. See, also, Carol Rosenberg, "Prison life turns upside down during Ramadan at Guantánamo", Miami Herald website, 19 July 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article27853954.html>>: "The exceptions are hunger strikers the military confines to solo cells for what it calls health and safety reasons, even those deemed 'highly compliant'".

⁵⁴³ United States District Court for the District of Columbia, *Hassan v. Obama*, "Petitioner's emergency application for a temporary restraining order prohibiting respondents from depriving petitioner of the right to pray communally during the month of Ramadan", 3 July 2014, p. 2, <<http://lawprofessors.typepad.com/files/tro.pdf>>: "After each day's final evening prayer, Muslims traditionally perform extra prayers—called *tarawih*—in which they recite one-thirtieth of the Qu'ran in consecutive segments throughout the month. (...) 'This is a special part of Ramadan tradition and is a collectively performed act of piety. If a person were prevented from performing this highly valued and deeply spiritual practice, it would truly create a great sense of deprivation and distress'; Dr. Sayyid M. Syeed, "The Meaning of Tarawih", National Religious Campaign Against Torture website, <<http://www.nrcat.org/interfaith-campaign-to-address-anti-muslim-sentiment/background/the-meaning-of-tarawih>>.

⁵⁴⁴ United States Military Commission, *United States of America v. Mohammad et al.*, AE 108 (MAH, AAA, RBS, WBA), *op. cit.*, note 424, Attachment G, p. 124.

⁵⁴⁵ "Requests to Improve the Conditions of Confinement in Guantánamo", Office of the Chief Defense Counsel, *op. cit.*, note 424, p. 10.

⁵⁴⁶ ODIHR interview with Marine Corps Major Derek Poteet and Army Major Jason Wright, *op. cit.*, note 542.

⁵⁴⁷ "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rule 41.

d. Recommendations

- To allow for detainees' free exercise of religion or belief to the maximum extent possible, insofar as it remains compatible with necessary and proportionate security restrictions;
- To provide all Guantánamo detainees with unhindered access to a qualified representative of the Muslim faith;
- To ensure that all official personnel do not engage in conduct that offends the religious beliefs or practices of detainees;
- To ensure that detainees have access to religious items, including the Koran, and that these religious items are handled in a respectful manner by official personnel;
- To review the practice of segregated prayer in Camps 5 and 7 so as to ensure that the grounds for any interference with the freedom to manifest one's religion are fully met and, if they are not met, to amend this practice accordingly.

C. RIGHT TO HEALTH AND OBLIGATION TO SECURE MEDICAL ATTENTION

a. International Standards

263. The right to health is guaranteed under Article 12 of the International Covenant on Economic, Social and Cultural Rights. Since the United States has signed but not ratified the Covenant, it is only "obliged to refrain from acts which would defeat [its] object and purpose".⁵⁴⁸ However, it should be noted that, as a member of the World Health Organization, the United States has also accepted the principle of "enjoyment of the highest attainable standard of health [as] one of the fundamental rights of every human being".⁵⁴⁹
264. In the context of detention more specifically, OSCE commitments such as Brussels 2006 foresee that "[l]aw enforcement officials should be cognizant and attentive to the health of persons in their custody and, in particular, should take immediate action to secure medical attention whenever required".⁵⁵⁰ Other international standards also require states to provide detainees with healthy living conditions and quality medical care.⁵⁵¹ Every detainee is to have "access to any medical examination and treatment needed".⁵⁵² States therefore need to ensure that detainees have access to at least one medical officer qualified to provide for their physical and mental care and to appropriate dental care. According to the Standard Minimum Rules for the Treatment of Prisoners, in the event that detainees require

⁵⁴⁸ Vienna Convention on the Law of Treaties, Art. 18. It is generally accepted that the Vienna Convention is a codification of existing international customary law.

⁵⁴⁹ Constitution of the World Health Organization, preamble setting forth principles accepted by Contracting Parties, <<http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>>; UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, para. 66.

⁵⁵⁰ OSCE Ministerial Council, Ministerial Declaration, "Brussels Declaration on Criminal Justice Systems", Brussels, 5 December 2006, <<http://www.osce.org/mc/23017>>. OSCE Vienna Document, *op. cit.*, note 90, para. 23.6. This right is also protected under Article 25 of the UDHR and Article XI of the ADRDM.

⁵⁵¹ UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, para. 69. These obligations are reflected in "Code of Conduct for Law Enforcement Officials", *op. cit.*, note 280, Art. 6; and "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rules 10, 15, 17, 22-26, among others.

⁵⁵² *Istanbul Protocol*, *op. cit.*, note 313, para. 67.

specialized treatment that is not available on site, they should be transferred to external facilities.⁵⁵³

265. It is essential that medical examinations be conducted in a diligent and thorough manner, and in full confidentiality. Prison staff should not be present during examinations, except when required by medical personnel themselves, nor should they monitor these examinations. They should not interfere, pressure, intimidate or give orders to medical personnel.⁵⁵⁴ The principles of clinical independence,⁵⁵⁵ medical ethics,⁵⁵⁶ autonomy of patients and informed consent⁵⁵⁷ are to be safeguarded.⁵⁵⁸ Moreover, international bodies and experts have stressed on several occasions that medical care should not be conditioned on detainees' compliance or co-operation with prison authorities and interrogators.⁵⁵⁹ Adequate medical care entails access to adequate medication and to a "level of health care that is equivalent to that available to the general population".⁵⁶⁰ Detainees also have a right to access their medical records.⁵⁶¹
266. Health professionals owe a primary duty to their patients, irrespective of their employer or chain-of-command.⁵⁶² They should document and report their suspicions of torture or ill-treatment to the competent authorities or international agencies, without putting their patients at risk.⁵⁶³ Medical investigations into allegations of torture or ill-treatment are to include, *inter alia*, a detailed record of the detainee's account, "all physical and psychological findings" of the examination, and a determination of the probable cause of these findings.⁵⁶⁴ Furthermore, medical personnel have a duty to document and report if conditions of detention, including continued detention, affect the physical and mental

⁵⁵³ "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rule 22. As previously mentioned, the United States has pledged to observe the United Nations Standard Minimum Rules for the Treatment of Prisoners, as part of its OSCE commitments. OSCE Vienna Document, *op. cit.*, note 90, para. 23.3.

⁵⁵⁴ UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, paras. 51-53.

⁵⁵⁵ *Istanbul Protocol*, *op. cit.*, note 313, para. 57: "The principle of professional independence requires health professionals always to concentrate on the core purpose of medicine, which is to alleviate suffering and distress and avoid harm, despite other pressures."

⁵⁵⁶ *Ibid.*, para. 51: "The central tenet of all health-care ethics (...) is the fundamental duty always to act in the best interests of the patient, regardless of other constraints, [and] pressures".

⁵⁵⁷ *Ibid.*, paras. 63-64: "An absolutely fundamental precept of modern medical ethics is that patients themselves are the best judge of their own interests. (...) [There is a] duty for doctors to obtain voluntary and informed consent from mentally competent patients to any examination or procedure. This means that individuals need to know the implications of agreeing and the consequences of refusing."

⁵⁵⁸ UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 54.

⁵⁵⁹ UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, para. 70. See, also, IACHR, *Eduardo F. Capote Rodríguez*, Case No. 6091, Resolution 3/82, 8 March 1982, <<http://www.cidh.org/annualrep/81.82eng/Cuba6091.htm>>.

⁵⁶⁰ UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 54.

⁵⁶¹ UN HRC, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para. 18, <<http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>>.

⁵⁶² *Istanbul Protocol*, *op. cit.*, note 313, para. 66.

⁵⁶³ *Ibid.*, paras. 67, 69, 72; UN Special Rapporteur on torture, "Study on the phenomena of torture", *op. cit.*, note 283, para. 137. See, also, UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 53: "Rule 24 [of the Standard Minimum Rules for the Treatment of Prisoners] should insist on the obligation of medical personnel to detect, treat, properly document and refer to the authority responsible for investigating allegations of torture or other ill-treatment any signs of torture or other ill-treatment or any case where there are allegations or reasonable grounds to believe that torture or other ill-treatment may have occurred prior to admission or while in detention".

⁵⁶⁴ "Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", 4 December 2000, Principle 6(b),

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/EffectiveInvestigationAndDocumentationOfTorture.aspx>>.

health of detainees.⁵⁶⁵ They should pay particular attention to the mental and physical health of detainees undergoing punishment.⁵⁶⁶

267. Finally, detainees “should not be subjected to any medical or scientific experimentation that may be detrimental to their health”.⁵⁶⁷ The Human Rights Committee has concluded, for example, that the treatment of a detainee, which included psychiatric experiments and tranquilizer injections against his will, amounted to inhuman treatment prohibited by Article 7 of the ICCPR.⁵⁶⁸ In 2006, it also specified that “when there is doubt as to the ability of a person or a category of persons to give [their free] consent, e.g. prisoners, the only experimental treatment compatible with Article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual”.⁵⁶⁹
268. International humanitarian law also guarantees the right of persons deprived of their liberty to adequate medical attention and healthy living conditions. These rules can be found in specific provisions of the Third and Fourth Geneva Conventions, among others.⁵⁷⁰ Additionally, customary international humanitarian law provides for the treatment and care of the wounded and sick and prohibits medical experimentation or any other medical procedure that is not indicated by a person’s state of health.⁵⁷¹

b. Domestic Standards

269. The Eighth Amendment to the US Constitution has been interpreted as guaranteeing detainees’ access to adequate medical care.⁵⁷² Inadequate care is found where prison officials had knowledge of and disregarded a substantial risk to a detainee’s health. Examples include “serious denials or delay in access to medical personnel; a denial of access to appropriately qualified health care personnel; [and] a failure to inquire into facts necessary to make a professional judgment”.⁵⁷³ Additionally, detainees have a right to be

⁵⁶⁵ “Standard Minimum Rules for the Treatment of Prisoners”, *op. cit.*, note 280, Rule 25.

⁵⁶⁶ UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 56.

⁵⁶⁷ UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 7. Article 7 of the ICCPR prohibits medical experiments without the free consent of the person concerned.

⁵⁶⁸ UN Special Rapporteur on torture, Interim report to the General Assembly, A/63/175, *op. cit.*, note 307, para. 63; UN HRC, *Antonio Viana Acosta v. Uruguay*, Communication No. 110/1981, 29 March 1984, para. 15,

<<http://www1.umn.edu/humanrts/undocs/session39/110-1981.htm>>.

⁵⁶⁹ UN HRC, Concluding observations, United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 31,

<<http://www.state.gov/documents/organization/133837.pdf>>.

⁵⁷⁰ See, for instance, Third Geneva Convention, Arts. 25, 30-31; Fourth Geneva Convention, Arts. 76, 85, 91-92. See, also, APII, Art. 5.

⁵⁷¹ “Customary International Humanitarian Law, Rule 110: Treatment and Care of the Wounded, Sick and Shipwrecked”, ICRC website, <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule110>; “Customary International Humanitarian Law, Rule 92: Mutilation and Medical, Scientific or Biological Experiments”, ICRC website, <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule92>.

⁵⁷² See, for instance, United States Supreme Court, *Estelle v. Gamble*, Case No. 75-929, 30 November 1976, <<http://www.law.cornell.edu/supremecourt/text/429/97>>; United States Supreme Court, *Edmund G. Brown, Jr., Governor of California, et al. v. Marciano Plata*, Case No. 09-1233, 23 May 2011, <<http://www.law.cornell.edu/supct/html/09-1233.ZO.html>>.

⁵⁷³ “Know your rights - Medical, dental and mental health care”, American Civil Liberties Union website, <https://www.aclu.org/files/assets/know_your_rights_-_medical_mental_health_and_dental_july_2012.pdf>, referring to United States Supreme Court, *Estelle v. Gamble*, *ibid.*; United States Court of Appeals, Ninth Circuit, *Lance Jett v. M. Penner, D. Peterson, and Cheryl K. Pliler Warden*, Case No. 04-15882, 9 March 2006, <<http://caselaw.findlaw.com/us-9th-circuit/1000528.html>> (delay of over a year before seeing a hand specialist); United States Court of Appeals, Seventh Circuit,

seen by specialists when their condition so requires. A prison should nonetheless provide adequate facilities and medical staff to deal with emergencies if outside facilities are too remote or inaccessible.⁵⁷⁴ Accurate medical records should also be kept.⁵⁷⁵ At the time of writing, US authorities had not conceded that the Eighth Amendment applies to Guantánamo detainees.

270. The Department of Defense Directive on the DoD Detainee Program stipulates that all detainees should be treated humanely, which includes “appropriate medical care and attention required by the detainee’s condition to the extent practicable”. The Directive also stipulates that “[detainees] will not be subjected to medical or scientific experiments”.⁵⁷⁶ The Department of Defense Instruction on Medical Program Support for Detainee Operations further requires that “in general, health care [be] provided with the consent of the detainee” and that “accurate and complete medical records [be] created and maintained”.⁵⁷⁷ Medical personnel are to be trained to detect and report signs of abuse or neglect.⁵⁷⁸

c. Findings and Analysis

271. Early efforts were made at Guantánamo to arrange medical care.⁵⁷⁹ Medical facilities now include a detainee hospital, medical treatment rooms at Camps 5, 6 and 7, and a behavioural health unit. These provide medical, dental and mental health care to detainees. If required, detainees can also be treated at the Naval Hospital on the main base, including for major surgeries. Specialists can also be brought to Guantánamo.⁵⁸⁰ Detainees cannot be brought to the United States for medical treatment even in case of medical emergency.⁵⁸¹ The United States nevertheless argues that Guantánamo detainees receive “quality care on the same level as that which US service members receive while on the base”.⁵⁸²

Richard Murphy v. Richard E. Walker, Case No. 94-1820, 4 April 1995, <<http://caselaw.findlaw.com/us-7th-circuit/1248951.html>> (several month delay in getting prisoner with head injury to a doctor).

⁵⁷⁴ See, for instance, United States Court of Appeals, Ninth Circuit, *Frederick Hoptowit et al. v. Dixy Lee Ray et al.*, Case No. 80-3366, 16 February 1982, <<http://openjurist.org/682/f2d/1237/hoptowit-v-ray-w-md>>; “Know your rights - Medical, dental and mental health care”, American Civil Liberties Union website, *ibid.*, p. 6.

⁵⁷⁵ See, for instance, United States Court of Appeals, Eighth Circuit, *Tyrone Antonio Johnson-El, et al. v. Vincent C. Schoemehl, et al.*, Case No. 88-1252, 17 July 1989, <<http://openjurist.org/878/f2d/1043/johnson-el-v-c-schoemehl-f-1t>>; United States District Court for the Eastern District of California, *Ralph Coleman, et al. v. Pete Wilson, et al.*, Case No. S-90-0520 LKK JFM, 13 September 1995, <http://www.leagle.com/decision/19952194912FSupp1282_12061.xml/COLEMAN%20v.%20WILSON>; “Know your rights - Medical, dental and mental health care”, American Civil Liberties Union website, *ibid.*, p. 7.

⁵⁷⁶ Department of Defense Directive 2310.01E, *op. cit.*, note 14, paras. 3.b(1)(d) and 3.b(2).

⁵⁷⁷ Department of Defense Instruction 2310.08E, “Medical Program Support for Detainee Operations”, 6 June 2006, paras. 4.2, 4.7, <<http://www1.umn.edu/humanrts/OathBetrayed/Winkenwerder%206-6-2006.pdf>>.

⁵⁷⁸ *Ibid.*, para. 4.5; UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, paras. 101, 106.

⁵⁷⁹ *Ethics Abandoned*, *op. cit.*, note 430, p. xix; Walsh Report, *op. cit.*, note 422, p. 13.

⁵⁸⁰ Detailed descriptions of the medical facilities at Guantánamo are available in: Walsh Report, *ibid.*, pp. 13-15; GAO November 2012 Report, *op. cit.*, note 425, pp. 21-22; Carol Rosenberg, “Web Extra – A prison camps primer”, Miami Herald website, last updated on 15 June 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1939250.html>>.

⁵⁸¹ The NDAA bans all transfers of Guantánamo detainees to the United States, which effectively prevents any transfer for emergency medical care. Although it has been proposed that an exception allowing for emergency medical care in the United States, in limited circumstances, be included in the NDAA, in the past, the final Act has so far not incorporated this provision.

⁵⁸² UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 222; Walsh Report, *op. cit.*, note 422, p. 52.

272. Medical care at Guantánamo appears to have improved over time. Interlocutors informed ODIHR that for certain medical conditions, the present quality of care seems to be equivalent or higher than in other detention facilities in the United States. However, aspects of basic medical care at Guantánamo are said to remain problematic and inadequate.⁵⁸³
273. Whereas some former detainees reportedly said they received appropriate medical care at Guantánamo,⁵⁸⁴ a number of reports and concurring testimonies appear to contradict this conclusion. Medical care, especially prior to 2008, has been said to not only be “inadequate and negligent, but also abusive”.⁵⁸⁵
274. In interviews with ODIHR, former detainees transferred from Guantánamo between 2006 and 2009 relayed complaints of long delays or denial of medical treatment, inadequate care, and provision of treatment conditioned upon co-operation with interrogators, as well as humiliating treatment by medical personnel and forced drugging during their detention. More specifically, they indicated that their medical and dental treatment had been denied or delayed for a year or more.⁵⁸⁶ In addition, they described that when they did receive medical care, the treatment was provided in humiliating circumstances and was often inadequate. Mustafa Ait Idir explained that after half of his face was paralysed following a beating, a medical technician “started making fun of [him], humiliating [him, asking if he had] AIDS (...) The technician said he would give [him] a sleeping pill (...) [He] gave [him] a small plaster and told [him] to put it over [his] eye when [he] wanted to sleep and to take it off when [he] was not sleeping”.⁵⁸⁷ He and Lakhdar Boumediene also recalled circumstances where medical staff told them that they needed to co-operate with interrogators to receive their medication. Some of the former detainees interviewed by ODIHR also alleged being subjected to forced drugging and receiving medication for mental-illness without their consent.⁵⁸⁸

⁵⁸³ ODIHR interview with Brigadier General Stephen Xenakis, *op. cit.*, note 231; ODIHR interview with Scott Allen, *op. cit.*, note 231; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255.

⁵⁸⁴ These detainees were treated for tuberculosis and a diabetic foot ulcer. *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact* (Cambridge: Physicians for Human Rights, 2008), p. 7, <https://s3.amazonaws.com/PHR_Reports/BrokenLaws_14.pdf>.

⁵⁸⁵ IACHR, *Ameziane v. United States*, “Petition”, *op. cit.*, note 527, para. 61.

⁵⁸⁶ ODIHR interview with David Hicks, *op. cit.*, note 228: Hicks explained that he developed large and painful lumps in his breasts that remained for over a year. Despite his complaints, this was not treated. He also mentioned the bad condition of his teeth as a major problem caused by five and a half years of detention where he was not able to brush them; ODIHR interview with Murat Kurnaz, *op. cit.*, note 400: Kurnaz stressed that he had a severe toothache and asked, unsuccessfully, to see a dentist for approximately two years; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216: Boumediene told ODIHR that he waited for about eight months for the removal of a tooth; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217: Boudella mentioned the bad condition of his teeth, which were rotten due to the water, and left untreated.

⁵⁸⁷ ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *ibid.* Murat Kurnaz and David Hicks also described incidents which would testify to the degrading and humiliating circumstances in which medical care was sometimes reportedly provided. ODIHR interview with Murat Kurnaz, *ibid.*; ODIHR interview with David Hicks, *ibid.* See, also, IACHR, *Ameziane v. United States*, “Petition”, *op. cit.*, note 527, para. 61.

⁵⁸⁸ ODIHR interview with David Hicks, *ibid.*: Hicks stressed his fear of forced drug injections, which he said were regular and left him without control over his body. He also reported being drugged prior to his notice of charge in 2007.; United States Court of Military Commission Review, *David Hicks v. United States of America*, “Appellant’s Motion to Attach”, 5 November 2013, paras. 257-259, <http://ccrjustice.org/files/Hicks_v_UnitedStates_MotiontoAttach%282013-11-05%29.pdf>; ODIHR interview with Murat Kurnaz, *ibid.*: Kurnaz said that detainees were forced to take drugs against malaria, among other drugs, even though there was no malaria in Guantánamo. Detainees were reportedly not informed of the side effects of the malaria medication, which included hallucinations; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216: Boumediene stated that he was given drugs every day. He alleged that he was once injected with penicillin after he had informed doctors that he was allergic to it, and

275. Such allegations give rise to concern over violations of the right of detainees to receive adequate medical care.⁵⁸⁹ Detainees are to be informed about the risks of particular drugs in order to give their informed consent or exercise their right to autonomy. According to several United Nations Special Procedures mandate-holders, treating a mentally competent detainee without his consent violates the right to health.⁵⁹⁰ The Human Rights Committee has also found that forced experimental treatment would also amount to ill-treatment if it is not “the most appropriate to meet [detainees’] medical needs”.⁵⁹¹ Forcing detainees to take medication for mental illness when their health does not require it would therefore violate international human rights standards. Unreasonable delays and denial of medical care are in violation of the right to health.⁵⁹² Furthermore, prison authorities and interrogators should not interfere or have control over whether and what type of medication detainees can receive. Medical care should never be conditioned on detainees’ co-operativeness.⁵⁹³
276. The provision of mental health care at Guantánamo appears to have been particularly deficient. Many detainees are said to have showed symptoms of psychological distress and mental pain from as early as 2002. Presumably, these were caused by a combination of factors that included their treatment in interrogation, their conditions of detention and their continued detention.⁵⁹⁴ Detainees who showed the greatest symptoms of psychological problems appear to have been treated as “non-compliant”, held in isolation and denied access to basic items. Subjecting detainees with mental health issues to prolonged solitary confinement in punitive conditions, however, prevents their recovery and may very well exacerbate their condition.⁵⁹⁵ Their isolation would not only amount to a violation of their right to medical care but could also constitute ill-treatment.
277. While medical personnel have a duty to report abuse, it has been reported that no policies or procedures on how to do so existed at Guantánamo until at least 2004.⁵⁹⁶ Such reporting standards and procedures have been established since then, but have been said to “remain seriously deficient”.⁵⁹⁷ This deficiency would stem in part from the lack of or inadequacy of a definition of reportable abuse, and the absence of any obligation to seek the probable relationship between the physical or psychological injury or symptom and the potential abuse.⁵⁹⁸ This is consistent with a review of the medical records and relevant case files of

he subsequently lost consciousness; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *ibid.* See, also, UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 70: “the Special Rapporteur (...) has received serious and credible reports of violations of the right to health (...) The reports allege, inter alia that (...) (iv) detainees have been subjected to non-consensual treatment, including drugging (...)”; *Ethics Abandoned*, *op. cit.*, note 430, pp. xix, 43: “unexplained use of the anti-malarial drug Mefloquine, which may have significant mental side effects”, “detainee accounts and the Inspector General’s report reveal that involuntary treatment with psychoactive medications was not uncommon”.

⁵⁸⁹ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *ibid.*

⁵⁹⁰ *Ibid.*, para. 82.

⁵⁹¹ UN HRC, Concluding observations, United States of America, CCPR/C/USA/CO/3/Rev.1, *op. cit.*, note 569, para. 31.

⁵⁹² UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 70.

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ethics Abandoned*, *op. cit.*, note 430, p. xix; “Current Conditions of Confinement at Guantánamo”, Center for Constitutional Rights, *op. cit.*, note 524, p. 9.

⁵⁹⁵ “Current Conditions of Confinement at Guantánamo”, Center for Constitutional Rights, *ibid.*, pp. 9-10.

⁵⁹⁶ *Ethics Abandoned*, *op. cit.*, note 430, p. xx. In this regard, US officials stressed that standards for reporting existed prior to 2004, and that the DoD Instruction on reportable incidents only solidified what was already in US policy. US comments to the draft report.

⁵⁹⁷ *Ethics Abandoned*, *ibid.*, p. 77.

⁵⁹⁸ *Ibid.*, pp. 78-80.

nine Guantánamo detainees who had alleged abuse, as this review found a correlation between detainees' symptoms and their allegations of abuse but noted that medical personnel treating these detainees "failed to inquire and/or document causes of the physical injuries and psychological symptoms they observed".⁵⁹⁹ Such failure runs contrary to international standards, including the Istanbul Protocol on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁶⁰⁰

278. Several past practices continue to impact the current quality of care provided to Guantánamo detainees. First, the involvement of behavioural science consultation teams in interrogations led to detainees' severe distrust of medical personnel.⁶⁰¹ Other practices carried out by medical personnel also undermined the doctor/patient relationship. This is the case of force-feeding, a practice which is still used in conditions that some hunger strikers have recently described as extremely painful.⁶⁰² Similarly, while medical personnel no longer participate in security functions such as body-cavity searches, it has been reported that they may still allow the sedation of detainees for transportation and security purposes.⁶⁰³ It can reasonably be assumed that past abuses and current practices such as force-feeding keep fuelling detainees' distrust of medical personnel. Furthermore, the rapid rotation of medical personnel appears to further undermine the development of a trusting relationship between detainees and medical staff and the effectiveness of medical care.⁶⁰⁴ Lack of trust is said to remain a significant problem which still compromises the quality of care at Guantánamo.⁶⁰⁵

279. Lack of timely and appropriate medical care may have an adverse effect on detainees' ability to meaningfully participate in the proceedings against them. For this reason, defence

⁵⁹⁹ *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 227; Vincent Iacopino and Stephen N. Xenakis, "Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series", *PLOS Medicine*, 26 April 2011, <<http://www.plosmedicine.org/article/info%253Adoi%252F10.1371%252Fjournal.pmed.1001027>>.

⁶⁰⁰ *Istanbul Protocol*, *op. cit.*, note 313, paras. 67, 69, 72; "Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *op. cit.*, note 564, Principle 6(b).

⁶⁰¹ UN Special Procedures, "Situation of detainees at Guantánamo Bay", *op. cit.*, note 23, para. 76; *Ethics Abandoned*, *op. cit.*, note 430, pp. xix, 47. In 2004, the ICRC, for instance, reported that detainees did not seek care for fear that medical personnel would pass on the information to interrogators. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo", *op. cit.*, note 399. For more information about the involvement of behavioural science consultation teams in interrogations, see Part 1-II-A of this report.

⁶⁰² For more information about the force-feeding of Guantánamo detainees, see Part 1-II-A of this report.

⁶⁰³ *Ethics Abandoned*, *op. cit.*, note 430, p. 47.

⁶⁰⁴ ODIHR interview with Brigadier General Stephen Xenakis, *op. cit.*, note 231; United States Military Commission, *United States of America v. Al-Nashiri*, "Unofficial/unauthenticated transcript of the hearing dated 4/24/2014 from 09:06 AM to 11:20 AM", p. 3753; "Medical Care and Medical Ethics at Guantanamo: A conference co-sponsored by The Constitution Project and Global Lawyers and Physicians - Post-conference summary", The Constitution Project's Task Force on Detainee Treatment website, 2 December 2013, p. 8, <<http://detaineeetaskforce.org/wp-content/uploads/2013/12/12-2-Conference-Summary-FINAL.pdf>>.

⁶⁰⁵ ODIHR interview with Brigadier General Stephen Xenakis, *op. cit.*, note 231; ODIHR interview with Physicians for Human Rights, *op. cit.*, note 472. See, also, United States District Court for the District of Columbia, *Shaker Aamer v. Barack H. Obama*, Case No. 04-CV-2215 (RMC), "Petitioner's motion for judgment on his petition for writ of habeas corpus", 7 April 2014, p. 9, <<http://s3.documentcloud.org/documents/1104737/aamer-ill-motion.pdf>>: "Because Joint Medical Group (...) physicians at Guantánamo are accountable to the Joint Detention Group (...) rather than their patients, a relationship of trust and agreement between JMG physicians and their prisoner-patients is impossible. (...) Further, "the ability to collaborate and build physician-trust at Guantánamo is impossible because [Joint Medical Group] clinicians were often complicit in the abusive interrogations of their patients. (...) With no possibility of sustained doctor-patient trust at Guantánamo, any treatment the [Joint Medical Group] provides in an attempt to rehabilitate Mr. Aamer's mental and physical fitness will be doomed to fail."

testimonies and arguments alleging that some of the detainees facing trial before military commissions have not received adequate medical care are of particular concern. Al-Nashiri's attorneys for example requested the abatement of the military commission proceedings until Al-Nashiri receives adequate medical care for his diagnosed post-traumatic stress disorder and depression.⁶⁰⁶ Defence lawyers for Ammar al Baluchi told ODIHR that their client suffers from substantial neurological problems for which adequate medical care had not been provided as of February 2014.⁶⁰⁷ Following a request by al Hawsawi's defence team stressing that medical care is "sporadic, with lack of continuity, lack of equipment and (...) inadequate to treat [their client's] myriad conditions", the IACHR required the United States to adopt precautionary measures to ensure his access to medical care and treatment.⁶⁰⁸

280. Military commission rulings on this particular issue have differed. The judge in the Al-Nashiri case concluded that the defence had failed to demonstrate how his medical treatment negatively affected the proceedings and to prove that the government had been deliberately indifferent to Al-Nashiri's medical needs.⁶⁰⁹ Another judge in the Mohammad *et al.* case⁶¹⁰ concluded that he "does not have the authority to address issues concerning medical care".⁶¹¹ These rulings notwithstanding, and in light of concurring allegations and available contextual information, ODIHR remains concerned that adequate medical care may not be provided to military commission defendants.

281. Other concerns have been raised in relation to the medical records of Guantánamo detainees. A motion filed by counsel for detainees facing capital trial before military commissions revealed that the detainees themselves did not have access to their medical records and that their attorneys were denied access as a matter of practice. In comparison, the prosecution appears to have full access to their records.⁶¹² This would contravene international standards providing for detainees' right to access their medical records.⁶¹³ It is especially concerning in the present cases where the documentation of acts of torture or ill-

⁶⁰⁶ United States Military Commission, *United States of America v. Al-Nashiri*, AE 205JJ, "Ruling – Defense Motion to Abate the Proceedings until the Accused Receives Adequate Medical Care", 24 March 2015, p. 1; United States Military Commission, *United States of America v. Al-Nashiri*, "Unofficial/unauthenticated transcript of the hearing dated 4/24/2014 from 09:06 AM to 11:20 AM", *op. cit.*, note 604, pp. 3740-3741; 3769-3770; United States Military Commission, *United States of America v. Al-Nashiri*, "Unofficial/unauthenticated transcript of the hearing dated 4/24/2014 from 1:12 PM to 2:40 PM", pp. 3840-3841.

⁶⁰⁷ ODIHR interview with James G. Connell III and Air Force Lieutenant Colonel Sterling Thomas, 26 February 2014.

⁶⁰⁸ "[T]he Commission issues precautionary measures in situations that are serious and urgent, and where such measures are necessary to prevent irreparable harm to persons". Resolution No. 24/2015, "Matter of Mustafa Adam Al-Hawsawi regarding the United States of America", IACHR, 7 July 2015, <<http://www.oas.org/en/iachr/decisions/pdf/2015/PM422-14-EN.pdf>>.

⁶⁰⁹ United States Military Commission, *United States of America v. Al-Nashiri*, AE 205JJ, "Ruling – Defense Motion to Abate the Proceedings until the Accused Receives Adequate Medical Care", *op. cit.*, note 606, p. 2.

⁶¹⁰ The 9/11 case will be referred to as the Mohammad *et al.* case in this report.

⁶¹¹ United States Military Commission, *United States of America v. Mohammad et al.*, AE 332C, "Order – Defense Motion for Medical Intervention", 10 March 2015, p. 2.

⁶¹² United States Military Commission, *United States of America v. Al-Nashiri*, AE 171, "Defense motion for appropriate relief to compel defense examination of the accused's conditions of confinement", 5 September 2013, Attachment B, "Counsel for Mr. Al Nashiri's response to Department review of conditions of confinement at Guantánamo Bay", Office of the Chief Defense Counsel, 19 March 2009, para. 12; United States Military Commission, *United States of America v. Mohammad et al.*, AE 108 (MAH, AAA, RBS, WBA), *op. cit.*, note 424, Attachment C, "Counsel for Mr. Ramzi Bin al Shihb's response to Department review of conditions of confinement at Guantánamo Bay", Office of the Chief Defense Counsel, 4 March 2009, p. 102. Similarly, *habeas corpus* counsel for Guantánamo detainees confirmed to ODIHR that lawyers' access to their clients' medical files could only be obtained through litigation.

⁶¹³ UN HRC, General Comment No. 34, *op. cit.*, note 561, para. 18.

treatment suffered by the defendants and their impact on their health could potentially affect the outcome of their cases. ODIHR notes that defence counsel in these two cases now have access to some medical records. The records are nevertheless said to be incomplete and to lack information such as the causes of particular disorders, the providers of medical treatment, or even entire periods of detention. These records would fail to fully document mistreatment and its impact on detainees' health.⁶¹⁴

282. Finally, serious questions arise in relation to the resources and equipment available at Guantánamo to treat an aging population increasingly presenting complex medical problems.⁶¹⁵ International standards provide that detainees should be transferred to external facilities if necessary specialized treatment is not available on site.⁶¹⁶ While detainees may be treated at the Naval Hospital on the main base, Marine General John F. Kelly, the Commander of the United States Southern Command (SOUTHCOM), would have recently acknowledged the “lack [of] certain specialty medical capabilities necessary to treat potentially complex emergencies and various chronic diseases.”⁶¹⁷
283. In relation to the lack of specific medical equipment, available information indicates that the United States may lease a magnetic resonance imaging machine for 30 to 180 days to comply with a judicial order.⁶¹⁸ This follows a military judge's order to examine Al-Nashiri's brain for forensic purposes (as opposed to his immediate medical needs), since his “past or current brain trauma, to include memory loss as a result of prior abuse by the Government, if true, (...) would indeed be mitigating factors” in the case.⁶¹⁹

⁶¹⁴ ODIHR interview with Scott Allen, *op. cit.*, note 231; ODIHR interview with Richard Kammen, 7 March 2014; ODIHR interview with Navy Commander Brian Mizer, 4 March 2014; ODIHR interview with James G. Connell III and Air Force Lieutenant Colonel Sterling Thomas, *op. cit.*, note 607. Interlocutors were not able to provide details as to the contents of the medical records since these are classified. See, also, United States Military Commission, *United States of America v. Al-Nashiri*, “Unofficial/unauthenticated transcript of the hearing dated 4/24/2014 from 09:06 AM to 11:20 AM”, *op. cit.*, note 604, pp. 3742-3746.

⁶¹⁵ “Medical Care and Medical Ethics at Guantanamo”, The Constitution Project's Task Force on Detainee Treatment website, *op. cit.*, note 604, p. 8.

⁶¹⁶ “Standard Minimum Rules for the Treatment of Prisoners”, *op. cit.*, note 280, Rule 22(2).

⁶¹⁷ Carol Rosenberg, “General to Congress: Guantánamo's hidden prison problems ‘increasingly unsustainable’”, Miami Herald website, 26 February 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/article1960805.html>>.

⁶¹⁸ While a mobile magnetic resonance imaging machine was purchased for delivery in early 2013, it was reportedly stored for a year and sent to an Army Medical Center in the United States. Carol Rosenberg, “Guantánamo judge orders MRI of USS Cole defendant's brain, abates trial”, Miami Herald website, 10 April 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article18204251.html#storylink=cpy>>; Carol Rosenberg, “Mystery solved: Southcom leasing MRI to study brain of Guantánamo prisoner, perhaps others”, Miami Herald website, 14 July 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article27248545.html>>.

⁶¹⁹ In this case, the defence had argued that the examination would “not only result in better treatment and a defendant that may be able to meaningfully participate in his defence, but it will also provide additional evidence in mitigation that is relevant to his past cooperation, or lack thereof, with law enforcement or detention officials, his conditions of confinement, and whether Mr. Al-Nashiri is a continuing threat to society”. Considering that the request for this examination was “framed as a request for adequate medical care” and that the defence “did not establish the care provided to the Accused was inadequate”, the military judge denied it in September 2014. Upon reconsideration of the ruling, the judge granted the defence's request, finding “further inquiry into the Defense's claims of the Accused's neuropsychological infirmity both relevant and necessary for mitigation”. United States Military Commission, *United States of America v. Al-Nashiri*, AE 277H, “Ruling – Defense motion for Appropriate Relief: Order a Magnetic Resonance Image (MRI) of Mr Al-Nashiri's Brain”, 29 September 2014, pp. 1-2; United States Military Commission, *United States of America v. Al-Nashiri*, AE 277M, “Ruling – Defense motion for Appropriate Relief: Order a Magnetic Resonance Image (MRI) of Mr Al-Nashiri's Brain”, 9 April 2015, pp. 3-4.

284. Should this *ad hoc* solution be mirrored in cases where medical necessity requires resources and equipment that are not available at Guantánamo at the time, it would nevertheless not sufficiently alleviate ODIHR's concerns that the legislative ban on detainee transfer to the United States may prevent Guantánamo detainees from receiving timely and appropriate healthcare, especially in emergency situations. If no alternative means to ensure adequate care for all detainees is found, this legislative ban would place the United States in contravention of international standards.

d. Recommendations

- Concerning the detention of any Guantánamo detainee, to ensure that timely and appropriate medical, psychological and dental care is provided;
- To ensure that only medical personnel are involved in decisions regarding the medical care of detainees;
- To ensure that detainees suffering from mental health issues are not treated as non-compliant detainees or held in solitary confinement in punitive conditions;
- To ensure that detainees' medical records are complete and accurate; to allow detainees and their attorney(s) direct access to the detainees' complete medical records;
- To ensure that allegations by detainees and suspicions by official personnel of torture or ill-treatment are documented and reported to the competent authorities and/or international bodies; to ensure that medical investigations into allegations of torture or ill-treatment include a medical assessment as to the probable relationship between the physical or psychological injury or symptom and the possible torture or ill-treatment;
- Pending the closure of the Guantánamo Bay detention facility, to allow for the transfer of detainees to US territory if necessary medical resources or equipment cannot reasonably be made available at the Guantánamo Naval Base;
- To allow detainees immediate access to independent medical and psychological professionals with specific relevant expertise, and increase their involvement in the care of detainees.

PART 2: HUMAN RIGHTS ISSUES IN THE PROSECUTION OF INDIVIDUALS BEFORE MILITARY COMMISSIONS

285. Formal military commissions were first established in the United States during the Mexican-American War (1846-48) and the American Civil War (1861-65), when they were used to try US soldiers, US civilians and foreign nationals.⁶²⁰ These commissions have historically been able to try offences designated by a statute or offences in violation of the laws of war.⁶²¹ The Uniform Code of Military Justice (UCMJ) affirmed this jurisdiction when it came into force in 1950.⁶²²
286. On 13 November 2001, President Bush issued a military order that authorized the establishment of military commissions to try non-US citizen members of al Qaeda and others allegedly involved in international terrorism directed against the United States.⁶²³ Military commissions were subsequently convened at Guantánamo with the first charges laid in 2004, but were soon suspended after the United States Supreme Court determined that the President had exceeded his authority in creating the military commissions by executive order.⁶²⁴ In response, the MCA 2006 was enacted, and prosecutions of detainees before military commissions recommenced in 2007.
287. President Obama suspended all charges pending under the MCA for 120 days after taking office in 2009, resulting in the withdrawal of many cases.⁶²⁵ The MCA 2009 was enacted and military commission trials recommenced in 2010. The primary regulatory framework for military commissions at Guantánamo Bay is the MCA 2009, the Rules for Military Commissions (RMC) and the Military Commission Rules of Evidence (MCRE).⁶²⁶
288. Since the establishment of the Guantánamo Bay detention facility in 2002, only 30 of the 780 detainees have been charged.⁶²⁷ Of those 30, charges have been dropped without prejudice against 15 detainees. Eight detainees have been convicted through trial or through plea agreements. Proceedings are ongoing against a further seven detainees.⁶²⁸ Five of those convicted have now been released from Guantánamo.⁶²⁹

⁶²⁰ Major Michael O. Lacey, "Military Commissions: A Historical Survey", March 2002, pp. 43-44, <<https://www.hsdl.org/?view&did=445207>>.

⁶²¹ Jennifer K. Elsea, "The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues", 4 August 2014, p. 6, <<http://fas.org/sgp/crs/natsec/R41163.pdf>>.

⁶²² UCMJ, 6 May 1950, Art. 21, <<http://www.ucmj.us/>>: "[t]he provisions (...) conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals".

⁶²³ George W. Bush, Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", *op. cit.*, note 47.

⁶²⁴ United States Supreme Court, *Hamdan v. Rumsfeld*, *op. cit.*, note 11.

⁶²⁵ United States Military Commission, *United States of America v. Mohammad et al.*, P-009, "Commission Ruling Regarding Government Motion for 120-Day Continuance", 21 January 2009.

⁶²⁶ Manual for Military Commissions, United States, 2012.

⁶²⁷ Andy Worthington, "The Full List of Prisoners Charged in the Military Commissions at Guantánamo", andyworthington.co.uk, March 2014, <<http://www.andyworthington.co.uk/the-full-list-of-prisoners-charged-in-the-military-commissions-at-guantanamo/>>.

⁶²⁸ Rosenberg, "By the Numbers", *op. cit.*, note 88.

⁶²⁹ As addressed in more detail below, Omar Ahmed Khadr, Salim Ahmed Hamdan, David Hicks, Noor Uthman Muhammed and Ibrahim Ahmed Mahmoud al Qosi have been released.

289. Under the MCA 2006, two detainees were convicted by military commissions and one detainee entered into a plea agreement. Salim Ahmed Hamdan was convicted for providing material support for terrorism in 2008, but his conviction was reversed on appeal by the United States Court of Appeals for the District of Columbia Circuit in October 2012.⁶³⁰ Ali Hamza Ahmad Suliman al Bahlul was originally convicted of conspiracy, solicitation and providing material support for terrorism in 2008.⁶³¹ However, his convictions for solicitation and providing material support for terrorism were vacated on appeal by the *en banc* Court of Appeals for the District of Columbia Circuit in July 2014 and a panel of the same court vacated his remaining conviction for conspiracy in June 2015.⁶³² David Hicks agreed to plead guilty to providing material support for terrorism pursuant to a plea agreement in 2007, but his conviction was vacated by the Court of Military Commission Review (CMCR) in February 2015.⁶³³
290. Pursuant to the MCA 2009, five detainees entered into plea agreements. Ibrahim Ahmed Mahmoud al Qosi pled guilty in July 2010 to conspiracy and providing material support for terrorism. A request for a new trial before the CMCR was denied, and the Court of Appeals for the District of Columbia Circuit subsequently dismissed the appeal of this decision, on jurisdictional grounds.⁶³⁴ Omar Ahmed Khadr pled guilty in October 2010 to murder in

⁶³⁰ Hamdan was sentenced to 66 months' confinement, but he received credit for 61 months and seven days for the time he spent in detention prior to his trial. He was transferred to Yemen on 24 November 2008. He remained in prison there until being released on 27 December 2008. United States Court of Military Commission Review (*en banc*), *United States of America v. Salim Ahmed Hamdan*, Case No. 09-002, 24 June 2011, <<https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2011/06/hamdan.pdf>>; United States Court of Appeals for the District of Columbia Circuit, *Salim Ahmed Hamdan v. United States of America*, "On Petition for Review from the United States Court of Military Commission Review", Case No. 11-1257, 16 October 2012,

<[http://www.cadc.uscourts.gov/internet/opinions.nsf/722A4A4B384D5EC985257A99004D77C0/\\$file/11-1257-1399811.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/722A4A4B384D5EC985257A99004D77C0/$file/11-1257-1399811.pdf)>.

⁶³¹ United States Military Commission, *United States of America v. Ali Hamza Ahmad Suliman al Bahlul*, AE 074, Findings Worksheet, 31 October 2008.

⁶³² In July 2014, the court, sitting *en banc*, vacated Bahlul's convictions for material support for terrorism and solicitation as violative of the *Ex Post Facto* Clause of the US Constitution, and remanded Bahlul's remaining challenges to his conspiracy conviction to the original panel. After a *de novo* review, the panel concluded, in June 2015, that his conviction for inchoate conspiracy had to be vacated. At the time of writing, the US government had petitioned the court for a rehearing *en banc* of the June 2015 ruling. United States Court of Appeals for the District of Columbia Circuit, *Ali Hamza Ahmad Suliman al Bahlul v. United States of America*, "On Petition for Review from the United States Court of Military Commission Review", Case No. 11-1324, 12 June 2015, <<https://www.justsecurity.org/wp-content/uploads/2015/06/al-bahlul.pdf>>; United States Court of Appeals for the District of Columbia Circuit, *Ali Hamza Ahmad Suliman al Bahlul v. United States of America*, "Petition of the United States for Rehearing *en Banc*", Case No. 11-1324, 27 July 2015, <<https://www.justsecurity.org/wp-content/uploads/2015/07/Petition-for-Rehearing-En-Banc-27-July-2015.pdf>>.

⁶³³ Hicks was sentenced to seven years' confinement, but his sentence was reduced to nine months. After sentencing, he was transferred to Australia to serve his remaining sentence and was released on 29 December 2007. His conviction was vacated by the CMCR in February 2015 based on *al Bahlul v. United States (en banc)*, which vacated Al Bahlul's material support conviction. United States Military Commission, *United States of America v. David Matthew Hicks*, AE 030, "Appellate Exhibit 030 Military Judge Mark-up of the Pre-Trial Agreement", 30 March 2007; United States Military Commission, *United States of America v. Hicks*, AE 026, "Member Instructions", 30 March 2007; United States Court of Military Commission Review, *David M. Hicks v. United States of America*, 18 February 2015, <[http://ccrjustice.org/sites/default/files/assets/files/Hicksv.United%20States_13-004%20Decision_\(2015.02.18\).pdf](http://ccrjustice.org/sites/default/files/assets/files/Hicksv.United%20States_13-004%20Decision_(2015.02.18).pdf)>.

⁶³⁴ Al Qosi was sentenced to 14 years, but his sentence was reduced to two years. He was released to Sudan in July 2012. The United States CMCR based its decision to deny his request for a new trial "principally (...) on the ground that the record contains no evidence that an attorney-client relationship exists between CAPT McCormick and Al Qosi. Without such a relationship, CAPT McCormick may not initiate litigation, file any pleading or seek any relief on behalf of Al Qosi". One should note, however, that Captain McCormick had been appointed by the military commissions' then-Chief Defense Counsel as al Qosi's appellate defence counsel, and that the 2014 decision of the CMCR also denied her application for funding to travel to Sudan to consult with Al Qosi, and allow him to make "an informed decision on whether he wanted her to represent him and whether she should challenge his military commission conviction". On appeal, the Court of Appeals for the District of Columbia Circuit also concluded that it lacked jurisdiction due to the lack of "evidence that al Qosi authorized Captain McCormick to pursue these

violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism and spying. He is also appealing his conviction.⁶³⁵ Noor Uthman Muhammed pled guilty in February 2011 to conspiracy and providing material support for terrorism,⁶³⁶ but the Convening Authority for the military commissions disapproved the findings and sentence in his case and dismissed the charges against him in January 2015.⁶³⁷ Majid Khan pled guilty in February 2012 to conspiracy, murder in violation of the law of war, attempted murder in violation of the law of war, providing material support for terrorism and spying.⁶³⁸ Finally, Ahmed Mohammed Ahmed Haza al Darbi pled guilty in February 2014 to charges that included attacking civilian objects, hazarding a vessel, terrorism, attempted hazarding a vessel and attempted terrorism.⁶³⁹

291. Seven detainees are currently subject to ongoing military commission proceedings. Khalid Shaikh Mohammad, Walid bin ‘Attash, Ramzi Bin al Shibh, Ammar al Baluchi and Mustafa Ahmed al Hawsawi have been jointly charged with conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft and terrorism in relation to their alleged roles in the 9/11 attack that killed 2,976 people.⁶⁴⁰ Abd Al-Rahim Al-Nashiri is charged with perfidy, murder in violation of the law of war, attempted murder in violation of the law of war,

petitions”. United States Military Commission, “Report of Result of Trial”, 11 August 2010; United States Court of Military Commission Review, *Ibrahim Ahmed Mahmoud al Qosi v. United States of America*, “Panel Designation”, 17 December 2013; United States Court of Military Commission Review, *United States of America v. Ibrahim Ahmed Mahmoud al Qosi*, 24 April 2014; United States Court of Appeals for the District of Columbia Circuit, In re: Ibrahim Ahmed Mahmoud Al Qosi, “Judgment”, 1 May 2015, <<https://www.justsecurity.org/wp-content/uploads/2015/05/al-Qosi.pdf>>.

⁶³⁵ Khadr’s pre-trial agreement provides for a maximum sentence of eight years’ confinement. He was transferred to Canada in September 2012 to serve out the remainder of his sentence, and was released on bail in May 2015. United States Military Commission, *United States of America v. Omar Ahmed Khadr*, PE001-A, “Stipulation of Fact”, 12 August 2010; “Canada: Ex-Guantanamo Child Soldier Freed”, Human Rights Watch website, 7 May 2015, <<http://www.hrw.org/news/2015/05/07/canada-ex-guantanamo-child-soldier-freed>>.

⁶³⁶ Muhammed was sentenced to 14 years’ confinement and was repatriated to Sudan in December 2013. United States Military Commission, “Report of Result of Trial”, 18 February 2011. See, also, Carol Rosenberg, “Convicted al Qaida operative released from Guantánamo, repatriated to Sudan in plea deal”, Miami Herald website, 10 July 2012, <<http://www.miamiherald.com/2012/07/10/2890308/convicted-al-qaida-operative-released.html>>.

⁶³⁷ “Subsequent to his commission proceedings, decisions by the D.C. Circuit Court of Appeals in separate commissions cases established that it was legal error to try the offense of providing material support for terrorism before a military commission. The decisions of the D.C. Circuit are binding on commissions cases and the convening authority’s action to disapprove the findings and sentence in Muhammed’s case is required in the interests of justice and under the rule of law”. “Findings and sentence disapproved in US v. Noor Uthman Muhammed”, United States Department of Defense website, 9 January 2015, <<http://www.defense.gov/News/News-Releases/News-Release-View/Article/605346>>.

⁶³⁸ In exchange for the promise of a reduced sentence, Khan agreed to co-operate with the prosecution. His sentencing will be delayed for four years to allow him time to co-operate. His sentence will be limited to no more than 19 years if he co-operates, and no more than 25 years if he does not. United States Military Commission, *United States v. Majid Shoukat Khan*, AE 013, “Appendix A to the Pre-Trial Agreement”, 29 February 2012. See, also, “Majid Shoukat Khan”, Human Rights Watch website, 25 October 2012, <<http://www.hrw.org/news/2012/10/25/majid-shoukat-khan>>.

⁶³⁹ Al Darbi will likely spend nine to 15 more years in confinement. At least three and a half more years will be spent in Guantánamo. His sentencing hearing will not be held until August 2017. United States Military Commission, *United States v. Ahmed Mohammed Ahmed Haza al Darbi*, AE 010, “Pre-Trial Agreement”, 20 February 2014; United States Military Commission, *United States v. al Darbi*, AE 011, “Appendix A to the Pre-Trial Agreement”, 20 December 2013. See, also, Charlie Savage, “Guantánamo Detainee Pleads Guilty in 2002 Attack on Tanker Off Yemen”, The New York Times website, 20 February 2014, <http://www.nytimes.com/2014/02/21/us/guantanamo-detainee-ahmed-muhammed-haza-al-darbi.html?_r=0>.

⁶⁴⁰ The charge sheet indicates that the accused are responsible for the deaths of 2, 976 persons listed in the annex to the charge sheet. This figure does not include the hijackers or persons who have subsequently died as a result of, for instance, dust inhalation at the site of the attack. United States Military Commission, “Charge Sheet: Mohammad *et al.*”, 5 May 2011.

terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects and hazarding a vessel in relation to an attempted attack on the U.S.S. *The Sullivans* in January 2000, an attack on the U.S.S. *Cole* in October 2000 and an attack on the *MV Limburg* in October 2002.⁶⁴¹ Abd al Hadi al-Iraqi is charged with denying quarter, attacking protected property, using treachery or perfidy and attempted use of treachery or perfidy in relation to a series of attacks in Afghanistan and Pakistan in 2003 and 2004.⁶⁴²

292. Part 2-I of this report addresses military commissions' jurisdiction in relation to the trial of civilians by military commissions and the principle of legality and to the right to equality before the law and courts, equal protection of the law and non-discrimination. Part 2-II focuses on fair trial guarantees in proceedings before the military commissions. Specifically, it covers the right to a public hearing before an independent and impartial tribunal established by law, the presumption of innocence, the right to a timely hearing, the right to legal counsel of one's choice, the right to adequate facilities for the preparation of a defence and the calling and examination of witnesses, the exclusion of unlawfully obtained evidence and plea agreements. Part 2-III discusses the death penalty in relation to fair trial standards.

I. JURISDICTION OF THE MILITARY COMMISSIONS

A. TRIAL OF CIVILIANS BY MILITARY COMMISSIONS AND THE PRINCIPLE OF LEGALITY

a. International Standards

293. Under international humanitarian law, all trials must be conducted by regularly constituted courts that afford all the essential judicial guarantees.⁶⁴³ Article 84 of the Third Geneva Convention stipulates that prisoners of war are to be "tried only by a military court", unless members of the armed forces of the Detaining Power are expressly permitted by law to be tried by civil courts for the particular offence charged.⁶⁴⁴ However, the Detaining Power may only sentence a prisoner of war "if the sentence has been pronounced by the same courts according to the same procedure" as members of the Detaining Power's armed

⁶⁴¹ At the time of this report, the military judge had dismissed the charges related to the *Limburg*, but this decision is under appeal. Pending appeal, the dismissal is automatically stayed, and the charges remain on the charge sheet. United States Military Commission, "Charge Sheet: Abd Al-Rahim Hussein Muhammed Al-Nashiri", 15 September 2011.

⁶⁴² United States Military Commission, "Charge Sheet: Abd al Hadi al-Iraqi", 5 February 2014.

⁶⁴³ See, for instance: Common Article 3: "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples"; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (hereinafter, "First Geneva Convention"), Art. 49,

<<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument>>; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereinafter, "Second Geneva Convention"), Art. 50, <<https://www.icrc.org/ihl/INTRO/370?OpenDocument>>; Third Geneva Convention, Arts. 84-88, 102-108, 129-130; Fourth Geneva Convention, Arts. 5, 66-75, 146-147; API, Art. 75(4): "[n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure"; "Customary International Humanitarian Law, Rule 100: Fair Trial Guarantees", ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule100>.

⁶⁴⁴ Third Geneva Convention, Art. 84.

forces.⁶⁴⁵ A prisoner of war may never be tried by any type of court that “does not offer the essential guarantees of independence and impartiality as generally recognized and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105”.⁶⁴⁶

294. As recognized by the Special Rapporteur on the independence of judges and lawyers, civilians charged with criminal offences are generally to be tried by civilian courts.⁶⁴⁷ International human rights law does not explicitly prohibit the trial of civilians by military courts. It does, however, require that these trials be fully compliant with Article 14 of the ICCPR and that the guarantees provided for in Article 14 are not “limited or modified because of the military or special character of the court”.⁶⁴⁸ Trials of civilians by military courts should only be conducted in exceptional cases and should be limited to trials that are “necessary and justified by objective and serious reasons” and where regular civilian courts are unable to conduct trials for the “specific class of individuals and offences”.⁶⁴⁹ The burden of proving the existence of such exceptional circumstances rests with the state in question, which must show that “regular civilian courts are unable to undertake the trials”, that other special or high-security civilian courts are inadequate, that the use of military courts is unavoidable and that the military courts guarantee the full protections of Article 14.⁶⁵⁰ Although military commissions can be used in exceptional cases, the Human Rights Committee has said that “the trial of civilians in military or special courts may raise serious problems, as far as the equitable, impartial and independent administration of justice is concerned”.⁶⁵¹ Furthermore, international humanitarian law provides that where a civilian is definitely suspected of or has engaged in hostile activities, the state must treat the individual with humanity and provide the individual with the “rights of fair and regular trial”.⁶⁵²

⁶⁴⁵ Third Geneva Convention, Art. 102.

⁶⁴⁶ Article 105 provides prisoners of war with the right to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his choice and other relevant rights when being tried. Third Geneva Convention, Arts. 84, 105.

⁶⁴⁷ The UN Special Rapporteur on the independence of judges and lawyers has said “a number of soft law instruments and the jurisprudence of international and regional mechanisms show that there is a strong trend against extending the criminal jurisdiction of military tribunals over civilians”. UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Report to the General Assembly, A/68/285, 7 August 2013, paras. 47-51, 89, 101-102, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/68/285>>. See, also UN Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, “Civil and political rights, including the question of independence of the judiciary, administration of justice, impunity - Issue of the administration of justice through military tribunals”, Report to the Commission on Human Rights, E/CN.4/2006/58, 13 January 2006 (hereinafter, “Decaux Principles”), Principle 5, <<http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/58>>: “[m]ilitary courts should, in principle, have no jurisdiction to try civilians”.

⁶⁴⁸ UN HRC, General Comment No. 32, “Article 14: Right to equality before courts and tribunals and to a fair trial”, CCPR/C/GC/32, 23 August 2007, para. 22.

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en>.

⁶⁴⁹ UN HRC, General Comment No. 32, *ibid.*, para. 22. See, also, UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, paras. 101-102.

⁶⁵⁰ UN HRC, *Salim Abbassi v. Algeria*, Communication No. 1172/2003, 21 June 2007, para. 8.7, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f89%2fd%2f1172%2f2003&Lang=en>. See, also, UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *ibid.*, para. 103.

⁶⁵¹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 22.

⁶⁵² Fourth Geneva Convention, Art. 5. See, also, Common Article 3.

295. The principle of legality requires that an individual cannot be found guilty of any criminal offence that “did not constitute a criminal offence, under national or international law, at the time when it was committed”.⁶⁵³ In cases where there has been a change in available sentencing powers, this prohibition of the retroactive application of criminal law forbids the imposition of a penalty in excess of the maximum permissible sentence at the time the offence was committed. The imposition of a lighter sentence will not violate the prohibition of retroactive offences.⁶⁵⁴ This prohibition is non-derogable.⁶⁵⁵
296. The principle of legality is not violated when the offence was already punishable under international law, such as international humanitarian law, at the time the conduct occurred even if it was not punishable under domestic law.⁶⁵⁶ For instance, war crimes, crimes against humanity and acts of torture are punishable under international law. Therefore, individuals may be prosecuted for these offences even where domestic law does not stipulate that these are criminal offences at the time the conduct occurred.⁶⁵⁷
297. The principle of legality also creates a duty to define all criminal offences and corresponding punishment clearly and precisely by law to avoid arbitrary application of the law.⁶⁵⁸ This requirement means that, at any given time, an individual must be able to know, or be able to find out, what the law is and be able to regulate his or her conduct accordingly.⁶⁵⁹ This requirement is not met if the individual could not reasonably have been aware that the act or omission was a criminal offence at the time of the conduct.⁶⁶⁰ The obligation to define crimes in precise unambiguous language implies that definitions of crimes must be strictly construed and that any ambiguity must be determined in favour of the accused.⁶⁶¹ If any necessary element of a criminal offence cannot be proven to have existed at the time the conduct occurred, then a conviction for the act or omission violates the principle of legality.⁶⁶²

⁶⁵³ ICCPR, Art. 15; ACHR, Art. 9; UDHR, Art. 11(2); OSCE Copenhagen Document, *op. cit.*, note 80, para. 5.18.

⁶⁵⁴ ICCPR, Art. 15; ACHR, Art. 9.

⁶⁵⁵ “No derogation from articles (...) 15 (...) may be made”. ICCPR, Art. 4(2); ACHR, Art. 27(2); UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 7.

⁶⁵⁶ ICCPR, Art. 15(2): “[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”.

⁶⁵⁷ International law refers to both international treaty law and customary international law. Nowak, *CCPR Commentary, op. cit.*, note 93, p. 360.

⁶⁵⁸ ICCPR, Art. 15; UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 7; Inter-American Court of Human Rights, *Castillo Petruzzi et al v. Peru*, 30 May 1999, para. 121, <http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf>; *Legal Digest of International Fair Trial Rights* (Warsaw: OSCE/ODIHR, 2012), pp. 186-189, <<http://www.osce.org/odihr/94214>>.

⁶⁵⁹ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, 5 December 2003, para. 93, <<http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>>; *Legal Digest of International Fair Trial Rights, ibid.*, p. 188.

⁶⁶⁰ ICTY, *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-T, 29 November 2002, para. 193, <<http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf>>.

⁶⁶¹ UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 7; ICTY, *Prosecutor v. Galić, op. cit.*, note 659, para. 93: “[t]he effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself”; Inter-American Court of Human Rights, *Petruzzi et al v. Peru, op. cit.*, note 658, para. 121.

⁶⁶² UN HRC, *David Michael Nicholas v. Australia*, Communication No. 1080/2002, 19 March 2004, para. 7.5, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2F80%2FD%2F1080%2F2002&Lang=en>.

298. International humanitarian law also specifically incorporates the principle of legality, including in the Third Geneva Convention, the Fourth Geneva Convention and API.⁶⁶³ Additionally, this prohibition is a norm of customary international humanitarian law.⁶⁶⁴
299. Recognized law of war offences are listed in several international treaties and statutes, including the Geneva Conventions and API,⁶⁶⁵ the International Criminal Court's (ICC) Rome Statute,⁶⁶⁶ and the statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).⁶⁶⁷ For instance, torture and ill-treatment, murder of protected persons, intentionally directing attacks against civilians, intentionally directing attacks against civilian objects, taking of hostages and pillaging are recognized war crimes.

b. Domestic Standards

300. In 1866, the United States Supreme Court held that military commissions should not be used to try civilians unconnected to military service in a territory that was not under martial law or military occupation when regular civilian courts “are open and their process unobstructed”.⁶⁶⁸ In the case of *Ex parte Quirin*, the United States Supreme Court recognized that Congress had authorized the establishment of military commissions to try enemy belligerents for violations of the law of war.⁶⁶⁹
301. The purpose of Guantánamo military commissions is to try only alien “unprivileged enemy belligerents” for law of war violations and for “other offenses triable by military commissions”, including aiding the enemy and spying.⁶⁷⁰ MCAs 2006 and 2009 list and define a number of offences that may be tried by military commissions, including conspiracy, providing material support for terrorism, solicitation and murder in the violation of war.⁶⁷¹ These offences must have been committed “in the context of and

⁶⁶³ Third Geneva Convention, Art. 99: “[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed”; Fourth Geneva Convention, Art. 65: “[t]he penal provisions enacted by the Occupying Power shall not come into force before they have been published (...). The effect of these penal provisions shall not be retroactive”; Art. 67: “The courts shall apply only those provisions of law which were applicable prior to the offence”; API, Art. 75(4)(c): “[n]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”

⁶⁶⁴ “Customary International Humanitarian Law, Rule 101: The Principle of Legality”, ICRC website, <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule101>.

⁶⁶⁵ First Geneva Convention, Art. 50; Second Geneva Convention, Art. 5; Third Geneva Convention, Art. 130; Fourth Geneva Convention, Art. 147; API, Art. 85.

⁶⁶⁶ Rome Statute, Art. 8.

⁶⁶⁷ Updated Statute of the ICTY, as amended in 7 July 2009, Arts. 2-3,

<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>; Statute of the ICTR, 8 November 1993, Art. 4, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx>>.

⁶⁶⁸ United States Supreme Court, *Ex Parte Milligan*, 1866, <<http://www.law.cornell.edu/supremecourt/text/71/2>>.

⁶⁶⁹ United States Supreme Court, *Ex Parte Quirin*, 31 July 1942, <https://www.law.cornell.edu/supremecourt/text/317/1#writing-USSC_CR_0317_0001_ZO>.

⁶⁷⁰ In addition to law of war violations and other offenses, the MCA 2009 also specifies that military commissions may also try cases for violations of 10 U.S.C. §§ 904, 906, which relate to spying and aiding the enemy. MCA 2009, §§ 948b(a), 948d. See, also, MCA 2006, § 948b(a).

⁶⁷¹ For instance, the MCA 2009 defines and lists 32 offences. The listed offences are: murder of protected persons, conspiracy, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or similar weapons, using protected persons as a shield, torture, cruel or inhuman treatment, intentionally causing serious

associated with hostilities”.⁶⁷² Both Acts specify that the military commissions have jurisdiction for offences committed before, on or after 11 September 2001.⁶⁷³ Additionally, these Acts stipulate that the provisions within them do not “establish new crimes that did not exist before the date[s]” of enactment.⁶⁷⁴

302. Under the MCA 2009, an alien “unprivileged enemy belligerent” is an individual who is not a US citizen and is not a privileged belligerent⁶⁷⁵ and who “(1) has engaged in hostilities⁶⁷⁶ against the United States or its coalition partners; (2) has purposefully and materially supported hostilities against the United States or its coalition partners; or (3) was a part of al Qaeda at the time of the alleged offense under this chapter.”⁶⁷⁷ The 2006 MCA used the term alien “unlawful enemy combatant”, which referred to an individual who (1) “engaged in hostilities or who purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant” or (2) an individual whom the CSRT or other “competent tribunal” determined was an unlawful enemy combatant.⁶⁷⁸
303. The *Ex Post Facto* Clause of the US Constitution provides that “no (...) ex post facto Law shall be passed”.⁶⁷⁹ Although a court has not determined that this constitutional provision is applicable to Guantánamo detainees,⁶⁸⁰ the US government’s position is that the *Ex Post Facto* Clause does extend to them.⁶⁸¹ The US Constitution also requires that penal statutes must explicitly define criminal offences so as to inform an average individual what conduct is prohibited and is subject to penalties.⁶⁸²

bodily injury, mutilating or maiming, murder in violation of the law of war, destruction of property in violation of the law of war, using treachery or perfidy, improperly using a flag of truce, improperly using a distinctive emblem, intentionally mistreating a dead body, rape, sexual assault or abuse, hijacking or hazarding a vessel or aircraft, terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, attempts to commit any of these offences, solicitation, contempt, perjury and obstruction of justice. MCA 2009, § 950t; MCA 2006, § 950v.

⁶⁷² MCA 2009, § 950p. See, also, MCA 2006, § 948b(a).

⁶⁷³ MCA 2009, § 948d; MCA 2006, § 948d.

⁶⁷⁴ MCA 2009, § 950p(d); MCA 2006, § 950p.

⁶⁷⁵ A privileged belligerent is an “individual belonging to one of the eight categories enumerated in Article 4” of the Third Geneva Convention. MCA 2009, §§ 948a(6), 948c; RMC, Rule 202: “[m]ilitary commissions (...) shall not have jurisdiction over privileged belligerents”.

⁶⁷⁶ Hostilities are defined as “any conflict subject to the laws of war”. MCA 2009, § 948a(9).

⁶⁷⁷ MCA 2009, § 948a(7).

⁶⁷⁸ MCA 2006, § 948a(1).

⁶⁷⁹ US Constitution, Art. 1, § 9.

⁶⁸⁰ In this case, the US government conceded that the *Ex Post Facto* Clause did apply to detainees. The court assumed that the clause applied for the purpose of the case without definitively deciding its applicability. Five of the seven judges on the *en banc* court appeared to accept the applicability of the *Ex Post Facto* Clause to Guantánamo detainees (according to Judge Kavanaugh) on the basis of the United States Supreme Court ruling in *Boumediene v. Bush*. Two of the judges (Judge Henderson and Judge Brown) argued in separate opinions that the *Ex Post Facto* Clause does not apply to Guantánamo detainees. United States Court of Appeals for the District of Columbia Circuit, *Ali Hamza Ahmad Suliman al Bahlul v. United States of America (en banc)*, Case No. 11-1324, 14 July 2014, <http://justsecurity.org/wp-content/uploads/2014/07/https___ecf.cadc_uscourts.pdf>.

⁶⁸¹ The US government confirmed that the US position is that the *Ex Post Facto* Clause is applicable to Guantánamo detainees. ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193.

⁶⁸² This is the Void for Vagueness Doctrine which stems from the due process clauses of the Fifth and Fourteenth Amendments. United States Supreme Court, *Connally v. General Construction Co.*, Case No. 314, 4 January 1926, <<https://supreme.justia.com/cases/federal/us/269/385/case.html>>: “that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties (...) [a legislative provision] so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”

c. Findings and Analysis

304. ODIHR has not undertaken a comprehensive analysis of whether each detainee subject to trial by a military commission is a civilian. The Guantánamo military commissions have been given jurisdiction over “unlawful enemy combatants” in the MCA 2006 and over “unprivileged enemy belligerents” in the MCA 2009. As discussed in the introduction of this report, these terms do not encompass privileged combatants and can be interpreted to encompass individuals who have never committed a belligerent act or who have never directly supported hostilities against the United States. Hence, these Acts grant jurisdiction over civilians, including civilians who did not directly participate in hostilities.⁶⁸³
305. Trials of civilians by military commissions should be exceptional, such as where they are “necessary and justified by objective and serious reasons”.⁶⁸⁴ In May 2009, President Obama said that in comparison to federal courts, military commissions: (1) are “an appropriate venue for trying detainees for violations of the laws of war”; (2) “allow for the protection of sensitive sources and methods of intelligence-gathering”; (3) “allow for the safety and security of participants”; and (4) allow “for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts”.⁶⁸⁵ ODIHR considers that each of these justifications run contrary to positions and practices that point to the ability of federal courts to try Guantánamo detainees.
306. First, as to the assertion that military commissions are the appropriate venue for trying alleged violations of the law of war, it is notable that ordinary civilian courts have been treated as appropriate venues for such offences. President Obama and the United States Department of Justice had decided in 2009 that the 9/11 suspects would be tried in federal courts in Manhattan, but pressure from opponents resulted in a reversal of this decision in favour of trials by military commissions.⁶⁸⁶ Additionally, the prosecution of those responsible for the bombings of the US Embassies in Kenya and Tanzania in 1998 took place in federal courts and some individuals involved in the *U.S.S. Cole* attack (with which some of Al-Nashiri’s charges are associated) were indicted by a Grand Jury in New

⁶⁸³ See the introduction of this report for additional information on this issue. See, also, United States District Court for the District of Columbia, *In re Guantánamo Detainee Cases*, Nos. CIV.A.02–CV–0299CKK, *op. cit.*, note 51; MCA 2006, § 948a(1)(ii); Wolfowitz, “Memorandum: Order Establishing Combatant Status Review Tribunal”, *op. cit.*, note 49; United States Supreme Court, *Hamdi v. Rumsfeld*, *op. cit.*, note 47; MCA 2009, § 938(7); Olson, “Guantánamo Habeas Review”, *op. cit.*, note 54, pp. 19-21; Ryan Goodman, “The Detention of Civilians in Armed Conflict”, *The American Journal of International Law*, Vol. 103, No. 48, 2009, pp. 61-63, <<http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanCivilianDetentionAJIL.pdf>>; Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *op. cit.*, note 45, pp. 83-84.

⁶⁸⁴ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 22.

⁶⁸⁵ United States President Barack Obama, “Remarks by the President on National Security”, The White House website, 21 May 2009, <<http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>>.

⁶⁸⁶ United States Attorney General Eric Holder, “Attorney General Announced Forum Decisions for Guantanamo Detainees”, United States Department of Justice website, 13 November 2009, <<http://www.justice.gov/opa/speech/attorney-general-announces-forum-decisions-guantanamo-detainees>>; Charlie Savage, “Accused 9/11 Mastermind to Face Civilian Trial in N.Y.”, The New York Times website, 13 November 2009, <http://www.nytimes.com/2009/11/14/us/14terror.html?pagewanted=all&_r=0>; Kenneth R. Bazinet, Adam Lisberg and Samuel Goldsmith, “White House Asks Justice Department to Look for other places to hold 9/11 Terror Trial”, New York Daily News website, 28 January 2010, <<http://www.nydailynews.com/news/crime/white-house-asks-justice-department-places-hold-9-11-terror-trial-article-1.457546>>.

York.⁶⁸⁷ Furthermore, some of the offences that detainees have been charged with, as discussed in more detail below, are not confined to alleged violations of the laws of war. For instance, despite being the most common charge against detainees, the offence of providing material support for terrorism is not a violation of the laws of war.⁶⁸⁸ Providing material support to terrorist groups and acts, however, are federal offences that can be charged in federal courts.⁶⁸⁹ The above suggests that federal courts may in fact be a more appropriate venue for trying detainees.

307. Second, and despite President Obama's reliance on the fact that military commissions enable the "protection of sensitive sources and methods of intelligence gathering", it is equally true that federal courts consistently handle cases involving classified and sensitive information. For instance, Guantánamo detainees' *habeas corpus* cases in federal courts routinely involve such information.⁶⁹⁰ In federal prosecutions of suspected terrorists, including the federal trial of former Guantánamo detainee Ahmed Khalfan Ghailani, federal courts have issued protective orders to help prevent the disclosure of both "particularly sensitive discovery materials" and classified information.⁶⁹¹ Furthermore, the Classified Information Procedures Act (CIPA) is used by federal courts to protect classified evidence in a way that balances the defendant's rights with the US government's national security needs.⁶⁹² The military commissions' Chief Prosecutor, Brigadier General Mark Martins, has stated that CIPA serves as the basis for the military commissions statute and rules and that the rules "incorporate CIPA and codify federal case law regarding CIPA

⁶⁸⁷ United States District Court Southern District of New York, *United States v. Usama Bin Laden et al.*, "Indictment", <<https://s3.amazonaws.com/s3.documentcloud.org/documents/802160/indict.pdf>>; United States District Court Southern District of New York, *United States v. Jamal Ahmed Mohammed Ali al Badwi and Fahd al Quso*, "Indictment", <<http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/cole/usalbadawi051503ind.pdf>>. See, also, Oriana Zill, "The U.S. Embassy Bombings Trial – A Summary", Frontline, <<http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>>; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 21.

⁶⁸⁸ See, for instance, United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America*, (*en banc*), 14 July 2014, *op. cit.*, note 680: "The Government concedes that material support is not an international law-of-war offense (...) and we so held in *Hamdan II*", "The government has repeatedly conceded that the three offenses of which Bahlul was convicted [namely material support for terrorism, solicitation and conspiracy] are not, and were not at the time of Bahlul's conduct, law-of-war offenses under international law". See, also, United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America*, 12 June 2015, *op. cit.*, note 632: "In light of the international community's explicit and repeated rejection of conspiracy as a law of war offense".

⁶⁸⁹ 18 U.S.C. §§ 2339A, 2339B, 2339C. See, also, UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 21: "the Government's justification for military commissions is incorrect as a matter of fact because the nexus between the events of 11 September and United States citizens would allow ordinary courts to try offences such as conspiracy and terrorism". ODIHR notes that before October 2001, 18 U.S.C. § 2339A, which authorizes federal courts to prosecute individuals for providing material support to terrorists, may not have applied to conduct committed outside the United States. Nonetheless, if the punishable conduct did constitute a war crime, ordinary courts-martial would have presumably been available.

⁶⁹⁰ See, for example, United States District Court for the District of Columbia, *Boumediene v. Bush*, 20 November 2008, *op. cit.*, note 203, pp. 9-10: "[t]o support its claim (...) the Government relies exclusively on information contained in a classified document from an unnamed source (...) Unfortunately, due to the classified nature of the Government's evidence, I cannot be more specific about the deficiencies of the Government's case at this time"; United States District Court for the District of Columbia, *Dhiab v. Obama*, Case No. 05-1457, 3 October 2014, <<http://www.lawfareblog.com/wp-content/uploads/2014/10/10-3-2014-Dhiab-order.pdf>>. In *Dhiab v. Obama*, there has been extensive litigation around the public release of the redacted video footage of Dhiab being forcibly extracted of his cell and force-fed. Both the government and Dhiab's lawyers are to privately review the tapes prior to their public disclosure. The tapes have not been released publically at the time of this report.

⁶⁹¹ "National Security Prosecutions: Protective Orders", Federal Judicial Center, February 2013, pp. 46-72, <[http://www.fjc.gov/public/pdf.nsf/lookup/trpord02.pdf/\\$file/trpord02.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/trpord02.pdf/$file/trpord02.pdf)>.

⁶⁹² "Synopsis of Classified Information Procedures Act (CIPA)", United States Department of Justice website, <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm>.

that has been decided by [...] Article III courts since 1980”.⁶⁹³ Accordingly, federal courts appear to be able to protect classified information in a similar way to the military commissions as their rules and practices have been utilized since 1980 and are the basis for the military commissions’ rules.

308. Third, as to the ability of military commissions to provide safety and security for participants, it should be noted that over 400 cases related to terrorism have been held in federal courts since 9/11. None of these trials have resulted in a retaliatory attack.⁶⁹⁴ While it may be true that the safety and security of the public is better protected if the trials are held at Guantánamo rather than in a city located in the United States, this is an issue of geography rather than an issue concerning the type of court to use.⁶⁹⁵
309. Fourth, although the applicable federal rules of evidence were not specifically created to address situations that arise during armed conflicts, the US courts-martial system applies more stringent rules than military commissions.⁶⁹⁶ One concern⁶⁹⁷ raised by members of Congress regarding the admissibility of evidence in federal courts is the requirement that a Miranda warning be issued before interrogations.⁶⁹⁸ US officials also argue that giving Miranda warnings to soldiers captured on the battlefield is both impractical and

⁶⁹³ The Chief Prosecutor of the Military Commissions has also said that the procedure for Rule 505(h) hearings, which is one method used to handle classified information, “mirror[s] those used in federal civilian prosecutions under (...) CIPA, as interpreted by Article III courts”. Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 27 January 2013, p. 4, <<http://s3.documentcloud.org/documents/562514/27-jan-2013-statement-of-the-chief-prosecutor.pdf>>; Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 15 December 2013, p. 3, <<http://www.lawfareblog.com/wp-content/uploads/2013/12/15-December-2013-Statement-of-the-Chief-Prosecutor.pdf>>.

⁶⁹⁴ “Terrorist Trial Report Card: September 11, 2001 - September 11, 2011”, Center on Law and Security, New York University School of Law, 2011, p. 7, <<http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf>>; “Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System”, United States Department of Justice website, 9 June 2009, <<http://www.justice.gov/opa/pr/fact-sheet-prosecuting-and-detaining-terror-suspects-us-criminal-justice-system>>; “Myth v. Fact: Trying Terror Suspects in Federal Courts”, Human Rights First website, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Federal_Court_Myth_vs_Fact.pdf>; United States Attorney General Eric Holder, “Attorney General Eric Holder Speaks at the American Constitution Society Convention”, United States Department of Justice website, 16 June 2011, <<http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-american-constitution-society-convention>>: “Since 9/11, hundreds of individuals have been convicted of terrorism or terrorism-related offenses in civilian courts. (...) Not one of the judicial districts involved has suffered retaliatory attacks.”

⁶⁹⁵ Cole, “Military Commissions and the Paradigm of Prevention”, *op. cit.*, note 258, p. 104.

⁶⁹⁶ The MCA 2009, for instance, specifically restricts the scope of the privilege against self-incrimination, by excluding UCMJ provisions relating to compulsory self-incrimination in military commission proceedings. Please refer to other sections of Part 2 for additional examples of differences between some of the rules applicable to courts-martials and military commissions. MCA 2009, § 948b(d).

⁶⁹⁷ See, for instance, United States Senator John McCain, “Statement by Senator McCain on the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010”, John McCain website, 4 March 2010, <<http://www.mccain.senate.gov/public/index.cfm/floor-statements?ID=2af60f3a-05dc-cdf6-7dc9-6501a995c17c>>; “Committee Reports, 113th Congress (2013-2014), Senate Report 113-176, Additional Views of Messrs. Inhofe, Sessions, Chambliss, Wicker, Ms. Ayotte, and Mr. Vitter”, The Library of Congress website, 2014, <http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp113&sid=cp113wLXCN&refer=&r_n=sr176.113&item=&&sel=TOC_1707563&>; United States Senator Jeff Sessions, “Sessions Speaks on Military Commissions”, Senator Jeff Sessions website, 5 March 2010, <<http://www.sessions.senate.gov/public/index.cfm/floor-statements?ID=3E74EA2E-B90C-5411-5076-C1A2001EB298>>.

⁶⁹⁸ A Miranda warning requires that “the person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him”. United States Supreme Court, *Miranda v. Arizona*, Case No. 759, 13 June 1966, <<https://supreme.justia.com/cases/federal/us/384/436/case.html>>.

dangerous.⁶⁹⁹ The rules governing military commissions do not contain this requirement, but the rules applicable to courts-martial contain a requirement whereby confessions may not be admitted if they are compelled or made without a warning that is substantially similar to a Miranda warning.⁷⁰⁰ As noted by some experts, courts-martial have dealt with situations arising on the battlefield for years and apply “largely the same evidentiary rules as civilian criminal trials”.⁷⁰¹ ODIHR notes that there are exceptions to the Miranda rule and other evidence rules in the federal justice system, such as where there are “overriding considerations of public safety”.⁷⁰² On this point, US officials claim that the public safety exception, which has parallels on the battlefield, would not be sufficient relief.⁷⁰³ This argument however does not suffice to justify the use of military commissions in their current iteration. As discussed in the introduction of this report, ODIHR disagrees with the notion of a war without geographical boundaries, effectively creating a worldwide battlefield.⁷⁰⁴ Instead, any relevant battlefield would be limited to armed conflicts that are within the meaning of international humanitarian law and would not be relevant to detainees that were unconnected to any armed conflict.⁷⁰⁵ The fourth rationale presented to justify the use of military courts is therefore entirely inapplicable for these civilians.

310. Based on all these factors, it does not appear that the US government’s rationale for trying civilians by military commissions, as explained by President Obama in May 2009, is exceptional, nor is it “necessary and justified by objective and serious reasons”.

311. International humanitarian law is only applicable in times of armed conflict. Hence, violations of the laws of war can only occur during armed conflicts.⁷⁰⁶ Some detainees, such as Al-Nashiri, have nevertheless been charged with violations of the laws of war for conduct that likely occurred outside of any armed conflict. Two problems arise in this

⁶⁹⁹ US comments to the draft report.

⁷⁰⁰ UCMJ, Art. 31; Military Rules of Evidence, 2012, Rule 305, <http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf>.

⁷⁰¹ Cole, “Military Commissions and the Paradigm of Prevention”, *op. cit.*, note 258, p. 104.

⁷⁰² The courts could also create new exceptions to the Miranda warning requirement depending on the circumstances. The United States Supreme Court has said that “[p]rocedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost (...). [T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination. We decline to place officers (...) in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them”. Accordingly, other exceptions to rules affecting the admissibility of evidence are also available, such as where evidence is obtained from unreasonable searches and seizures, when US officials’ actions are conducted outside the United States. These exceptions generate further questions on the need for military commissions based on presentation of evidence obtained on the battlefield. United States Supreme Court, *New York v. Benjamin Quarles*, Case No. 82-1213, 12 June 1984,

<http://scholar.google.pl/scholar_case?case=13717772316457971707&hl=en&as_sdt=6&as_vis=1&oi=scholar&sa=X&ei=esPcVOT7LIT9UKHbgLgE&ved=0CCkQgAMoADAA>; United States Supreme Court, *United States v. Verdugo-Urquidez*, Case No. 88-1353, 28 February 1990, <<https://supreme.justia.com/cases/federal/us/494/259/case.html>>.

⁷⁰³ US comments to the draft report.

⁷⁰⁴ See the introduction and Part 1-A of this report for additional information.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ “Customary International Humanitarian Law, Rule 156: Definition of War Crimes”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156#Fn_21_1>; “Customary International Humanitarian Law, Rule 3”, ICRC website, *op. cit.*, note 44. See also, United States Supreme Court, *Hamdan v. Rumsfeld*, *op. cit.*, note 11; MCA 2009, § 950p(c).

context: (a) detainees can be identified as civilians; and (b) a number of individuals have not been tried with pre-existing offences under international or national law, in violation of the principle of legality.

312. Al-Nashiri is being tried by a military commission for offences which relate to the attack on the *U.S.S. Cole* in the Yemeni port of Aden in October 2000, the attempted attack on the *U.S.S. The Sullivans* in Aden in January 2000, as well as the attack on the *MV Limburg* off the coast of Al Mukallah, Yemen, in October 2002.
313. The attack on the *U.S.S. Cole* and attempted attack on the *U.S.S. The Sullivans* occurred in 2000. The United States posits that the existence of hostilities at the time of the alleged conduct is a question of fact to be decided by the jury at Al-Nashiri's trial.⁷⁰⁷ Yet, ODIHR notes the widely-accepted view among the international community that the international armed conflict in Afghanistan began in 2001, that is after these attacks.⁷⁰⁸ Furthermore, ODIHR considers that the "global war against terrorism" does not extend the application of international humanitarian law to all events included in it. While the determination of the existence of an armed conflict depends upon an assessment of all the circumstances in the case, it is nevertheless telling that the *U.S.S. Cole* attack was never treated as an act of war at the time. Instead, the United States President at the time, Bill Clinton, specifically said that the tragic loss of life "reminds us that even when America is not at war, the men and women of our military still risk their lives for peace".⁷⁰⁹
314. The attack of the *MV Limburg* occurred in October 2002 that is after the start of the non-international armed conflict in Afghanistan. This attack, allegedly carried out by a Saudi citizen, took place in Yemeni waters against a French flagged oil tanker carrying Iranian oil under a Malaysian contract and resulted in the death of a Bulgarian national. While it undoubtedly violated a number of laws, one can reasonably question whether this attack actually took place as part of an armed conflict within the meaning of international humanitarian law and, more specifically, as part of an armed conflict involving the United States. In fact, several interlocutors interviewed by ODIHR argued that, at the time, France did not consider the event as part of an armed conflict with al Qaeda and associated forces.⁷¹⁰ The US government, however, maintains that the United States was engaged in hostilities with al Qaeda, the Taliban and associated forces and that the attack was "part of

⁷⁰⁷ United States Military Commission, *United States of America v. Al-Nashiri*, AE 104, "Government Response to Defense Motion to Dismiss Because the Convening Authority Exceeded his Power in Referring this Case to a Military Commission", 13 September 2012, pp. 6-8. See, also, United States Court of Military Commission Review, *United States of America v. Al-Nashiri*, Case No. 14-001, "Brief on behalf of Appellant", 29 September 2014, p. 11, 23, (in relation to the *MV Limburg* charges).

⁷⁰⁸ See the introduction of this report for additional information.

⁷⁰⁹ United States President William J. Clinton, "Remarks at the Memorial Service for Crewmembers of the *U.S.S. Cole* in Norfolk Virginia", United States Government Printing Office website, 18 October 2000, <<http://www.gpo.gov/fdsys/pkg/PPP-2000-book3/html/PPP-2000-book3-doc-pg2216.htm>>; David Glazier, "Destined for an Epic Fail: The Problematic Guantánamo Military Commissions", Legal Studies Paper No. 2014-12, Loyola Law School, 31 March 2014, pp. 955-956, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419656>; ODIHR interview with Richard Kammen, *op. cit.*, note 614: Kammen said that the charges related to the *U.S.S. Cole* are very troubling considering that after the *U.S.S. Cole* bombing the President said it was an attack in times of peace. ODIHR interview with Human Rights First, 25 February 2014: representatives expressed the view that the armed conflict had not started at the time of the *U.S.S. Cole* attack.

⁷¹⁰ ODIHR interview with Richard Kammen, *ibid.*: Kammen said that it certainly seemed as though France did not perceive that they were at war. They saw the attack as a terrorist attack for a different purpose. ODIHR interview with Human Rights First, *ibid.*: a representative said that even with the *Limburg* bombing, there was no allegation that the United States was involved at all, France does not see it as part of an armed conflict with al Qaeda and associated forces.

a broader al Qaeda plot to conduct terrorist attacks against the United States and its coalition partners”, a fact that it intends to demonstrate at trial.⁷¹¹ At the time of writing, the military commission had dismissed the charges against Al-Nashiri relating to the *MV Limburg* because the government “failed (...) to offer any documentary or testimonial evidence into the record to factually support their assertion of jurisdiction as to the charges and specification involving the *MV Limburg*”.⁷¹² Pending the US government’s appeal of this decision, the dismissal has been stayed, and the charges remain on the charge sheet.

315. Given the likelihood that the attacks on the *U.S.S. Cole* and the *U.S.S. The Sullivans* occurred outside the context of any armed conflict, the charges associated with these attacks present a number of fair trial issues for Al-Nashiri’s trial by a military commission. First, Al-Nashiri could not have been classified as a combatant or even a civilian directly participating in hostilities for these acts, because these terms are not applicable outside an armed conflict. In this regard, ODIHR reiterates that the trial of civilians before military commissions raises concerns regarding the “equitable, impartial and independent administration of justice”.⁷¹³ Second, because international humanitarian law was not applicable to these specific events, Al-Nashiri could not have violated the laws of war. Hence, in order to comply with the principle of legality, the offences with which he is charged in relation to the attacks on the *U.S.S. Cole* and the *U.S.S. The Sullivans* must have been established offences that were already precisely defined by domestic law at the time the conduct occurred. The first MCA, however, was only enacted in 2006, so its offences could not have been applicable to the attacks and could thereby not serve as a basis for Al-Nashiri’s prosecution. Similarly, the MCA applicable to his current case was only created in 2009 and specifies that offences must be “committed in the context of and associated with hostilities”, whereas the attacks appear to have occurred during peacetime.⁷¹⁴ Thus, it does not appear that either domestic or international law was applicable to the offences that Al-Nashiri has been charged with in relation to the attacks on the *U.S.S. Cole* and the *U.S.S. The Sullivans*. As ODIHR believes that the *MV Limburg* attack did not take place in the context of an armed conflict involving the United States, a similar reasoning may be applied to the charges stemming from this specific attack. Even assuming that the *MV Limburg* took place in the context of such armed conflict, the military commission jurisdiction would not extend over acts related to the *U.S.S. Cole* and the *U.S.S. The Sullivans* attacks and allegedly committed by Al-Nashiri, as a civilian.

316. Under international humanitarian law, civilians that directly participate in hostilities may, unlike combatants,⁷¹⁵ be prosecuted under domestic law for their mere participation in hostilities. For instance, a civilian directly participating in hostilities may be prosecuted for the domestic offences of murder or attempted murder. These offences, however, are not

⁷¹¹ United States Court of Military Commission Review, *United States of America v. Al-Nashiri*, Case No. 14-001, “Brief on behalf of Appellant”, 29 September 2014, *op. cit.*, note 707, pp. 6, 11, 23

⁷¹² United States Military Commission, *United States of America v. Al-Nashiri*, AE 168G/AE 241C, “Order – Defense Motion to Dismiss Charges VII-IX for Lack of Jurisdiction under International Law”, 11 August 2014, p. 5, also stating that “[t]he Commission need not reach any conclusions of law based on both parties’ legal arguments”.

⁷¹³ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 22.

⁷¹⁴ MCA 2009, § 950p.

⁷¹⁵ Combatants are entitled to the combatant’s privilege which provides them with the “right” to participate directly in hostilities and are immune from criminal prosecution for belligerent acts which do not violate international humanitarian law. Upon capture, a combatant is entitled to prisoner of war status. API, Arts. 43(2), 44(1); Third Geneva Convention, Art. 4.

per se violations of the law of war.⁷¹⁶ Khadr was charged and pled guilty to several offences, including murder in violation of the law of war. The US government said that Khadr, who was 15 years old at the time, intentionally threw a grenade that caused the death of a US Special Forces soldier during a firefight in Afghanistan on 27 July 2002.⁷¹⁷ Intentionally targeting a soldier of an opposing force,⁷¹⁸ however, is not in itself a violation of the law of war. Although the detention and trial of children is beyond the scope of this report, ODIHR also notes that children are to be provided with special protection and afforded procedures that take into consideration “their age and the desirability of promoting their rehabilitation”.⁷¹⁹ In particular, children are to be “tried as soon as possible in a fair hearing” and detention before and during trial is to be “avoided to the extent possible”.⁷²⁰

317. Additionally, the MCAs provide military commissions with jurisdiction over several offences that are not among or not defined in accordance with recognized law of war offences, such as providing material support for terrorism, spying, solicitation and conspiracy.⁷²¹ The US government recently conceded that conspiracy,⁷²² solicitation and providing material support for terrorism are not violations of international humanitarian law.⁷²³ However, the US government has argued that these offences exist as part of the domestic common law of war⁷²⁴ that was in effect at the time the alleged conduct occurred.⁷²⁵ ODIHR is concerned that offences defined in the MCAs, which are not part of

⁷¹⁶ Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *op. cit.*, note 45, pp. 83-84.

⁷¹⁷ United States Military Commission, *United States of America, v. Khadr*, “Stipulation of Fact”, 13 October 2010, paras. 35, 42.

⁷¹⁸ ICTY, *Prosecutor v. Miroslav Kvocka et al.*, Case No. IT-98-30/1-T, 2 November 2001, para. 124,

<<http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>>: “An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons ‘taking no active part in the hostilities’”; Rome Statute, Art. 8: in non-international armed conflict, a combatant adversary must be killed or wounded treacherously to be considered a war crime.

⁷¹⁹ ICCPR, Arts. 10, 14(4).

⁷²⁰ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 42.

⁷²¹ “[O]ffences listed in Section 950v (24)-(28) of the Act (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war”. The offences in § 950v of the MCA 2006 cited by the Special Rapporteur are now defined in § 950t (24)-(27) and (29) of the MCA 2009. UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 20. See, also, United States Assistant Attorney General David Kris, “Statement of David Kris, Assistant Attorney General, Before the Committee on Armed Services, United States Senate”, United States Department of Justice website, 7 July 2009, <<http://www.justice.gov/sites/default/files/nsd/legacy/2014/07/23/AAG-Kris-testimony-7-7-09.pdf>>: “there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war.”

⁷²² During ODIHR meetings with US government representatives, it was noted that even though the conspiracy conviction was not vacated in *al Bahlul v. United States of America (en banc)*, it did not mean that conspiracy was a healthy charge for pre-2006 conduct. ODIHR meeting with the Department of Defense Office of the Chief Prosecutor, 5 September 2014.

⁷²³ United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America (en banc)*, 14 July 2014, *op. cit.*, note 680: “The government has repeatedly conceded that the three offenses of which Bahlul was convicted [namely material support for terrorism, solicitation and conspiracy] are not, and were not at the time of Bahlul’s conduct, law-of-war offenses under international law”.

⁷²⁴ US government representatives explained that the domestic common law of war includes crimes like conspiracy which have been tried before military commissions. They said that Congress can create military commissions to try offences triable by military commissions, including conspiracy, material support for terrorism and solicitation. ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193.

⁷²⁵ The very existence of a domestic common law of war has been strongly challenged based upon, *inter alia*: (1) the contention that the concept was reportedly never raised until *al Bahlul* and related cases; (2) the concept was omitted from United States Department of Justice’s memo on the use of drones and (3) prior to the enactment of the MCA 2006 no court had upheld the power of a military commission to try an offence on the grounds that it violated domestic – but not international – laws of war. Marty Lederman and Steve Vladeck, “*al Bahlul* and the Future of ‘Domestic Law-of-War Offenses’ in Military Commissions”, Just Security website, 16 July 2014, <<http://justsecurity.org/12948/al-bahlul-2/>>; United States Court of Appeals for the District

the international laws of war, may be applied to cover any hostile act committed by a detainee because of the US government's position that detainees do not qualify as combatants in accordance with international humanitarian law. Reliance on a domestic common law of war undermines the very concept of international humanitarian law and the principles enshrined in the Geneva Conventions. Convicting individuals for offences that are not defined in accordance with existing crimes at the time of the conduct or that extend liability beyond the specified conduct violates the principle of legality, which is protected by both international humanitarian and human rights laws.⁷²⁶

318. As the MCAs have failed to restrict their jurisdiction to offences recognized under international humanitarian law, some detainees have been tried and convicted of such offences. In *al Bahlul v. United States of America*, an *en banc* decision by the United States Court of Appeals for the District of Columbia Circuit unanimously determined that it was a plain error⁷²⁷ to convict al Bahlul of providing material support for terrorism and of solicitation. The Court found that military commissions could not try these offences because, at the time of al Bahlul's conduct, they were neither violation of the laws of war nor established offences under domestic law as the relevant conduct occurred prior to the enactment of the MCA 2006.⁷²⁸ As a result, convicting him of these offences was a plain violation of the *Ex Post Facto* Clause.⁷²⁹ Furthermore, in June 2015 a panel of the same court vacated al Bahlul's remaining conviction for conspiracy after finding that the conviction violated the separation of powers enshrined in the US Constitution. Stating that inchoate conspiracy is not a crime under international humanitarian law, the Court concluded that Congress exceeded its authority by subjecting domestic offenses such as

of Columbia Circuit, *al Bahlul v. United States of America*, "Brief of the National Institute of Military Justice as *Amicus Curiae* in Support of the Petitioner", 18 August 2014, <<http://www.lawfareblog.com/wp-content/uploads/2014/08/al-Bahlul-Panel-Remand-Amicus.pdf>>; Wells Bennett, "Defense: OLC Memo Supports Invalidation of Omar Khadr's Conviction", Lawfare website, 2 July 2014, <<http://www.lawfareblog.com/2014/07/defense-olc-memo-supports-invalidation-of-omar-khadrs-conviction/>>; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, 28 January 2014: it was explained that the domestic law of war concept will not stand before federal courts. In relation to the applicability of international law, defence counsel stressed that if the crimes their clients are accused of are war crimes, then international law must apply.

⁷²⁶ See, for instance, ICCPR, Art. 15; UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 7; UN HRC, *David Michael Nicholas v. Australia*, *op. cit.*, note 662, para. 7.5; Third Geneva Convention, Art. 99, Fourth Geneva Convention, Arts. 65, 67; API, Art. 75(4)(c); "Customary International Humanitarian Law, Rule 101", ICRC website, *op. cit.*, note 664.

⁷²⁷ The majority opinion in *al Bahlul v. United States of America (en banc)* employs the "plain error" standard of review. The "plain error standard of review" stems from the rule that generally bars the petitioner from raising an argument that was not preserved in the lower court trial, unless a plain error occurred or exceptional circumstances exist. To preserve an error, a timely objection must be made during the lower court proceedings. However, in rare cases, an appellate court can take notice and correct a plain error. To constitute a plain error, and for the appellate court to vacate the lower court's holding, four elements must be present. A plain error occurs when there is (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America (en banc)*, 14 July 2014, *op. cit.*, note 680.

⁷²⁸ This case referred to both international humanitarian law and the concept of US common law of war. ODIHR does not support the existence of the US common law of war.

⁷²⁹ As a result of this decision, the convictions for providing material support for terrorism and solicitation were vacated in July 2014. The Court also determined that the conviction for conspiracy was not a plain error. The case was remanded for further proceedings on remaining issues. In June 2015, the conspiracy conviction of al Bahlul was vacated by a panel of the Court of Appeals for the District of Columbia Circuit. Following the June 2015 ruling, the United States petitioned for a rehearing *en banc* of the decision. United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America (en banc)*, 14 July 2014, *op. cit.*, note 680; United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America*, 12 June 2015, *op. cit.*, note 632; United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America*, "Petition of the United States for Rehearing *en Banc*", 27 July 2015, *op. cit.*, note 632.

conspiracy to the jurisdiction of the Guantánamo military commissions.⁷³⁰ As noted by one of the judges in his concurrence, “as a result of [this] decision, Congress will be unable to vest military commissions with jurisdiction over crimes that do not violate the international law of war”.⁷³¹

319. Despite the fact that the charge of providing material support for terrorism violates the prohibition of retroactive offences, seven detainees have either agreed to plead guilty to, or been convicted by a military commission of, providing material support for terrorism.⁷³² These convictions are not only violations of the *Ex Post Facto* Clause of the US Constitution, as established in al Bahlul’s case, but they also constitute violations of international standards regarding the principle of legality.

d. Recommendations

- To disestablish the Guantánamo military commissions;
- To ensure that Guantánamo detainees suspected of a criminal offence are prosecuted before ordinary civilian courts which are established and operate in accordance with international fair trial standards;
- To immediately vacate all convictions (whether by guilty verdicts following a trial by a military commission or the result of a plea agreement) for providing material support for terrorism, solicitation, and inchoate conspiracy;
- To ensure that all other past convictions before the military commissions (whether by guilty verdicts following a trial by military commission or the result of a plea agreement) are vacated in respect of other offences that did not exist at the time of the alleged conduct.

B. EQUALITY BEFORE THE LAW AND COURTS, EQUAL PROTECTION OF THE LAW AND NON-DISCRIMINATION

a. International Standards

320. The principles of equality before the law and courts, equal protection of the law and non-discrimination are protected under numerous international instruments, including under Articles 2, 14 and 26 of the ICCPR⁷³³ and OSCE commitments.⁷³⁴

⁷³⁰ United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America*, 12 June 2015, *ibid*. As previously mentioned, the United States has petitioned for a rehearing *en banc* of this decision.

⁷³¹ *Ibid*.

⁷³² Ali Hamza al Bahlul and Salim Hamdan were convicted by military commissions of providing material support for terrorism. Both convictions have been overturned. David Hicks, Ibrahim al Qosi, Omar Khadr, Noor Uthman Muhammed and Majid Khan agreed to plead guilty to the charge of providing material support for terrorism. As previously mentioned, David Hicks’ conviction for material support for terrorism was vacated in February 2015 and the Convening Authority disapproved the findings and sentence in the case of Noor Uthman Muhammed and therefore decided to dismiss the charges against him in January 2015.

⁷³³ Whereas Article 2(1) of the ICCPR can be violated only in conjunction with other rights guaranteed under the Covenant, Article 26 provides an autonomous right. Article 14(1) of the ICCPR provides for a “specific manifestation of the general right to equality” (Art. 26). Nowak, *CCPR Commentary, op. cit.*, note 93, pp. 35, 45, 307; UN HRC, General Comment No. 18: Non-discrimination, HRI/GEN/1/Rev.6 at 146, 10 November 1989, paras. 3, 12, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11>. See, also, ACHR, Arts. 1, 24; UDHR, Arts. 2, 7; ADRDM, Art. II; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>.

321. These principles first require states to ensure that they do not enact discriminatory laws, and that their laws are not applied in an arbitrary and/or discriminatory manner.⁷³⁵ The term discrimination refers to “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.⁷³⁶ However, not every differentiation of treatment amounts to prohibited discrimination. Discrimination under the ICCPR is found where the differential treatment is not justified by reasonable and objective criteria and does not aim to achieve a legitimate purpose under the ICCPR.⁷³⁷
322. While nationality is not explicitly listed among the prohibited grounds of discrimination in Articles 2 and 26 of the ICCPR, it falls under the category of “other status”.⁷³⁸ Furthermore, the vast majority of the rights protected under the Covenant, including the principles of equal protection by the law, equality before the courts and tribunals, and the right to a fair trial in general, are to be “guaranteed without discrimination between citizens and aliens”.⁷³⁹ It follows that they are applicable to citizens and non-citizens alike, and “may be qualified only by such limitations as may be lawfully imposed under the [ICCPR]”.⁷⁴⁰
323. The principle of equality before the courts and tribunals requires that “similar cases are dealt with in similar proceedings”.⁷⁴¹ Reading Article 14 of the ICCPR in conjunction with Articles 2 or 26, the Human Rights Committee has held that “[p]rocedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26 (...) to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that ‘all persons shall be equal before the courts and tribunals,’ but may also amount to discrimination”.⁷⁴²
324. Discrimination in the application of international humanitarian law is also prohibited by Common Article 3, Articles 9(1) and 75(1) of API, and relevant provisions of the Third

⁷³⁴ These include, for instance, OSCE Copenhagen Document, *op. cit.*, note 80, para. 5.9: “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground”. See, also, OSCE Helsinki 1975 Document, *op. cit.*, note 502; OSCE Vienna Document, *op. cit.*, note 90, para. 13.7; OSCE, “Brussels Declaration on Criminal Justice Systems”, *op. cit.*, note 550.

⁷³⁵ UN HRC, General Comment No. 18, *op. cit.*, note 733, para. 12; Nowak, *CCPR Commentary*, *op. cit.*, note 93, pp. 606-607.

⁷³⁶ UN HRC, General Comment No. 18, *ibid.*, para. 7.

⁷³⁷ *Ibid.*, para. 13; Nowak, *CCPR Commentary*, *op. cit.*, note 93, pp. 45-46.

⁷³⁸ UN HRC, *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, 6 April 1989, para. 9.4, <<http://www1.umn.edu/humanrts/undocs/session35/196-1985.html>>; Nowak, *CCPR Commentary*, *ibid.*, pp. 47, 55, 620.

⁷³⁹ Articles 13 (relating to procedural guarantees applicable to the expulsion of aliens) and 25 (relating to participation in public affairs and right to vote) of the ICCPR are the exception to this rule, as they are expressly applicable only to aliens and citizens, respectively. UN HRC, General Comment No. 15: The position of aliens under the Covenant, HRI/GEN/1/Rev.6 at 140, 30 September 1986, paras. 2, 7,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11>.

⁷⁴⁰ *Ibid.*; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 619.

⁷⁴¹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 14.

⁷⁴² *Ibid.*, para. 65; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 308: “Establishing separate courts for the groups of persons listed in Art. 2(1) thus violates Art. 14.”

and Fourth Geneva Conventions.⁷⁴³ Prohibited grounds of discrimination include “race, colour, religion or faith, sex, birth or wealth, or on any other similar criteria”.⁷⁴⁴ This is a norm of customary international humanitarian law applicable in both international and non-international armed conflicts.⁷⁴⁵

b. Domestic Standards

325. Upon ratification of the ICCPR, the United States specified that its Constitution and laws safeguard the principle of equal protection of the law and provide “extensive protections against discrimination”.⁷⁴⁶ These equal protection principles are embedded in the Fifth and Fourteenth Amendments to the US Constitution.⁷⁴⁷ The applicability of these constitutional principles to the military commissions at Guantánamo has not been definitively determined or ruled upon by domestic courts.
326. This understanding to the ICCPR also stipulates that the United States “understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.”⁷⁴⁸ In this regard, the Human Rights Committee noted its satisfaction that the “principle of non-discrimination is construed by the Government as not permitting distinctions which would not be legitimate under the Covenant”.⁷⁴⁹
327. Pursuant to the MCA 2009, only non-US citizens can be tried before the military commissions at Guantánamo.⁷⁵⁰

c. Findings and Analysis

328. The military commissions are a separate system of justice expressly designed to prosecute only certain non-citizens. A US citizen charged with identical acts could only be prosecuted before ordinary courts. Jose Padilla and John Walker Lindh, two US citizens detained and labelled as enemy combatants, were, for example, tried before federal courts.⁷⁵¹

⁷⁴³ Third Geneva Convention, Art. 16; Fourth Geneva Convention, Art. 13.

⁷⁴⁴ Common Article 3(1). Article 75(1) of API also refers explicitly to distinctions based upon national origin or other status. Articles 16 and 13 of the Third and Fourth Geneva Conventions, respectively, also refer to adverse distinctions based on nationality.

⁷⁴⁵ “Customary IHL, Rule 88: Non-Discrimination”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88>: “Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited”.

⁷⁴⁶ US reservations to the ICCPR, *op. cit.*, note 327, para. II(1).

⁷⁴⁷ The Fourteenth Amendment however relates to state action, and is therefore not addressed in this report.

⁷⁴⁸ US reservations to the ICCPR, *op. cit.*, note 327, para. II(1).

⁷⁴⁹ UN HRC, Concluding observations, United States of America, CCPR/C/79/Add.50, *op. cit.*, note 328, para. 275.

⁷⁵⁰ MCA 2009, § 948a(1); MCA 2009, § 948c.

⁷⁵¹ Jose Padilla was convicted on charges of conspiracy to murder, kidnap and maim individuals in a foreign country, conspiracy to provide material support for terrorism, and providing material support to terrorists. United States District Court for the Southern District of Florida, *United States of America v. Jose Padilla*, Case No. 04-60001-CR-COOKE, “Amended Judgment”, 9 September 2014, <http://www.investigativeproject.org/documents/case_docs/2474.pdf>; “Jose Padilla Re-Sentenced to 21

329. This differentiation in treatment carries important consequences for aliens prosecuted before military commissions. Military commission proceedings depart in several ways from trial rules and procedures used in federal courts and courts-martial. The MCA 2009 expressly provides for exceptions to procedures and rules of evidence used in general courts-martial when required by the “unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need”.⁷⁵² Whereas the MCA 2009 provides for significant improvements to the previous iterations of the Guantánamo military commissions,⁷⁵³ the current system continues to be criticized as providing a lower level of safeguards than ordinary courts.⁷⁵⁴ While it is beyond the scope of this report to

Years in Prison for Conspiracy to Murder Individuals Overseas, Providing Material Support to Terrorists”, Federal Bureau of Investigation website, 9 September 2014, <<http://www.fbi.gov/miami/press-releases/2014/jose-padilla-re-sentenced-to-21-years-in-prison-for-conspiracy-to-murder-individuals-overseas-providing-material-support-to-terrorists>>. John Walker Lindh pleaded guilty to “one count of supplying services to the Taliban and a charge that he carried weapons while fighting on the Taliban’s front lines in Afghanistan against the Northern Alliance”. “Department of Justice Examples of Terrorism Convictions Since Sept. 11, 2001”, United States Department of Justice website, 23 June 2006, <http://www.justice.gov/archive/opa/pr/2006/June/06_crm_389.html>; United States District Court for the Eastern District of Virginia, *United States of America v. John Lindh*, Case No. 02-37A, “Plea agreement”, <<http://www.justice.gov/ag/plea-agreement>>; United States District Court for the Eastern District of Virginia, *United States of America v. John Lindh*, Case No. 02-37A, “Indictment”, <http://www.investigativeproject.org/documents/case_docs/129.pdf>.

⁷⁵² MCA 2009, § 949a(b): “(1) In trials by military commission under this chapter, the Secretary of Defense, in consultation with the Attorney General, may make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter. (...) (3) In making exceptions (...) the Secretary of Defense may provide the following: “(A) Evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization. (B) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title. (C) Evidence shall be admitted as authentic so long as - “(i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and “(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence. (D) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission (...).” ODIHR was provided with similar information during its interview with the American Civil Liberties Union, 28 February 2014, *op. cit.*, note 255, and with the Center for Constitutional Rights, *op. cit.*, note 255.

⁷⁵³ See, for example, “US: Revised Military Commissions Remain Substandard”, Human Rights Watch website, 28 October 2009, <<http://www.hrw.org/news/2009/10/28/us-revised-military-commissions-remain-substandard>>; “House Passes Changes to Guantánamo Military Commissions”, American Civil Liberties Union website, 8 October 2009, <<https://www.aclu.org/national-security/house-passes-changes-guantanamo-military-commissions>>.

⁷⁵⁴ “US: Revised Military Commissions Remain Substandard”, Human Rights Watch website, *ibid.*; “House Passes Changes to Guantánamo Military Commissions”, American Civil Liberties Union website, *ibid.*; “CCR Condemns President Obama’s Embrace of Military Commission System”, Center for Constitutional Rights website, 20 January 2011, <<http://ccrjustice.org/newsroom/press-releases/ccr-condemns-president-obama%E2%80%99s-embrace-of-military-commission-system>>; Mason C. Clutter, “Guantanamo: Ten Years After 9/11”, *Human Rights Magazine*, Vol. 38, 2011, <http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_winter2011/guantanamo_ten_years_after_9-11.html>; David Glazier, “The Development of an Exceptional Court: The History of the American Military Commission”, in Fionnula Ni Aolain & Oren Gross, *Guantánamo and Beyond, Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge: Cambridge University Press, 2013), p. 37; Jordan J. Paust, “Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit”, *Cornell International Law Journal*, Vol. 45, No. 2, April 2012, pp. 381-387, <<http://www.lawschool.cornell.edu/research/ILJ/upload/Paust-final.pdf>>; UN HRC, *David Hicks v. Australia*, “Individual Communication under the First Optional Protocol to the ICCPR”, 23 August 2010, para. 255, <<http://thejusticecampaign.org/wordpress/wp-content/uploads/2011/06/UN-Communication.pdf>>; United States Court of Appeals for the District of Columbia Circuit, *Hamdan v. United States of America*, Case No. 11-1257, “Brief of Amici Curiae Japanese American Citizens League, Asian American Legal Defense and Education Fund, National Asian Pacific American Bar Association, and Asia Law Caucus in Support of Petitioner and Urging Reversal”, 22 November 2011, pp. 3-4, <<https://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/loader.cfm?csModule=security/getfile&pageid=248939>>; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255.

conduct a systematic analysis of the protections afforded to defendants in ordinary courts compared to those available to Guantánamo detainees, ODIHR takes note that adverse differences are said to include, among others: the lack of constitutional due process protections in military commission trials;⁷⁵⁵ the potential for admissibility of some coerced statements when they were obtained through coercion that falls short of torture and other abuses listed in the MCA;⁷⁵⁶ and the potential for admissibility of hearsay evidence that would not be admissible before ordinary courts.⁷⁵⁷ ODIHR also notes that US courts have held that the distinction between aliens and citizens in the MCA does not violate the equal protection component of the due process clause of the Fifth Amendment.⁷⁵⁸ Nonetheless, it is ODIHR's view that the differentiation in treatment between citizens and aliens appears detrimental to non-US citizens. This would run contrary to the right of aliens to equal treatment before the courts.⁷⁵⁹

330. This distinction of treatment between citizens and aliens cannot be justified by objective and reasonable criteria. ODIHR notes that previous military commissions could apparently try US citizens⁷⁶⁰ and the Supreme Court of the United States itself had concluded citizenship to be irrelevant to the jurisdiction of a military commission.⁷⁶¹ Furthermore, the

⁷⁵⁵ Clutter, "Guantanamo: Ten Years After 9/11", *ibid.*; "House Passes Changes to Guantánamo Military Commissions", American Civil Liberties Union website, *ibid.*; "Myth v. Fact", Human Rights First website, *op. cit.*, note 694, p. 2.

⁷⁵⁶ "CCR Condemns President Obama's Embrace of Military Commission System", Center for Constitutional Rights website, *op. cit.*, note 754; Joanne Mariner, "A First Look at the Military Commissions Act of 2009, Part Two", FindLaw website, 30 November 2009, <<http://writ.news.findlaw.com/mariner/20091130.html>>; "House Passes Changes to Guantánamo Military Commissions", American Civil Liberties Union website, *ibid.*; United States Court of Appeals for the District of Columbia Circuit, *Hamdan v. United States of America*, "Brief of Amici Curiae", *op. cit.*, note 754, p. 3; Praust, "Still Unlawful", *op. cit.*, note 754, p. 386.

⁷⁵⁷ "CCR Condemns President Obama's Embrace of Military Commission System", Center for Constitutional Rights website, *ibid.*; Laura Pitter, "Guantanamo's system of injustice", Salon website, 19 January 2012, <http://www.salon.com/2012/01/19/guantanamos_system_of_injustice/>; Praust, "Still Unlawful", *ibid.*, p. 383; Marjorie Cohn, "Guantanamo Prisoner Al-Nashiri's Case Demonstrates Unfairness of Military Commissions", Truthout website, 18 June 2013, <<http://truth-out.org/news/item/17058-guantanamo-prisoner-al-nashiris-case-demonstrates-unfairness-of-military-commissions#>>; ODIHR interview with the American Civil Liberties Union, 28 February 2014, *op. cit.*, note 255; ODIHR interview with Navy Commander Brian Mizer, *op. cit.*, note 614.

⁷⁵⁸ In *United States of America v. Hamdan*, *op. cit.*, note 630, the United States Court of Military Commission Review held that "Analyzing the comparative rights and protections afforded by the M.C.A. in comparison to the UCMJ and criminal defendants in domestic federal District Courts, we are satisfied that the equal protection element of the due process clause has been met in this case", "[w]e find, therefore, that Congress had a rational basis for the disparate treatment of aliens in the M.C.A. and that such disparate treatment does not violate the equal protection component of the Fifth Amendment". The US CMCR upheld this decision in *United States of America v. al Bahlul* on the basis of the reasons stated in *Hamdan*. United States Court of Military Commission Review, *United States of America v. Ali Hamza Ahmad Suliman Al Bahlul*, Case 09-001, 9 September 2011. Similarly, the military commission in *Al-Nashiri* denied a motion related to the equal protection argument on the basis of the *Hamdan* decision. United States Military Commission, *United States of America v. Al-Nashiri*, AE 046B, "Ruling – Motion to Dismiss for Lack of Personal Jurisdiction Because the Military Commissions Act Violates the Equal Protection Component of the Due Process Clause", 19 June 2012.

⁷⁵⁹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 65; UN HRC, General Comment No. 15, *op. cit.*, note 739, para. 7; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 308. See, also, Praust, "Still Unlawful", *op. cit.*, note 754, p. 381.

⁷⁶⁰ United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America*, "Brief of Petitioner", 13 August 2014, pp. 48-50, <<http://www.lawfareblog.com/wp-content/uploads/2014/08/8-13-14-Petitioner-Brief.pdf>>. See, also, United States Court of Appeals for the District of Columbia Circuit, *Hamdan v. United States of America*, "Brief of Amici Curiae", *op. cit.*, note 754, pp. 13-14; Glazier, "The Development of an Exceptional Court", *op. cit.*, note 754, p. 37.

⁷⁶¹ "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." United States Supreme Court, *Ex Parte Quirin*, *op. cit.*, note 669; "United States Military Commission, *United States of America v. Mohammad et al.*, AE 104 (AAA), "Motion to Dismiss the Charges Because the Military Commission Act of 2009 Exceeds Congress' Power Under the Define and Punish Clause", 24 October 2012, pp. 19-20.

legislative history of the MCA 2006 suggests the intention to apply procedures depriving aliens of rights that US citizens could not be deprived of, such as, at minimum, the right to *habeas corpus*.⁷⁶² But if military commission procedures are not to be applied to US citizens, it seems impossible to argue reasonable and objective justifications for aliens to be subjected to them.⁷⁶³ As “similar cases are [to be] dealt with in similar proceedings”,⁷⁶⁴ persons accused of comparable conduct (capable of being tried in ordinary courts) should also be prosecuted before ordinary courts following procedures that comply with international fair trial standards. Accordingly, the legislative provision limiting military commission jurisdiction to non-US citizens appears to violate the prohibition of discrimination and the principle of equal protection of the law.⁷⁶⁵

331. Furthermore, ODIHR is concerned that only Muslim men have been prosecuted before military commissions. While the MCAs do not expressly limit the jurisdiction of military commissions on the basis of gender or religion,⁷⁶⁶ the effect of the MCAs in practice gives rise to concern that the treatment of the defendants may be discriminatory.

d. Recommendations

- Regardless of the status of Guantánamo detainees under international law, to ensure that those suspected of a criminal offence are prosecuted before an ordinary court in

⁷⁶² United States Court of Appeals for the District of Columbia Circuit, *al Bahlul v. United States of America*, “Brief of Petitioner”, *op. cit.*, note 760, pp. 51-52; United States Court of Appeals for the District of Columbia Circuit, *Hamdan v. United States of America*, “Brief of Amici Curiae”, *op. cit.*, note 754, pp. 1, 4; United States Military Commission, *United States of America v. Al-Nashiri*, AE 046, “Defense Motion to Dismiss for Lack of Personal Jurisdiction because the Military Commissions Act Violates the Equal Protection Component of the Due Process Clause”, 12 March 2012, pp. 5-7. Relevant statements include: United States Senator Jon Kyl, 28 September 2006, <http://fas.org/irp/congress/2006_cr/s092806.html>: “[T]here is nothing wrong with this legislation before us limiting the rights of habeas to those who are citizens and not extending it to alien enemy combatants”; United States Senator John Cornyn, 28 September 2006, <http://fas.org/irp/congress/2006_cr/s092806.html>: “Now, we may disagree - and we do disagree on the Senate floor - with the level of rights that an accused terrorist should have. I happen to believe these individuals, who are high-value detainees at Guantanamo Bay, do not deserve the same panoply of rights preserved for American citizens in our legal system”; United States Senator John Warner, 27 September 2006, <http://fas.org/irp/congress/2006_cr/s092706.html>: “It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens. (...) We have no intention to try to accord aliens engaged as unlawful combatants with all the rights and privileges of American citizens (...)”; United States Senator Lindsey Graham, 27 September 2006, <http://fas.org/irp/congress/2006_cr/s092706.html>: “Under no circumstance can an American citizen be tried in a military commission. The jurisdiction of military commissions does not allow for the trial of American citizens or lawful combatants, and those who say otherwise, quite frankly, have not read the legislation because there is a prohibition to that happening”; United States Senator Jon Kyl, 27 September 2006, <http://fas.org/irp/congress/2006_cr/s092706.html>: “This legislation has nothing to do with citizens. The decision cited by the Senator from Pennsylvania is the Hamdi decision, which dealt with a U.S. citizen. And, of course, the writ of habeas corpus applies to U.S. citizens. Our legislation does not”.

⁷⁶³ See, for instance, “US: Revised Military Commissions Remain Substandard”, Human Rights Watch website, *op. cit.*, note 753: “If the commissions are too unfair to be used on US citizens, they’re too unfair to be used on anyone”; Cole, “Military Commissions and the Paradigm of Prevention”, *op. cit.*, note 258, p. 6; United States Court of Appeals for the District of Columbia Circuit, *Hamdan v. United States of America*, “Brief of Amici Curiae”, *op. cit.*, note 754, p. 11.

⁷⁶⁴ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 14.

⁷⁶⁵ See, also, UN Special Rapporteur on the independence of judges and lawyers, Report to the Commission on Human Rights, E/CN.4/2005/60, *op. cit.*, note 236, para. 18: “military commissions (...) violate the principles of equality before the law and non-discrimination, since only non-US nationals may be tried before them”.

⁷⁶⁶ Because the military commission in *Al-Nashiri* found “no reference to the Islamic religion or to Muslims in the text of the statute” and only “a reference to the al Qaeda organization as a part of the definition of an unprivileged enemy belligerent, which (...) does not invoke the Islamic faith nor does it operate to limit an individual’s ability to practice the Islamic faith or be a Muslim”, it held that the MCA “does not single out or discriminate against Muslim or Muslim men”. United States Military Commission, *United States of America v. Al-Nashiri*, AE 295B, “Ruling – Defense Motion to Dismiss All Charges Because the Military Commissions Act Was Designed to Discriminate Against Muslims”, 22 September 2014.

proceedings that guarantee full respect of the principles of equality before the law and courts, equal protection of the law and non-discrimination.

II. FAIR TRIAL GUARANTEES IN PROCEEDINGS BEFORE MILITARY COMMISSIONS

332. Article 14 of the ICCPR provides that everyone is “equal before the courts and tribunals”, entitled to a public hearing before an independent and impartial tribunal, and entitled to minimum fair trial guarantees in any criminal case.⁷⁶⁷ Article 14 applies to all courts, “whether ordinary or specialized, civilian or military”.⁷⁶⁸ While some provisions of Article 14 of the ICCPR on the right to a fair trial may be derogated from during public emergencies, international bodies have stressed on several occasions that fundamental principles of a fair trial and non-derogable rights are not subject to any derogation.⁷⁶⁹

A. RIGHT TO A PUBLIC HEARING BEFORE AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

a. *International Standards*

333. Article 14(1) of the ICCPR states that in criminal proceedings “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. A number of other international and regional instruments, including OSCE commitments, include similar provisions.⁷⁷⁰ This section of the report focuses on the right to be tried by an independent and impartial tribunal established by law, and the right to a public hearing.

334. As part of their OSCE commitments, participating States have agreed to pay particular attention to the Basic Principles on the Independence of the Judiciary,⁷⁷¹ which stipulate that “[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”⁷⁷²

⁷⁶⁷ ICCPR, Art. 14. See, also, ACHR, Art. 8; UDHR, Arts. 10, 11; ADRDM, Art. XVIII; OSCE Vienna Document, *op. cit.*, note 90, para. 13.9; OSCE Copenhagen Document, *op. cit.*, note 80, paras. 5.16-5.19; OSCE Ljubljana Document, *op. cit.*, note 90; OSCE, “Brussels Declaration on Criminal Justice Systems”, *op. cit.*, note 550; OSCE Ministerial Council, Decision No. 7/08, “Further Strengthening the Rule of Law in the OSCE Area”, Helsinki, 5 December 2008 (hereinafter, “OSCE Helsinki 2008 Document”), para. 4, <<http://www.osce.org/mc/35494?download=true>>; Decaux Principles, *op. cit.*, note 647, Principle 2.

⁷⁶⁸ ICCPR, Art. 14; UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 22.

⁷⁶⁹ Although Article 14 may be derogated from under Article 4 of the ICCPR, “a general reservation to the right to a fair trial” is not “acceptable”. UN HRC, General Comment No. 24, *op. cit.*, note 287, para. 8; UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 16: “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency”; UN, HRC, General Comment No. 32, *op. cit.*, note 648, para. 5; Decaux Principles, *op. cit.*, note 647, Principle 3.

⁷⁷⁰ See, for instance, ACHR, Art. 8; UDHR, Arts. 10-11; ADRDM, Art. XXVI. Relevant OSCE commitment include: OSCE Copenhagen Document, *op. cit.*, note 80, paras. 5.12-5.13, 5.16; OSCE Moscow Document, *op. cit.*, note 90, paras. 19.1-19.2; OSCE Helsinki 2008 Document, *op. cit.*, note 767, para. 4.

⁷⁷¹ OSCE Moscow Document, *ibid.*, para. 19.2; “Basic Principles on the Independence of the Judiciary”, Milan, 13 December 1985, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>.

⁷⁷² “Basic Principles on the Independence of the Judiciary”, *ibid.*, Principle 5.

335. According to the Human Rights Committee, the right to be tried by an independent and impartial tribunal can suffer no exception.⁷⁷³ It entails that the body entrusted with hearing a criminal case be established by law and present guarantees of independence from other branches of government, among others.⁷⁷⁴
336. Judicial independence encompasses independence of judicial institutions, as well as the individual independence of judges in carrying out their duties.⁷⁷⁵ It refers to the need for clear procedures and objective criteria, determined by law, for the appointment of judges, their security of tenure, and the conditions governing their promotion, transfer, suspension and cessation of functions.⁷⁷⁶ It also requires independence from political influence of the executive or legislative branches of government.⁷⁷⁷ International standards foresee that there should be no “inappropriate or unwarranted interference with the judicial process”.⁷⁷⁸
337. The requirement of impartiality aims at ensuring that judges exercise their function without personal bias, prejudice, or preconceived views on the case or the parties before them, and do not improperly promote the interests of one side.⁷⁷⁹ Judges need also to act in a manner that offers sufficient guarantees to exclude legitimate doubt of their impartiality.⁷⁸⁰ International bodies and experts have stressed that a tribunal must appear impartial to a “reasonable observer”.⁷⁸¹ Impartiality is not limited to the decision itself but also extends to the entire process that leads to this decision.⁷⁸² In a similar vein, it is essential that jurors and prosecutors be able to carry out their duties independently and impartially, and be free from any interference.⁷⁸³

⁷⁷³ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 19.

⁷⁷⁴ *Ibid.*, paras. 18, 22.

⁷⁷⁵ UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 44; “Bangalore Principles of Judicial Conduct”, The Hague, 2002, <http://www.unrol.org/files/Bangalore_principles.pdf>, Principle 1; UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 19.

⁷⁷⁶ UN HRC, General Comment No. 32, *ibid.*, paras. 19-20; “Basic Principles on the Independence of the Judiciary”, *op. cit.*, note 771, Principle 11.

⁷⁷⁷ UN HRC, General Comment No. 32, *ibid.*, para. 19; “Bangalore Principles of Judicial Conduct”, *op. cit.*, note 775, Principle 1.3. See, also, UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Report to the Human Rights Council, A/HRC/11/41, 24 March 2009, para. 18, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41_en.pdf>.

⁷⁷⁸ “Basic Principles on the Independence of the Judiciary”, *op. cit.*, note 771, Principles 2, 4. See, also, “Bangalore Principles of Judicial Conduct”, *ibid.*, Principle 1.1.

⁷⁷⁹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 21; UN HRC, *Arvo O. Karttunen v. Finland*, Communication No. 387/1989, 23 October 1992, para. 7.2,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F46%2FD%2F387%2F1989&Lang=en>; “Bangalore Principles of Judicial Conduct”, *ibid.*, Principles 2.1, 2.5; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 44.

⁷⁸⁰ UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *ibid.*; “Bangalore Principles of Judicial Conduct”, *ibid.*, Principle 2.2; *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 658, p. 58.

⁷⁸¹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 21; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *ibid.*, para. 44.

⁷⁸² “Bangalore Principles of Judicial Conduct”, *op. cit.*, note 775, Principle 2.

⁷⁸³ UN HRC, *Willard Collins v. Jamaica*, Communication No. 240/1987, 1 November 1991, para. 8.4, <<http://www.un.org/Docs/journal/asp/ws.asp?m=CCPR/C/43/D/240/1987>>; UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Report to the Commission on Human Rights, E/CN.4/2004/60, 31 December 2003, para. 48, <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9140>; UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Report to the Human Rights Council, A/HRC/20/19, 7 June 2012, paras. 24-26, 55, 98, <<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session20/Pages/ListReports.aspx>>; UN Special Rapporteur on the

338. The requirement of publicity is essential to guarantee the open and transparent administration of justice. Criminal proceedings are, in principle, to be conducted orally and publicly.⁷⁸⁴ Courts are therefore to provide information and adequate facilities to allow interested members of the public, including the media, to attend oral hearings, “within reasonable limits, [and] taking into account, *inter alia*, the potential interest in the case”.⁷⁸⁵ However, this requirement of publicity is not necessarily applicable to all appellate proceedings or pre-trial decisions of prosecutors and other public authorities.⁷⁸⁶
339. The right to a public hearing is not an absolute right. In a democratic society, it can be limited in exceptional circumstances, and the public, including the media, may for instance be excluded from the trial, in part or for its entire duration, for reasons of public order or national security.⁷⁸⁷ Any such restriction to the right to a public hearing is to remain proportional and be assessed on a case-by-case basis.⁷⁸⁸
340. The right to a public hearing by an independent and impartial tribunal established by law is protected under international humanitarian law by virtue of Common Article 3 of the Geneva Conventions, which prohibits the “passing of sentences (...) without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people”.⁷⁸⁹ The right to be tried by an independent and impartial court is also enshrined in Article 75(4) of API.⁷⁹⁰

b. Domestic Standards

341. In the United States, independence of the judiciary from other branches of government derives from Article III, Section 1 of the Constitution.⁷⁹¹ The Fifth Amendment guarantees

Independence of judges and lawyers, Gabriela Knaul, Interim report to the General Assembly, 10 August 2010, A/65/274, para. 18, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/65/274>>; “Guidelines on the Role of Prosecutors”, Havana, 7 September 1990, para. 4, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>>.

⁷⁸⁴ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 28; Novak, *CCPR Commentary*, *op. cit.*, note 93, p. 324.

⁷⁸⁵ UN HRC, General Comment No. 32, *ibid.*, paras. 28-29; UN HRC, *G. A. van Meurs v. The Netherlands*, Communication No. 215/1986, 13 July 1990, para. 6.2,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2F%2F39%2FD%2F215%2F1986&Lang=en>; Novak, *CCPR Commentary*, *ibid.*, pp. 324-325.

⁷⁸⁶ UN HRC, General Comment No. 32, *ibid.*, para. 28.

⁷⁸⁷ ICCPR, Art. 14(1); UN HRC, General Comment No. 32, *ibid.*, para. 29; Novak, *CCPR Commentary*, *op. cit.*, note 93, pp. 325-326.

⁷⁸⁸ “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights”, Geneva, 28 September 1984, paras. 10-11, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G84/182/73/PDF/G8418273.pdf?OpenElement>>; UN HRC General Comment No. 29, *op. cit.*, note 111, para. 4; *Legal Digest of International Fair Trial Rights*, *op. cit.*, note 658, p. 80.

⁷⁸⁹ Common Article 3(1)(d); ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić*, Case No. IT-95-9-T, 17 October 2003, para. 678, <<http://www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf>>. The Statutes of the ICC (Rome Statute), the ICTY, and the ICTR also specifically provide for the right to a public hearing, subject to narrow exceptions. Rome Statute, Arts. 64(7), 67(1), 68(2); Updated Statute of the ICTY, Art. 20(4); Statute of the ICTR, Art. 19(4).

⁷⁹⁰ API, Art. 75(4): “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”.

⁷⁹¹ “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office”. US Constitution, Art. 3, § 1.

due process of law,⁷⁹² and the Sixth Amendment provides for the right to a public trial by an impartial jury.⁷⁹³ The applicability of these Constitutional Amendments to the military commissions at Guantánamo has not been definitively determined or ruled upon by domestic courts.

342. Under the applicable law and regulations, military commissions are convened by the Secretary of Defense or his designee.⁷⁹⁴ The Office of this Convening Authority is under the “authority, direction, and control of the Secretary of Defense” and consists primarily of the Convening Authority, the Director of the Office of the Convening Authority and the Legal Advisor to the Convening Authority.⁷⁹⁵ The Convening Authority has multiple other roles, including, among others: referring charges to a military commission;⁷⁹⁶ detailing the Chief Trial Judge;⁷⁹⁷ detailing members (jurors) for each trial;⁷⁹⁸ entering into a pretrial agreement with an accused where applicable;⁷⁹⁹ and modifying the findings and sentence of a military commission by dismissing a charge or specification or changing a finding of guilty to a lesser offense where applicable.⁸⁰⁰
343. Military judges and members (jurors) of military commissions are commissioned officers of the armed forces.⁸⁰¹ The Chief Trial Judge is personally selected by the Convening Authority from a pool of certified military judges,⁸⁰² and in turn details military judges for each commission.⁸⁰³ The military judge may be challenged by the defence or prosecution for cause.⁸⁰⁴ Any military judge may also be changed by the Chief Trial Judge prior to the assembly of the jury, without cause.⁸⁰⁵ Members who are deemed as “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament” are selected by the Convening Authority among a list of available officers on active duty.⁸⁰⁶ They are to determine the guilt of the accused and, if necessary, his or her sentence in light of available evidence and in accordance with the military judge’s instructions.⁸⁰⁷ For this reason, members of the jury are not to have any previous connection to either the charged crime or to the accused.⁸⁰⁸ The prosecution and defence

⁷⁹² “No person shall (...) be deprived of life, liberty, or property, without due process of law”. US Constitution, Fifth Amendment.

⁷⁹³ “In all criminal prosecutions, the accused shall enjoy the right to a (...) public trial, by an impartial jury (...)”.US Constitution, Sixth Amendment.

⁷⁹⁴ MCA 2009, § 948h; RMC, Rule 504.

⁷⁹⁵ Regulation for Trial by Military Commission (RTMC), 6 November 2011, Regulation 2-1.

⁷⁹⁶ RMC, Rule 601. A distinction is to be made between the swearing and referring of the charges. The Convening Authority does not swear the charges. Charges “will normally be sworn by an appropriate official in the office of the Chief Prosecutor of the Office of Military Commissions”. RTMC, Regulation 3-1.

⁷⁹⁷ RMC, Rule 503(b)(2).

⁷⁹⁸ MCA 2009, § 948i(b); RMC Rule 503(a).

⁷⁹⁹ RMC, Rule 705.

⁸⁰⁰ MCA 2009, § 950b(c), RMC Rule 1107(c).

⁸⁰¹ MCA 2009, § 948i(a); RMC, Rule 502(a)(1) and (c)(1); MCA 2009, § 948j(b).

⁸⁰² RMC, Rule 503(b)(2).

⁸⁰³ RMC, Rule 503(b)(1).

⁸⁰⁴ In such case, the military judge will determine the relevance and validity of the challenges for cause. MCA 2009, §949f(a).

⁸⁰⁵ RMC, Rule 505(e)(1).

⁸⁰⁶ MCA 2009, § 948i(b); RMC, Rule 503(a)(1).

⁸⁰⁷ RMC, Rule 502(a)(2).

⁸⁰⁸ MCA 2009, § 948i(b).

both have the opportunity to *voir dire* the members and to challenge for cause individuals who appear to be biased.⁸⁰⁹

344. The MCA 2009 and its implementing regulations contain provisions against unlawful influence of the Convening Authority in the conduct of the proceedings.⁸¹⁰ They also stipulate that “[n]o person may attempt to coerce or, by any unauthorized means, influence (A) the action of a military commission (...) or any member thereof, in reaching the findings or sentence in any case; (B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or (C) the exercise of professional judgment by trial counsel or defense counsel”.⁸¹¹ The MCA 2006 included similar provisions against unlawful influence on the various actors.⁸¹²
345. Military commissions are to be publically held except in cases where the closure of part or all the proceedings is deemed necessary by the military judge in order to “protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities” or “ensure the physical safety of individuals”.⁸¹³ Access to the proceedings may however be limited by the location, the size of the facility, physical security requirements, and national security concerns.⁸¹⁴

c. Findings and Analysis

RIGHT TO BE TRIED BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

346. The first iteration of the military commissions was established by a military order of President Bush, whereas subsequent versions were created by law, namely by the MCAs of 2006 and 2009. The commissions were created for the specific purpose of trying “enemy combatants” and “unprivileged enemy belligerents”. They had no established procedures and the laws constituting them in 2006 and 2009 were enacted years after detainees entered into US custody.⁸¹⁵ While judges and counsel may be able to rely on a large and well-developed body of law and practice from federal courts and courts-martial to interpret the MCA, the military commissions remain a process “statutorily created with elements of both court-martial and federal court practice” and, as such, “it may be unclear exactly what

⁸⁰⁹ They are also each entitled to one peremptory challenge. MCA 2009, § 949f.

⁸¹⁰ MCA 2009, § 949b(a): “(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings”; RMC, Rule 104(a)(1).

⁸¹¹ MCA 2009, § 949b(a)(2); RMC, Rule 104(a)(2).

⁸¹² MCA 2006, § 949b(a).

⁸¹³ MCA 2009, § 949d(c)(2); RMC, Rule 806; RTMC 2011, Regulation 19-6. These provisions are not limited to trial. They are applicable to all aspects of the proceedings, “from the swearing of charges until the completion of trial and appellate proceedings or any final disposition of the case”. RTMC 2011, Regulation 19-2. See, also, United States Military Commission, *United States of America v. Mohammad et al.*, “Motion of the American Civil Liberties Union for Public Access to Proceedings and Records”, 2 May 2012, pp. 11-12.

⁸¹⁴ RMC, Rule 806.

⁸¹⁵ Praust, “Still Unlawful”, *op. cit.*, note 754, p. 370.

law and precedent controls a particular issue”.⁸¹⁶ For these reasons, ODIHR considers that the Guantánamo military commissions constitute an *ad hoc* system which has denied Guantánamo detainees the right to be tried by well-established legal procedures of ordinary federal courts or courts-martial.⁸¹⁷

347. The need for independence from the executive branch of government, as well as for actual impartiality and safeguards to ensure the appearance of impartiality, has led international bodies and experts to raise serious concerns over the independence and impartiality of military tribunals.⁸¹⁸
348. Military commissions at Guantánamo are administered by the Department of Defense.⁸¹⁹ Concerns regarding the lack of structural independence within the commissions first arise in relation to the designation of and roles played by the Convening Authority in the proceedings. Whereas the Office of the Convening Authority is under the authority and the responsibility of the Department of Defense, and ultimately of the President,⁸²⁰ the Convening Authority has broad powers, including referring charges to trial and subsequently intervening in the conduct of these trials. This proximity with the executive branch, combined with an ability to influence the proceedings, “adds to an appearance that military commissions are not independent”.⁸²¹
349. Similar concerns arise in relation to the independence and impartiality of military commission judges.⁸²² Judges are detailed for each commission⁸²³ and have no fixed term of office. This insecurity of tenure makes them particularly vulnerable to threats to their independence.⁸²⁴ This vulnerability is said to be illustrated, for example, in the decision not to renew the contract of Judge Peter Brownback, on retiree recall status,⁸²⁵ a few months after he was publically criticized by the executive for dismissing all charges without prejudice in *United States v. Khadr*, in 2007.⁸²⁶ The retiree recall status of Judge James

⁸¹⁶ United States Military Commission, *United States of America v. Mohammad et al.*, “Unofficial/unauthenticated transcript of motions hearing dated 31/01/2013 from 9:01 AM to 09:22 AM”, p. 1720.

⁸¹⁷ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 30; “Basic Principles on the Independence of the Judiciary”, *op. cit.*, note 771, Principle 5.

⁸¹⁸ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 22; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 320; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 14; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 23; Alex Conte, “Approaches and Responses of the UN Human Rights Mechanisms to Exceptional Courts and Military Commissions”, in Fionnula Ni Aolain & Oren Gross, *Guantánamo and Beyond, Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge: Cambridge University Press, 2013), pp. 333-334; ODIHR interview with Amnesty International, 5 August 2013.

⁸¹⁹ “Organization Overview”, Office of Military Commissions website.

⁸²⁰ MCA 2009, § 948h; RTMC 2011, Regulation 2-1. See, also, UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 32.

⁸²¹ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 25. ODIHR interview with Human Rights Watch, 3 March 2014.

⁸²² ODIHR interview with Human Rights Watch, *ibid.*

⁸²³ RMC, Rule 503(b)(1). See, also, UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 24.

⁸²⁴ UN Special Rapporteur on the independence of judges and lawyers, Report to the Commission on Human Rights, E/CN.4/2004/60, *op. cit.*, note 783, para. 45; UN Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, A/HRC/11/41, *op. cit.*, note 777, para. 54.

⁸²⁵ This status leads to the renegotiation of the judge’s contract every year.

⁸²⁶ United States Military Commission, *United States of America v. Al-Nashiri*, AE 084, “Motion to Disqualify or, in the Alternative Requesting the Recusal of Colonel James L. Pohl as Military Judge in this Case”, 14 June 2012, pp. 3-4.

Pohl, the current Chief Trial Judge and commission judge in the Mohammad *et al.* case has raised analogous concerns. The defence in the Al-Nashiri case, to which he was previously detailed, for example argued that his continued employment, and thus financial interest, depends on his temporary duty status and provides no insurance that he will not be removed in the middle of a case or trial for ruling contrary to the interests of the government.⁸²⁷

350. ODIHR considers that the selection of military commission judges, either directly (in the case of Judge Pohl) or indirectly (for those judges detailed to a case by the Chief Trial Judge), by the Convening Authority, i.e. a person under the authority and the responsibility of the Department of Defense, combined with their lack of security of tenure, creates at least the appearance that the executive branch can exert influence over judicial decisions. Additionally, ODIHR takes note of concerns over Judge Pohl's initial decision to detail himself to all three cases involving "high-value detainees",⁸²⁸ including the two capital military commissions, which raised doubts as to his impartiality.⁸²⁹
351. ODIHR welcomes recent rulings regarding a Department of Defense regulation, adopted in January 2015, which required all military commission judges to move to Guantánamo for the duration of their assignment and to set aside their other duties.⁸³⁰ Defence attorneys in the Al-Nashiri and Mohammad *et al.* cases argued that this regulation constituted actual and apparent unlawful influence exerted on the trial judiciary⁸³¹ as it was proposed by the Convening Authority itself, to allegedly accelerate the pace of the proceedings.⁸³² The first ruling, in the Mohammad *et al.* case, concluded that the regulation and recommendation of the Convening Authority constituted at least the appearance of an unlawful attempt to

⁸²⁷ *Ibid.*, pp. 8-9. On 17 July 2012, and subsequently on 20 June 2014, Judge Pohl denied the defence motion and renewed motion, respectively, for his recusal as military judge in the Al-Nashiri case. United States Military Commission, *United States of America v. Al-Nashiri*, AE 084O, "Ruling – Defense Renewed Motion for the Recusal of COL James Pohl as Judge of this Military Commission – Motion to Disqualify, or in the Alternative Requesting Recusal of, COL James L. Pohl as Military Judge in this Case", 20 June 2014.

⁸²⁸ Judge Pohl is no longer detailed to all ongoing cases. Air Force Colonel Vance H. Spath is detailed to the Al-Nashiri case since July 2014. Navy Captain J. Kirk Waits is the military judge detailed to the case of Abd al Hadi al-Iraqi. United States Military Commission, *United States of America v. Al-Nashiri*, AE 001, "Memorandum for Convening Authority, Office of the Military Commissions", 28 September 2011; United States Military Commission, *United States of America v. Al-Nashiri*, AE 302, "Memorandum for Colonel Vance H. Spath, USAF", 10 July 2014; United States Military Commission, *United States of America v. Mohammad et al.*, AE 001, "Memorandum for Convening Authority, Office of the Military Commissions", 8 April 2012; United States Military Commission, *United States of America v. Khan*, AE 001, "Memorandum for Convening Authority, Office of the Military Commissions", 17 February 2012; United States Military Commission, *United States of America v. Abd al Hadi al-Iraqi*, AE 002, "Arraignment Order", 3 June 2014, para. 1.

⁸²⁹ See, for example, United States Military Commission, *United States of America v. Al-Nashiri*, AE 084, *op. cit.*, note 826, pp. 1-2.

⁸³⁰ Judges assigned to the proceedings juggle the military commission cases with other work and commute to Guantánamo part-time. See, for example, United States Military Commission, *United States of America v. Mohammad et al.*, AE 343C, "Ruling – Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary", 25 February 2015; David Lerman, "Pentagon orders Guantánamo judges to stay there to pick up pace", Miami Herald website, 9 January 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article5679231.html>>.

⁸³¹ See, for example, United States Military Commission, *United States of America v. Mohammad et al.*, AE 343, "Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary", 30 January 2015, p. 1; Carol Rosenberg, "Pentagon scraps judges' Guantánamo move order; 9/11 case unfrozen", Miami Herald website, 27 February 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article11334425.html>>.

⁸³² United States Military Commission, *United States of America v. Mohammad et al.*, AE 343C, *op. cit.*, note 830, pp. 1-2. Defence attorneys argued that the Convening Authority itself has proposed this relocation order, assessing that "the status quo [did] not support the pace of litigation necessary to bring these cases to their just conclusion".

pressure the judges, and ordered that the case be abated until the regulation was rescinded.⁸³³ While the Department of Defense revoked the contentious rule less than 24 hours later, the judge in the Al-Nashiri case then dismissed the Convening Authority and four of his legal assistants from that case, as well as cancelled half of a two-week hearing scheduled soon after, to reportedly demonstrate that he was not pressured to accelerate the pace of litigation.⁸³⁴ In the wake of this decision, the then-Convening Authority resigned.⁸³⁵ ODIHR considers that these rulings help mitigating some of its concerns regarding the lack of structural independence of military commission judges.

352. The selection by the Convening Authority of military officers on active duty to serve as jurors in the trial of individuals labelled as their enemy (especially when these officers have been on active duty continuously since 9/11 and served during the “global war against terrorism”) has also casted doubts on their independence and impartiality, or appearance thereof.⁸³⁶ Doubts as to members’ independence may also arise in the absence of specific prohibition against the selection of two or more members who fall within the same direct chain of command.⁸³⁷ More junior jurors may be influenced in their consideration of the facts, despite any formal advice to the contrary.⁸³⁸
353. Furthermore, ODIHR is troubled by public statements of high-level officials of both the Bush and Obama administrations and of influential elected politicians who, on multiple occasions since 2001, used “prejudicial and inflammatory”⁸³⁹ language such as “thugs”, “murderers”, “terrorists”, and “the worst of the worst” to refer to the accused and infer their guilt.⁸⁴⁰ Such statements, combined with issues related to the military commission’s

⁸³³ United States Military Commission, *United States of America v. Mohammad et al.*, AE 343C, *ibid.*, pp. 9-10.

⁸³⁴ See, for example, Carol Rosenberg, “War court judge orders Pentagon to replace USS Cole trial overseer”, Miami Herald website, 2 March 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article11915561.html>>; “Al-Nashiri Judge Orders to Replace Guantanamo Military Commission Convening Authority and Staff”, Human Rights First website, 3 March 2015, <<http://www.humanrightsfirst.org/blog/al-nashiri-judge-orders-replace-guantanamo-military-commission-convening-authority-and-staff>>.

⁸³⁵ Carol Rosenberg, “Guantánamo war court overseer quits”, Miami Herald website, 18 March 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article15262808.html>>.

⁸³⁶ ODIHR interview with Human Rights Watch, *op. cit.*, note 821.

⁸³⁷ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 24. It should be noted that in meetings with ODIHR, US representatives indicated that the fact that two jurors are in the same direct chain of command would be a cause of challenge in the *voir dire* process. ODIHR nevertheless remains concerned that this possibility is not prevented under the current statutes.

⁸³⁸ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *ibid.*

⁸³⁹ United States Military Commission, *United States of America v. Al-Nashiri*, AE 197, “Defense Motion to Dismiss for Unlawful Influence”, 24 December 2013, p. 1.

⁸⁴⁰ *Ibid.*, pp. 2-29. Relevant statements include: United States Press Secretary Ari Fleischer, “Press Briefing by Ari Fleischer”, The American Presidency Project website, 23 January 2002, <<http://www.presidency.ucsb.edu/ws/index.php?pid=61624#axzzluTJirNbs>>: “The President also understands that the people who are detained there are detained because, for the most part they’re all al Qaeda, and if they were free they would engage in murder once again. These are not mere innocents. These are among the worst of the worst”; United States Press Secretary Ari Fleischer, “Statement by the Press Secretary”, The White House website, 1 March 2003, <<http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030301-1.html>>: “Khalid Shaikh Mohammed is one of Usama Bin Laden’s most senior and significant lieutenants, a key Al Qaida planner and the mastermind of the September 11th attacks”; Deputy National Security Advisor for Combating Terrorism Juan Zarate, “Ask the White House”, The White House website, 5 September 2006, <<http://georgewbush-whitehouse.archives.gov/ask/20060905.html>>: “That has led to the capture of two of the masterminds of the Cole - Nashiri and Khallad bin Attash - who were senior lieutenants for al Qaida”; United States President George W. Bush, “President Bush Discusses Progress in the Global War on Terror”, The White House website, 7 September 2006, <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060907-2.html>>: “I authorized his transfer to Guantanamo Bay - and the sooner the Congress authorizes the military commissions I have called for, the sooner Khalid Sheikh

lack of structural independence, create the perception of a tainted system and the reasonable fear that the various actors involved in the proceedings may be influenced by bias, prejudice, or preconceptions about the cases and the defendants before them.

354. ODIHR notes US representatives' confidence in the independence of the various actors involved in the proceedings.⁸⁴¹ Nevertheless, the potential for perceived or actual undue influence remains in the current system, and it appears that no substantial changes were made to the wording of the MCA 2009 to prevent or mitigate this risk further.⁸⁴² Military commissions do not seem to present sufficient guarantees of structural independence and of impartiality as required by Article 14(1) of the ICCPR and corresponding OSCE commitments.

RIGHT TO A PUBLIC HEARING

355. Publicity of proceedings requires that interested individuals be provided with information and adequate facilities to attend oral hearings, within reasonable limits, especially when there is a high public interest in a specific case.⁸⁴³ The MCA and its implementing regulations mandate public access to military commission proceedings at Guantánamo, unless specific exceptions apply.⁸⁴⁴ However, in practice, the ability of the public, including media and NGO representatives, to attend and observe public hearings is limited. It is hindered by practical factors related to the remote location of the courtroom, such as limited air service, limited number of seats available to fly to Guantánamo, obligations to apply for permission, to stay at Guantánamo for several consecutive days and to pay their own flight costs, etc.⁸⁴⁵ Given the significant public interest in military commission

Mohammed will receive the justice he deserves"; Josh Gerstein, "Obama on terror trials: KSM will die", Politico website, 18 November 2001, <<http://www.politico.com/news/stories/1109/29661.html>>, reporting that President Obama would have said: "I think this notion that somehow we have to be fearful, that these terrorists are –possess some special powers that prevent us from presenting evidence against them, locking them up and, you know, exacting swift justice, I think that has been a fundamental mistake"; "Gibbs: Accused 9/11 plotter likely to be executed", NBC News website, 31 January 2010, <<http://www.nbcnews.com/id/35168785/ns/usnews-security/t/gibbs-accused-plotter%2%ADlikely-be-executed/#.VMEsX9RwaJB>>, reporting the words of Press Secretary Robert Gibbs: "Khalid Sheikh Mohammed is going to meet justice and he's going to meet his maker. He will be brought to justice and he's likely to be executed for the heinous crimes he committed"; United States Deputy Press Secretary Bill Burton, "Gaggle by Deputy Press Secretary Bill Burton aboard Air Force One en route Tampa, Florida, 1/28/10", The White House website, 28 January 2010, <<http://www.whitehouse.gov/the-press-office/gaggle-deputy-press-secretary-bill-burton-aboard-air-force-one-en-route-tampa-flori>>: "Well, let me start by saying that Khalid Sheikh Mohammed is a murderous thug who has admitted to crimes - who has admitted to some of the most heinous crimes ever committed against our country". See, also, Part 2-II-B of this report on the presumption of innocence.

⁸⁴¹ In meetings with ODIHR, US representatives stressed their confidence in the independence of the Convening Authority and his Legal Advisor, and in their ability to make fair decisions or provide neutral and detached advice, respectively. ODIHR meeting with the Department of Defense Office for the Convening Authority, 5 September 2014. US representatives also stressed that the prosecution function is independent, and that there have been no attempts whatsoever to influence the prosecution since at least the fall of 2011. ODIHR meeting with the Department of Defense Office of the Chief Prosecutor, *op. cit.*, note 722.

⁸⁴² See, in particular, MCA 2009, § 949b and MCA 2006, § 949b. See, also, Elsea, "The Military Commissions Act of 2009", *op. cit.*, note 621, pp. 52-53.

⁸⁴³ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 28; UN HRC, *G. A. van Meurs v. The Netherlands*, *op. cit.*, note 785, para. 6.2; Novak, *CCPR Commentary*, *ibid.*, pp. 324-325.

⁸⁴⁴ MCA 2009, § 949d(c)(2); RMC, Rule 806; RTMC 2011, Regulations 19-2, 19-6.

⁸⁴⁵ See, for example, United States Military Commission, *United States of America v. Mohammad et al.*, AE 007, "Order – Government Motion for Public Access to Open Proceedings of this Military Commission via Closed-Circuit Television Transmission to Remote Locations", 26 April 2012, p. 1; "Media – Welcome to JTF Guantanamo!", Joint Task Force Guantanamo website, <<http://www.jtftgmo.southcom.mil/xWEBSITE/commissions/media.html>>; "Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO)", Joint Task Force Guantanamo website, 10 September 2010, paras. K.2-4, <<http://www.jtftgmo.southcom.mil/xWEBSITE/commissions/DOD%20Media%20Ground%20Rules.pdf>>; "Guantanamo

proceedings,⁸⁴⁶ holding high-profile trials in a remote military base located outside of the United States can be considered to present a serious obstacle to their public character.

356. Moreover, limitations are placed on the ability of the public present at Guantánamo to observe the proceedings from the actual courtroom “given the constraints of courtroom size and the requirement to safeguard protected information”.⁸⁴⁷ In Courtroom Two,⁸⁴⁸ where ongoing proceedings take place, the media and public can only “observe proceedings from behind a glass partition”.⁸⁴⁹ In these proceedings, additional limitations have involved holding “open sessions with delay” and entirely closed sessions.⁸⁵⁰ “Open sessions with delay” have for instance been the norm in the Al-Nashiri and Mohammad *et al.* cases.⁸⁵¹ They entail that observers behind the glass partition hear the audio portion of the proceedings with a 40-second delay “to allow security officers to interrupt the feed in the event of the disclosure of protected information”.⁸⁵² In recent years, the United States has also provided a number of observers with the opportunity to watch a closed-circuit television (CCTV) feed of military commission proceedings from locations in the United

Bay Media Invitation Announced”, United States Department of Defense website, 14 October 2011, <<http://www.defense.gov/advisories/advisory.aspx?advisoryid=3396>>; “Military Commissions Media Invitation Announced”, United States Department of Defense website, 26 September 2012,

<<http://www.defense.gov/Releases/Release.aspx?ReleaseID=15586>>; United States Military Commission, *United States of America v. Mohammad et al.*, AE 008 (MAH), “Defense Motion to Dismiss for Defective Referral”, 19 April 2012, p. 7.

⁸⁴⁶ In the Mohammad *et al.* case, the military judge has recognized that “due to the serious nature of the crimes alleged and the historic nature of military commissions, there is significant public interest in the Commission proceedings.” United States Military Commission, *United States of America v. Mohammad et al.*, AE 007, *ibid.*

⁸⁴⁷ “Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO)”, Joint Task Force Guantánamo website, *op. cit.*, note 845, para G.1.

⁸⁴⁸ Courtroom Two is the courtroom used in ongoing cases before military commissions. It is a multi-defendant courtroom capable of trying up to six defendants jointly, to accommodate a capital case, and to permit the use of highly classified information at the Top Secret/ Sensitive Compartmented Information level or below. “Courtroom II”, Office of Military Commissions website.

⁸⁴⁹ “Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO)”, Joint Task Force Guantánamo website, *op. cit.*, note 845, para. G. 4.

⁸⁵⁰ *Ibid.*, paras. G.4-.5.

⁸⁵¹ United States Military Commission, *United States of America v. Mohammad et al.*, AE 013DDD, “Second Amended Protective Order #1”, 16 December 2013, para. 8.a.(3)(a); United States Military Commission, *United States of America v. Al-Nashiri*, AE 013M, “Amended Protective Order #1”, 27 March 2014, para. 47.c(i).

⁸⁵² “Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO)”, Joint Task Force Guantánamo website, *op. cit.*, note 845, para. G.4. When “open sessions with delay” are to occur in relation to proceedings taking place in Courtroom One, all observers are to view a delayed feed of the proceedings from a viewing area at Guantánamo. “Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO)”, Joint Task Force Guantánamo website, *op. cit.*, note 845, para. G. 4.

States, including Fort Meade, a US military base in Maryland.⁸⁵³ This CCTV feed is broadcasted with the same 40-second delay.⁸⁵⁴

357. Efforts to accommodate the level of public interest by broadcasting the proceedings in the United States constitute a positive development. However, such broadcasting cannot, by itself and in the present conditions involving a 40-second delay of the audio-feed, sufficiently meet the requirement of publicity of trials.
358. ODIHR takes note of the military judge's conclusion that the 40-second delay is "the least disruptive method of both insuring the continued protection of classified information while providing the maximum in public transparency".⁸⁵⁵ However, it is of concern that this delay may have in fact rendered the proceedings "presumptively closed by withholding from the public, media, and observers, at the press of a button any access to detainees' personal accounts of their detention and mistreatment".⁸⁵⁶ While considerations of national security may justify restrictions to the right to a public hearing, any such restriction is to remain strictly proportionate to its aim. In this regard, ODIHR is troubled by reports of incidents where the audio transmission of non-classified information was unduly suspended,⁸⁵⁷ and where a third party outside the courtroom cut off the audio-feed of the proceedings without the judge's knowledge and approval, revealing the existence of an

⁸⁵³ According to an order of December 2014, military commission proceedings are transmitted via CCTV to Fort Meade, Maryland, Fort Devens, Massachusetts, Fort Hamilton, New York and Joint Base McGuire Dix Lakehurst, New Jersey. However, several facilities are not available to the general public, including media and NGO representatives, but are restricted to relatives of the victims of the 9/11 attacks as well as first responders. Media and NGO representatives can watch the proceedings from Fort Meade, Maryland. United States Military Commission, *United States of America v. Mohammad et al.*, AE 007F, "Order – To Amend the Commission's Order For Additional Public Access to Open Proceedings Of This Military Commission Via Closed-Circuit Television Transmission To Remote Locations", 16 December 2014, pp. 1-2. See, also, United States Military Commission, *United States of America v. Mohammad et al.*, AE 007, *op. cit.*, note 845, pp. 1-4; "Guantanamo Bay Media Invitation Announced", United States Department of Defense website, 14 October 2011, *op. cit.*, note 845; "Military Commissions Media Invitation Announced", United States Department of Defense website, 26 September 2012, *op. cit.*, note 845; Donna Miles, "Pretrial Hearings Kick Off for 9/11 Defendants", United States Department of Defense website, 15 October 2012, <<http://www.defense.gov/news/newsarticle.aspx?id=118219>>; Jane Sutton, "Defense wants 9/11 trial televised globally from Guantanamo", Reuters website, 19 October 2012, <<http://www.reuters.com/article/2012/10/20/us-usa-guantanamo-idUSBRE89I19620121020>>.

⁸⁵⁴ Karen Parrish, "Chief Prosecutor Outlines Military Commissions Process", United States Department of Defense website, 8 November 2011, <<http://www.defense.gov/news/newsarticle.aspx?id=66011>>; Charlie Savage, "Defendants in Sept. 11 Case Cooperate as Proceedings Resume at Guantánamo", The New York Times website, 15 October 2012, <http://www.nytimes.com/2012/10/16/us/sept-11-terrorism-case-resumes-smoothly-at-guantanamo.html?_r=0>; Keith Gerber, "Coverage of al-Nashiri's Arraignment", Lawfare website, 9 November 2011, <<http://www.lawfareblog.com/2011/11/coverage-of-al-nashiris-arraignment-2/>>.

⁸⁵⁵ United States Military Commission, *United States of America v. Mohammad et al.*, AE 013DDD, "Second Amended Protective Order #1", *op. cit.*, note 851, para. 8.a.(3)(a); United States Military Commission, *United States of America v. Al-Nashiri*, AE 013M, "Amended Protective Order #1", *op. cit.*, note 851, para. 47.c(i).

⁸⁵⁶ United States Military Commission, *United States of America v. Mohammad et al.*, "Motion of the American Civil Liberties Union for Public Access to Proceedings and Records", *op. cit.*, note 813, p. 2.

⁸⁵⁷ "This is not the first time the suspension of the broadcast has been initiated. It is also not the first time the military judge ruled the evidence should have been discussed in open court". United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of motions hearing dated 31/01/2013 from 9:01 AM to 09:22 AM", *op. cit.*, note 816, p. 1720-1721. See, also, United States Military Commission, *United States of America v. Mohammad et al.*, AE 013H, "Reply of the American Civil Liberties Union to the Government's Response to the Motion for Public Access to Proceedings and Records", 23 May 2012, p. 11; Jane Sutton and Josh Meyer, "Insight: At Guantanamo tribunals, don't mention the 'T' word", Reuters website, 20 August 2012, <<http://www.reuters.com/article/2012/08/20/us-guantanamo-tribunals-idUSBRE87J03U20120820>>.

external monitoring system of the proceedings.⁸⁵⁸ These incidents, viewed in light of the over-classification of information related to “high-value detainees” treatment in CIA detention, lead to the conclusion that the use of the 40-second delay has not in practice always been necessary and strictly proportionate to safeguard national security. Therefore, they give rise to concern over violations of the right to a public trial provisions as stipulated in Article 14(1) of the ICCPR and OSCE commitments.

d. Recommendations

- Regardless of the status of Guantánamo detainees under international law, to ensure that those suspected of a criminal offence are prosecuted before ordinary courts providing sufficient guarantees of independence, impartiality and publicity;
- To ensure that restrictions to the publicity of any criminal proceeding against Guantánamo detainees are decided on a case-by-case basis and remain proportionate to the need to protect national security or public order.

B. PRESUMPTION OF INNOCENCE

a. International Standards

359. The presumption of innocence is protected by various international treaties, including Article 14(2) of the ICCPR,⁸⁵⁹ and by OSCE commitments, such as Copenhagen 1990, which states that the presumption of innocence is “essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings”.⁸⁶⁰
360. The presumption of innocence is a fundamental element of a fair trial in criminal proceedings. According to Article 14 of the ICCPR, “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to

⁸⁵⁸ During a January 2013 pre-trial hearing, the audio feed of the courtroom was cut for a few minutes by an entity outside the courtroom, later identified as the original classification authority. The feed was cut after a defence counsel mentioned a request to preserve evidence of a CIA detention facility where “high-value detainees”, including the accused, were held prior to their transfer to Guantánamo. Judge Pohl subsequently ruled that the information should not have been kept from the public and summarized it in open court the following day. He also stressed that this was the last time any third party was permitted to unilaterally decide to suspend the broadcast and ordered the government to dismantle the monitoring system. United States Military Commission, *United States of America v. Mohammad et al.*, “Unofficial/unauthenticated transcript of the hearing dated 1/28/2013 from 1:31 PM to 2:46 PM”, pp. 1445-1447; “Statement of Judge Col. James Pohl, 1.31.2013”, 31 January 2013, <<https://www.documentcloud.org/documents/563738-statement-of-judge-col-james-pohl-jan-31-2013.html>>; United States Military Commission, *United States of America v. Mohammad et al.*, “Unofficial/unauthenticated transcript of motions hearing dated 31/01/2013 from 9:01 AM to 09:22 AM”, *op. cit.*, note 816, p. 1720; Jane Sutton, “Judge orders end to secret censorship of Guantanamo court”, Reuters website, 1 February 2013, <<http://in.reuters.com/article/2013/01/31/usa-guantanamo-idINDEE90U0JM20130131>>; Wells Bennett and Sophia Brill, “1/28 Hearing #6: Who Hit the Censor Button? And Voluntariness, and a 505(h) Session”, Lawfare website, 28 January 2013, <<http://www.lawfareblog.com/2013/01/28-hearing-6-who-hit-the-censor-button-and-voluntariness-and-a-505h-session/>>; Carol Rosenberg, “Guantánamo spills its secrets slowly, in surprising ways”, Miami Herald website, 2 February 2013, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article3620967.html>>; Jason Leopold, “Secret censor revealed at Guantanamo Military Commissions”, Truthout website, 29 January 2013, <<http://www.truth-out.org/news/item/14223-secret-censor-revealed-at-guantanamo-military-commissions>>.

⁸⁵⁹ ICCPR, Art. 14(2); ACHR, Art. 8(2); ADRDM, Art. XXVI; UDHR, Art. 11. See, also, “Body of Principles”, *op. cit.*, note 89, Principle 36.

⁸⁶⁰ OSCE Copenhagen Document, *op. cit.*, note 80, paras. 5, 5.19.

law”.⁸⁶¹ The Human Rights Committee specified that the right to be presumed innocent extends until the prosecution has proved each element of a criminal charge beyond a reasonable doubt.⁸⁶² This presumption is non-derogable.⁸⁶³

361. The actions of public authorities, the media and the courts all affect the presumption of innocence. Therefore, international bodies found that all public authorities are to refrain from publically stating or otherwise prejudicing the outcome of any criminal trial.⁸⁶⁴ For instance, public statements by senior officials on the guilt of the accused, such as statements advocating for an accused to be sentenced to death, are a violation of the presumption of innocence.⁸⁶⁵ Media reporting that is capable of influencing ongoing or subsequent court proceedings to the detriment of the defendant may also undermine the presumption of innocence.⁸⁶⁶ The right to be presumed innocent also requires that the judge and the jurors not hold any preconceptions or notions of the defendant’s guilt.⁸⁶⁷ Hence, defendants should generally not be shackled, held in cages or otherwise presented as dangerous criminals during trial.⁸⁶⁸
362. Additionally, the length of pre-trial detention should not be indicative of guilt.⁸⁶⁹ When pre-trial or preventative detention is excessive, such as when pre-trial or preventative detention exceeds a reasonable period of time,⁸⁷⁰ the presumption of innocence may be violated.⁸⁷¹
363. International humanitarian law also protects the presumption of innocence. API stipulates that “[n]o sentence may be passed and no penalty may be executed on a person found

⁸⁶¹ ICCPR, Art. 14(2); Nowak, *CCPR Commentary, op. cit.*, note 93, pp. 329-330: “The prevailing view (...) is that the presumption of innocence, as well as most of the other rights in Art. 14, are available not only to the defendant in the strictest sense of the word but also to an accused person prior to the filing of a criminal charge. A person has this right ‘until proved guilty according to law.’”

⁸⁶² UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 30.

⁸⁶³ *Ibid.*, paras. 6, 30; UN HRC General Comment No. 29, *op. cit.*, note 111, para. 11.

⁸⁶⁴ UN HRC, General Comment No. 32, *ibid.*, para. 30; UN HRC, *Munguwambuto Kabwe Peter Mwamba v. Zambia*, Communication No. 1520/2006, 30 April 2010, para. 6.5,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F98%2FD%2F1520%2F2006&Lang=en>.

⁸⁶⁵ UN HRC, *Francisco Juan Larrañaga v. The Philippines*, Communication No. 1421/2005, 14 September 2006, para. 7.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f87%2fd%2f1421%2f2005&Lang=en>; UN HRC, *Dimitry L. Gridin v. Russian Federation*, Communication No. 770/1997, 20 July 2000, para. 8.3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F69%2FD%2F770%2F1997&Lang=en>.

⁸⁶⁶ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 30; UN HRC, *Mwamba v. Zambia, op. cit.*, note 864, para. 6.5; UN HRC, *Barno Saidova v. Tajikistan*, Communication No. 964/20001, 20 August 2004, para. 6.6,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f81%2fd%2f964%2f2001&Lang=en>.

⁸⁶⁷ UN HRC, General Comment No. 32, *ibid.*, para. 21; UN HRC, *Arvo O. Karttunen v. Finland, op. cit.*, note 779, para. 7.2; Nowak, *CCPR Commentary, op. cit.*, note 93, p. 330.

⁸⁶⁸ UN HRC, General Comment No. 32, *ibid.*, para. 30.

⁸⁶⁹ *Ibid.*

⁸⁷⁰ IACHR, *Jorge A. Giménez v. Argentina*, Case No. 11.245, Report 12/96, 1 March 1996, paras. 80, 114, <<http://cidh.org/annualrep/95eng/Argentina11245.htm>>.

⁸⁷¹ The Human Rights Committee found a violation of the presumption of innocence when preventative detention before trial exceeded nine years. UN HRC, *Geniuval M. Cagas, Wilson Butin and Julio Astillero v. The Philippines*, Communication No. 788/1997, para. 7.3, 23 October 2001, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f73%2fd%2f788%2f1997&Lang=en>.

guilty of a penal offence” unless an impartial and regularly constituted court or tribunal respects the presumption of innocence.⁸⁷²

b. Domestic Standards

364. Although the presumption of innocence is not specifically referred to in the US Constitution, it is implied in the Fifth, Sixth and Fourteenth Amendments.⁸⁷³ A large body of domestic case law defines the presumption of innocence as applicable to all trials on a criminal charge whereby the accused is presumed innocent until every element of the offence is proven beyond a reasonable doubt.⁸⁷⁴
365. Before holding the vote on the findings of the commission, the military commission’s judge must inform the members (jurors) that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt”; that any “doubt must be resolved in favor of the accused”; that the accused is to be found guilty of a lower offence of which there is no reasonable doubt where doubt exists for a more serious offence; and that “the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States”.⁸⁷⁵ Members must be excused if they have “informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged”.⁸⁷⁶

c. Findings and Analysis

366. Several safeguards protect the presumption of innocence in proceedings before the military commissions. First, Article 949I(c) of the MCA 2009 provides for the protection of the presumption of innocence. Additionally, the dismissal requirement for potentially biased members helps protect the accused from preconceptions of guilt.⁸⁷⁷ Second, defendants are generally dressed in civilian clothes and unshackled when in the courtroom. Third, the Chief Prosecutor of the military commissions has repeatedly stressed that detainees who have been charged with an offence are presumed innocent “unless and until” they are proven guilty beyond a reasonable doubt.⁸⁷⁸

⁸⁷² API, Art. 75(4)(d). See, also, Common Article 3; Third Geneva Convention, Arts. 84, 102, 130; Fourth Geneva Convention, Arts. 66, 147; ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić, op. cit.*, note 789, para. 678.

⁸⁷³ The due process clause of the Fourteenth Amendment is only applicable to states, not the federal government.

⁸⁷⁴ See, for instance, United States Supreme Court, *In re Winship*, Case No. 778, 31 March 1970, <<https://supreme.justia.com/cases/federal/us/397/358/case.html>>: “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”. See, also, United States Supreme Court, *John Sullivan v. Louisiana*, Case No. 92-5129, 1 June 1993, <<http://www.law.cornell.edu/supct/html/92-5129.ZO.html>>; United States Supreme Court, *Coffin v. United States*, Case No. 741, 4 March 1895, <<http://www.constitution.org/ussc/156-432.htm>>.

⁸⁷⁵ MCA 2009, § 949I(c). See, also, MCA 2009, § 949i; RMC, Rules 918, 920.

⁸⁷⁶ RMC, Rule 912(f)(1).

⁸⁷⁷ *Ibid.*

⁸⁷⁸ For example, on 21 April 2014 before the pre-trial hearings commenced for the week for Al-Nashiri, Chief Prosecutor Brigadier General Mark Martins said “I emphasize that the charges are only allegations. Mr. Al Nashiri is presumed innocent unless and until proven guilty beyond a reasonable doubt. This is what the law requires, and this is what all who have responsibilities within this process must ensure”. Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 21 April 2014, <<http://www.lawfareblog.com/wp-content/uploads/2014/04/Statement-of-the-Chief-Prosecutor-21-April-2014.pdf>>.

367. However, other factors undermine the presumption of innocence. For instance, the accused, who has already been classified as an enemy combatant by the CSRTs, is presented as an alien “unprivileged enemy belligerent” before facing trial. This designation, which is indispensable to satisfy the personal jurisdiction requirements of the MCA, indicates to the judge and to the members of the military commission that the accused engaged in hostilities against the United States or coalition partners, purposefully and materially supported hostilities and/or was part of al Qaeda before the trial even begins.⁸⁷⁹ Additionally, the length of detention may affect the presumption of innocence. Of the detainees currently facing pre-trial proceedings, one detainee has been in detention for approximately 13 years, five detainees have been in detention for approximately 12 years and one detainee has been detained for almost nine years.⁸⁸⁰ Notably, the Human Rights Committee has found that nine years of preventative detention constituted a violation of the right to be presumed innocent.⁸⁸¹ The lengthy ongoing detention of the detainees currently facing trial by military commissions likely violates international standards on the right to be presumed innocent.
368. Senior government officials’ public statements on the guilt of the detainees also affect the presumption of innocence. The President, the Secretary of Defense, the United States Attorney General, members of Congress and senior military figures have made numerous statements that have asserted the guilt of the defendants.⁸⁸² These statements include those that refer to detainees as “killers”, “terrorists”, “murderers”, “the worst of the worst”, members of al Qaeda who would “engage in murder once again” and, in Khalid Shaikh Mohammad’s case, “the mastermind of the September 11 attacks (...) [who] conceived and planned the hijackings and directed the actions of the hijackers”.⁸⁸³ In some instances,

⁸⁷⁹ See MCA 2009, § 948(a)(7).

⁸⁸⁰ This detention includes detention in both Guantánamo and secret CIA detention facilities. Al-Nashiri has been detained since 2002, while al Shibh, Khalid Shaikh Mohammad, al Baluchi, bin ‘Attash and al Hawsawi have been in detention since 2003. Al-Iraqi has been detained since 2006. Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 458-461; “The Guantánamo Docket”, The New York Times website, *op. cit.*, note 88; Rosenberg, “Who’s still being held at Guantánamo”, *op. cit.*, note 88; Rosenberg, “By the Numbers”, *op. cit.*, note 88.

⁸⁸¹ UN HRC, *Cagas, Butin and Astillero v. The Philippines*, *op. cit.*, note 871, para. 7.3.

⁸⁸² A brief submitted to the military commission in the Mohammad *et al.* case includes approximately 71 public statements made by US officials that infer the guilt of the accused. A similar brief was submitted in Al-Nashiri’s case. United States Military Commission, *United States of America v. Mohammad et al.*, AE 031B (MAH), “Defense Reply to Government Response to Joint Defense Motion to Dismiss for Unlawful Influence”, 1 June 2012, p. 1; United States Military Commission, *United States of America v. Mohammad et al.*, AE 031, “Joint Defense Motion for Unlawful Influence”, 11 May 2012; United States Military Commission, *United States of America v. Al-Nashiri*, AE 197, *op. cit.*, note 839.

⁸⁸³ See, also, Part 2-II-A for additional statements. Examples of relevant statements include: “Transcript of Bush News Conference on Iraq”, CNN website, 7 March 2003, <<http://edition.cnn.com/2003/US/03/06/bush.speech.transcript/>>; “Bush Reconsiders Prisoners’ Rights”, BBC website, 29 January 2002, <<http://news.bbc.co.uk/2/hi/americas/1788062.stm>>; President Bush said “these are killers, these are terrorists”; Secretary of Defense Donald H. Rumsfeld, “Secretary Rumsfeld Media Availability En Route to Guantanamo Bay, Cuba”, United States Department of Defense website, 27 January 2002, <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2320>>; “these are among the most dangerous, best trained vicious killers on the face of the earth”; Liz Halloran, “Trying Sept. 11 Suspects in U.S. A Political Gamble”, NPR website, 19 November 2009, <<http://www.npr.org/templates/story/story.php?storyId=120546400>>; United States Attorney General Eric Holder said “I’m not going to base a determination on where these cases ought to be brought on what a terrorist - what a murderer - wants to do”; Fleischer, “Press Briefing by Ari Fleischer”, *op. cit.*, note 840: The White House Press Secretary said “for the most part they’re all al Qaeda, and if they were free they would engage in murder once again. These are not mere innocents. These are among the worst of the worst who are being detained because of what they have done, because of the suicidal nature of the actions that they have taken - their willingness, their training to go out and kill and destroy and engage in suicide if they can take others with them”; United States President George W. Bush, “Remarks at a Texas Victory 2006 Rally in Sugar Land, Texas”, 30 October 2006, <

officials have also expressed a clear desire for the imposition of the death penalty for particular defendants. The then-US Attorney General Eric Holder, for example, said that the 9/11 suspects “would be on death row as we speak” if the case had been tried in federal court.⁸⁸⁴ Public authorities, however, are under a duty not to prejudge the outcome of any criminal trial as a violation of the presumption of innocence occurs where public officials publically infer the guilt of the accused or advocate for the death penalty.⁸⁸⁵ Thus, the public statements made by US authorities violate international standards on the right to be presumed innocent.

d. Recommendations

- To ensure that any proceedings against Guantánamo detainees meet international standards on the presumption of innocence, including regarding the length of pre-trial detention which should not be indicative of guilt.
- To take effective steps to ensure that all public officials refrain from making any statements that prejudge or otherwise prejudice the outcome of any trials of Guantánamo detainees;
- To provide an effective remedy where a defendant’s right to be presumed innocent has been violated.

C. RIGHT TO BE TRIED WITHOUT UNDUE DELAY

a. International Standards

369. Article 14(3)(c) of the ICCPR stipulates that the right “to be tried without undue delay” is a fundamental guarantee in any determination of a criminal charge against the accused.⁸⁸⁶ Similar guarantees are provided by other international treaties and standards⁸⁸⁷ and by OSCE commitments.⁸⁸⁸ The primary purpose of this right is to “avoid keeping persons too long in a state of uncertainty about their fate”; to minimize deprivation of liberty when the accused is held in detention; and to serve the interests of justice.⁸⁸⁹

370. The right to be tried without undue delay is engaged from the time the accused is formally charged until the final judgment on appeal.⁸⁹⁰ All stages must occur “without undue

Commission, *United States of America v. Mohammad et al.*, AE 031, *ibid.*; United States Military Commission, *United States of America v. Al-Nashiri*, AE 197, *ibid.*

⁸⁸⁴ See, for instance: Evan Perez, “Holder: ‘I was right’ on KSM Trial”, CNN website, 4 November 2013,

<<http://security.blogs.cnn.com/2013/11/04/holder-i-was-right-on-ksm-trial/>>: Holder said “the defendants would be on death row as we speak”; “Holder Speaks Out on Snowden, Drone Policy, Softening Sentences”, NPR website, 11 March 2014,

<<http://www.npr.org/2014/03/11/288727200/holder-speaks-out-on-snowden-drone-policy-softening-sentences>>: “Khalid Shaikh Mohammad and his confederates would be on death row”.

⁸⁸⁵ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 30; UN HRC, *Mwamba v. Zambia*, *op. cit.*, note 864, para. 6.5;

UN HRC, *Francisco Juan Larrañaga v. The Philippines*, *op. cit.*, note 865, para. 7.4.

⁸⁸⁶ ICCPR, Art. 14(3)(c).

⁸⁸⁷ ADRDM, Art. XXV; Decaux Principles, *op. cit.*, note 647, Principle 15. See, also, ACHR, Art. 8(1); “Body of Principles”, *op. cit.*, note 89, Principle 38.

⁸⁸⁸ See, for instance, OSCE Vienna Document, *op. cit.*, note 90, para. 13.9, which provides that participating States will “effectively apply...the right to a fair and public hearing *within a reasonable time.*”

⁸⁸⁹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 35.

⁸⁹⁰ *Ibid.*

delay”.⁸⁹¹ For cases that involve serious criminal charges, such as murder, and where the accused is held in detention before and during trial, the Human Rights Committee has found that “the accused must be tried in as expeditious a manner as possible”.⁸⁹²

371. A determination of what constitutes an undue or unreasonable delay will depend upon the circumstances of each particular case.⁸⁹³ Relevant factors include the complexity of the case, the conduct of the accused and the actions of the administrative and judicial authorities of the state in handling the matter.⁸⁹⁴ The burden of proof for showing that a delay is justified and reasonable rests with the state.⁸⁹⁵ The Human Rights Committee has found that a delay of over four years, from when the accused was charged until convicted, in the absence of any justification, is a violation of Article 14(3)(c) of the ICCPR.⁸⁹⁶ If an individual is detained and “charged with an offence but not brought to trial” then both Article 9(3) and Article 14(3)(c) of the ICCPR may be violated.⁸⁹⁷
372. The right to be tried without undue delay is also protected under international humanitarian law by virtue of Common Article 3 and other provisions of the Geneva Conventions.⁸⁹⁸

b. Domestic Standards

373. The Sixth Amendment to the US Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”.⁸⁹⁹ The applicability of this

⁸⁹¹ *Ibid.*

⁸⁹² UN HRC, *Glenroy Francis et al. v. Trinidad and Tobago*, Communication No. 899/1999, 25 July 2002, para. 5.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f75%2fd%2f899%2f1999&Lang=en>: the Committee said that the State party would have to show very exceptional reasons to justify delays of four years and three months, and three years and five months, until trial.

⁸⁹³ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 35; Nowak, *CCPR Commentary, op. cit.*, note 93, p. 334.

⁸⁹⁴ UN HRC, General Comment No. 32, *ibid.*

⁸⁹⁵ UN HRC, *Isidora Barroso v. Panama*, Communication No. 473/1991, 27 July 1995, para. 8.5, <http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/54/D/473/1991>; IACHR, *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, 21 June 2002, paras. 122, 145, <http://www.corteidh.or.cr/docs/casos/articulos/seriec_94_ing.pdf>.

⁸⁹⁶ UN HRC, *Jan Filipovich v. Lithuania*, Communication No. 875/1999, 4 August 2003, para. 7.1, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f78%2fd%2f875%2f1999&Lang=en>: the State party did not provide justification and the Committee noted the case was not too complex; UN HRC, *Girjadas Siewpersaud et al. v. Trinidad and Tobago*, Communication No. 938/2000, 29 July 2004, para. 6.1, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f81%2fd%2f938%2f2000&Lang=en>: the State party provided no justification for the delay. The Human Rights Committee has also found that an unexplained pre-trial delay of approximately 2 years also violates the ICCPR. See, also, UN HRC, *Xavier Evans v. Trinidad and Tobago*, Communication No. 908/2000, 21 March 2003, para. 6.2, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f77%2fd%2f908%2f2000&Lang=en>; UN HRC, *Boodoo v. Trinidad and Tobago, op. cit.*, note 511, paras. 6.2, 6.3: the accused was detained for two years and nine months.

⁸⁹⁷ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 61.

⁸⁹⁸ Third Geneva Convention, Art. 103: “[j]udicial investigations (...) shall be conducted as rapidly as circumstances permit and so that trial shall take place as soon as possible”; Fourth Geneva Convention, Art. 71: “[a]ccused persons (...) shall be brought to trial as rapidly as possible”; API, Art. 75(4): “[n]o sentence may be passed and no penalty may be executed (...) except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”; Common Article 3; ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić, op. cit.*, note 789, para. 678.

⁸⁹⁹ US Constitution, Sixth Amendment.

Amendment to detainees held at Guantánamo has not been determined by a domestic court.⁹⁰⁰

374. The MCA 2009 specifically excludes the applicability of speedy trial rights contained in the UCMJ and the rules of courts-martial to military commissions.⁹⁰¹ Additional provisions in the RMC provide, subject to some exceptions, that an accused should be arraigned before the military commission within 30 days of the service of the charges and that the judge shall announce the assembly of the military commission within 120 days of the service of the charges.⁹⁰²

c. Findings and Analysis

375. Under the MCA 2009, the right to be tried without undue delay, as contained in the UCMJ, has been explicitly made inapplicable to military commissions.⁹⁰³ The specific removal of speedy trial rights creates the impression that the US government does not intend or does not believe that it is possible for military commissions' proceedings to comply with speedy trial rights. This exclusion combined with the lengthy proceedings thus far, as discussed in more detail below, raise grave concerns that Guantánamo detainees have been intentionally deprived of their right to be tried without undue delay.
376. The multiple versions of military commissions between 2001 and 2009 have led to long delays, in some cases due to the withdrawal and refile of charges, which explains some of the earlier delays involved in military commission proceedings. For instance, al Bahlul was initially charged in 2004 and, following the United States Supreme Court ruling that invalidated the original military commissions and the subsequent creation of the MCA 2006, the US government recharged al Bahlul in 2008⁹⁰⁴ and he was convicted in 2008.⁹⁰⁵ As of 31 August 2015, his case was still under appeal. Hence, it has been more than 11 years since al Bahlul was initially charged and more than seven years since he was recharged, but his trial has still not reached the point of final judgment on appeal. Additionally, Hamdan was initially charged in 2004,⁹⁰⁶ recharged in 2007⁹⁰⁷ and convicted in 2008,⁹⁰⁸ but the final decision on appeal, in which his conviction was vacated, was not

⁹⁰⁰ In the federal prosecution of former Guantánamo detainee Ahmed Khalfan Ghailani, the US Court of Appeals for the Second Circuit held that “there was no violation of Ghailani’s right under the Speedy Trial Clause of the Sixth Amendment” of the US Constitution in spite of the fact that he “was held abroad for several years by the Central Intelligence Agency and the Department of Defense while his indictment was pending”. United States Court of Appeals for the Second Circuit, *United States v. Ahmed Khalfan Ghailani*, Case No. 11-320-CR, 24 October 2013.

⁹⁰¹ MCA 2009, § 948(b)(d)(1)(A).

⁹⁰² RMC, Rule 707(a). Exceptions to the prescribed time periods are set out in RMC, Rule 707(b)(4), which provides that new time periods run following the withdrawal or dismissal of charges, mistrials, government appeals, rehearings, continuances and for periods of hospitalization of the accused.

⁹⁰³ MCA 2009, § 948(b)(d)(1)(A); ODIHR meeting with the Department of Defense Office for the Convening Authority, *op. cit.*, note 841.

⁹⁰⁴ United States Military Commission, “Charges”, 28 June 2004; United States Military Commission, “Charge Sheet: Ali Hamza Ahmad Suliman al Bahlul”, 8 February 2008.

⁹⁰⁵ United States Military Commission, *United States of America v. al Bahlul*, AE 074, “Findings Worksheet”, *op. cit.*, note 631.

⁹⁰⁶ United States District Court for the District of Columbia, *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, Case No. 04-1519, 8 November 2004, p. 3, <www.legislationline.org/documents/id/7456>.

⁹⁰⁷ United States Military Commission, “Charge Sheet: Salim Ahmed Hamdan”, 5 April 2007.

⁹⁰⁸ United States Military Commission, “Report of Result of Trial”, 7 August 2008.

made until the end of 2012.⁹⁰⁹ In light of the length between the charges and the final decisions on appeal (as noted, al Bahlul's case has not yet reached this stage), ODIHR's view is that the right to be tried without undue delay has likely been violated in both cases.⁹¹⁰

377. Other delays may be partly explained by the complexity of the case. Charges were sworn against the five co-defendants in the Mohammad *et al.* case in April 2008.⁹¹¹ These charges were subsequently withdrawn in January 2010 after the Obama administration decided to try the defendants in federal court.⁹¹² Following the subsequent decision to try the 9/11 suspects by a military commission, charges were again sworn in May 2011.⁹¹³ At the time of this report, the Mohammad *et al.* case remained at the pre-trial stage.
378. ODIHR notes that this case is very complex. It involves five defendants who are charged with eight serious offences in relation to the death of thousands of people on 9/11. This case likely involves a large quantity of evidence, including classified evidence, and witnesses, as well as complicated legal, factual, evidential and procedural issues. This complexity necessarily entails a trial of considerable duration, particularly to allow both the prosecution and the defence sufficient time to prepare.
379. Nevertheless, acts of the US government have contributed to the slow pace of this trial. First, the US government decided to try the five co-defendants together in a court without long-standing established rules of procedure or precedent. Second, it dropped all charges in order to try the co-defendants in federal court only to later decide to use the military commissions. This by itself led to a delay of almost one and a half years. Third, the decision by the US government to hold trials at Guantánamo creates challenges to attorney-client meetings and to holding regularly scheduled hearings as the judges and lawyers live in the United States and must travel to Guantánamo.⁹¹⁴ Fourth, further delays occurred after FBI agents secretly questioned members of al Shihb and Khalid Shaikh Mohammad's defence teams thereby creating concerns over potential conflicts of interest between the defence teams and their clients.⁹¹⁵ Although the FBI's actions were revealed in April 2014,

⁹⁰⁹ United States Court of Appeals for the District of Columbia Circuit, *Hamdan v. United States of America*, "On Petition for Review from the United States Court of Military Commission Review", 16 October 2012, *op. cit.*, note 630.

⁹¹⁰ The Human Rights Committee has, for example, found violations where there was a delay of two and a half years and over three years between the conviction and the final decision on appeal. UN HRC, *Jose Luis Garcia Fuenzalida v. Ecuador*, Communication No. 480/1991, 12 July 1996, para. 9.6, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f57%2fd%2f480%2f1991&Lang=en>; UN HRC, *Eustace Henry and Everaldo Douglas v. Jamaica*, Communication No. 571/1994, 25 July 1996, para. 9.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f57%2fd%2f571%2f1994&Lang=en>.

⁹¹¹ See, for instance, United States Military Commission, "Charge Sheet: Khalid Shaikh Mohammad", 9 May 2008.

⁹¹² See, for instance: United States Military Commission, "Direction of the Convening Authority", 21 January 2010; "Attorney General Announced Forum Decisions for Guantanamo Detainees", United States Department of Justice website, *op. cit.*, note 686.

⁹¹³ United States Military Commission, "Charge Sheet: Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul-Aziz Ali, Mustafa Ahmed Adam al Hawsawi", 5 May 2011.

⁹¹⁴ ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, 5 September 2014; ODIHR interview with Matthew O'Hara, *op. cit.*, note 255; ODIHR interview with David Remes, *op. cit.*, note 255; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725.

⁹¹⁵ The military commission did find that the FBI questioned al Shihb's Defense Security Officer, and that another situation had arisen in 2013, which had involved the FBI and a linguist assigned to Khalid Shaikh Mohammad's team. The FBI also required

the Mohammad *et al.* case has remained effectively stalled due to the need for further inquiry into the potential conflict of interest created by these actions.⁹¹⁶ While this issue remains unresolved, further delays have occurred since February 2015, when a pre-trial hearing ended after only a few hours, following the revelation that an interpreter newly and temporarily assigned to the defence formerly worked in a CIA secret detention facility where several accused were detained.⁹¹⁷ Since then, pre-trial hearings in the case have been repeatedly cancelled.⁹¹⁸

380. ODIHR is not aware of conduct by the co-defendants that has led to significant delays in trial. Al Shibh has at times disrupted pre-trial hearings, but this conduct led the commission to question his mental competence to stand trial.⁹¹⁹ Taking into account the complexity of the case, the conduct of the accused and the actions of US authorities,⁹²⁰ ODIHR is gravely concerned by the fact that it has been more than four years since the current charges were sworn, that more than seven years have passed since the initial charges were sworn and that setting a trial date is currently beyond “the realm of possibility”.⁹²¹ Trials involving serious criminal charges where the accused is held in detention are to be tried in as expeditious a manner as possible.⁹²² ODIHR is therefore of the view that these delays are in contravention of the right to be tried without undue delay.
381. Similarly, Al-Nashiri was apprehended in 2002, but he was not initially charged until June 2008.⁹²³ Charges were dismissed without prejudice in November 2009 and his current charges were sworn in September 2011.⁹²⁴ Like the Mohammad *et al.* case, Al-Nashiri’s case is also affected by the remote location of Guantánamo and the lack of longstanding established procedures and precedent of the military commissions. Additionally, pre-trial hearings have been delayed by, *inter alia*, concerns over government monitoring and interference,⁹²⁵ allegations of unlawful influence,⁹²⁶ Al-Nashiri’s treatment in the CIA RDI

the Defense Security Officer to sign a nondisclosure agreement and a classified information nondisclosure agreement. See, for instance: United States Military Commission, *United States of America v. Mohammad et al.*, AE 292QQ, “Amended Order - Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused”, 16 December 2014, pp. 1, 11-12.

⁹¹⁶ Judge Pohl determined that a conflict of interest may only be present in al Shibh’s case. *Ibid.*, pp. 31-32.

⁹¹⁷ See, for example, Daphne Eviatar, “Stalled 9/11 Case is Another Reason to Close Guantanamo”, The World Post website, 13 August 2015, <http://www.huffingtonpost.com/daphne-eviatar/stalled-911-case-is-anoth_b_7985120.html>; Daphne Eviatar, “Guantanamo Military Commissions Stall Again: Time to Move On”, The World Post website, 6 April 2015,

<http://www.huffingtonpost.com/daphne-eviatar/guantanamo-military-commi_b_7012000.html>; John Knefel, “FBI infiltrates defense team, causes new delay in 9/11 trial”, Al Jazeera America, 5 June 2015,

<<http://america.aljazeera.com/blogs/scrutineer/2015/6/5/fbi-infiltrates-defense-team-causes-new-delay-in-911-trial.html>>.

⁹¹⁸ *Ibid.*

⁹¹⁹ Al Shibh has been removed from the courtroom for outbursts on five separate occasions. United States Military Commission, *United States of America v. Mohammad et al.*, AE 152J, *op. cit.*, note 437, p. 3.

⁹²⁰ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 35.

⁹²¹ United States Military Commission, *United States of America v. Mohammad et al.*, AE 175F, “Order - Government Motion for a Trial Scheduling Order and Notice of Status of Discovery”, 12 December 2014.

⁹²² UN HRC, *Francis et al. v. Trinidad and Tobago*, *op. cit.*, note 892, para. 5.4.

⁹²³ Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, p. 458; United States Military Commission, “Charge Sheet: Abd Al-Rahim Hussein Muhammed Al-Nashiri”, 30 June 2008.

⁹²⁴ United States Military Commission, “Direction of the Convening Authority”, 20 November 2009; United States Military Commission, “Charge Sheet: Abd Al-Rahim Hussein Muhammed Al-Nashiri”, 15 September 2011, *op. cit.*, note 641.

⁹²⁵ For instance, pre-trial proceedings were side-tracked to hear motions on government interference after third-party monitoring and FBI interference occurred in the Mohammad *et al.* case. Among others, there has also been reports of interference with the attorney-client privilege, please see Part 2-II-D of this report for more information. Donna Miles, “Hearing for Accused USS Cole Bomber Continues, Despite Delays”, United States Department of Defense website, 4 February 2013,

programme,⁹²⁷ and by other delays attributed to classified discovery.⁹²⁸ In April 2015, the proceedings were abated pending the resolution by the CMCR of two interlocutory government appeals of military commission rulings (including the one dismissing the *Limburg*-related charges), and a defence challenge of the CMCR's composition in parallel legal proceedings before the Court of Appeals for the District of Columbia Circuit.⁹²⁹ Furthermore, as in all current military commissions' cases, there have been limited pre-trial hearings. In 2014, for all the cases before the military commissions, only 33 calendar days of pre-trial hearings were conducted and lasted a total of 107 hours and 50 minutes (approximately 10.5 hours per month).⁹³⁰ It is not clear when his trial will commence.⁹³¹ Given that initial charges were sworn seven years ago, the current charges were sworn four years ago and the proceedings remain in the pre-trial stage, ODIHR's view is that the right to be tried without undue delay has been violated.

382. ODIHR notes that Article 9(3) of the ICCPR on arbitrary detention also provides that those apprehended or detained on a criminal charge be tried "within a reasonable time or (...)

<<http://www.defense.gov/news/newsarticle.aspx?id=119198>>; United States Military Commission, *United States of America v. Al-Nashiri*, AE 272C, "Ruling - Defense Motion for Appropriate Relief: Inquiry into the Existence of a Conflict of Interest Burdening Counsel's Representation of the Accused Based on Ongoing Executive Branch Investigations", 22 August 2014; United States Military Commission, *United States of America v. Al-Nashiri*, AE 207, "Ruling on Defense Motion to Bar JTF-GTMO from Interfering with the Accused's Right to Receive Confidential Legal Mail and Access to Courts", 10 February 2012.

⁹²⁶ The defence has submitted motions on unlawful influence. In one instance, the judge ruled that the defence had not met its burden. United States Military Commission, *United States of America v. Al-Nashiri*, AE 197B, "Order - Defense Motion to Dismiss for Unlawful Influence", 28 March 2014.

⁹²⁷ These delays have included delays and denial of access to "meaningful discovery", as well as the delays associated with the US government's failure to promptly provide a declassified version of the full Senate Study to the defence. See, for instance, Charley Keys, "Guantanamo Detainee Lawyers Ask that Death Penalty Case be Dropped", CNN website, 19 July 2011, <<http://edition.cnn.com/2011/CRIME/07/19/guantanamo.detainee/index.html>>; Wells Bennett, "5/28 Session #1: Getting the SSCI RDI Report – or Not", Lawfare website, 28 May 2014, <<http://www.lawfareblog.com/2014/05/28-session-1-getting-the-ssci-rdi-report-or-not/>>; United States Military Commission, *United States of America v. Al-Nashiri*, "Unofficial/unauthenticated transcript of the motions hearing dated 5/28/2014 from 10:52 AM to 12:11 PM", pp. 4360-4371; Chief Prosecutor Brigadier General Mark Martins, "Chief Prosecutor Mark Martins Remarks at Guantanamo Bay", 13 December 2014, p. 2, <<http://www.lawfareblog.com/wp-content/uploads/2014/12/Statement-of-the-Chief-Prosecutor-13-December-2014-1.pdf>>.

⁹²⁸ The Office of the Chief Defense Counsel explained that in most cases the defence is prohibited from knowing who the classification authority is. They are reportedly not given guidance or guides and may not contact the classification authority. See Part 2-II-D of this report for more information. ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914.

⁹²⁹ The military judge granted the defence motion to abate military commission pre-trial hearings pending the resolution of the two interlocutory appeals. The interlocutory appeals before the CMCR were stayed pending the resolution of the defence challenge of the CMCR's composition before the Court of Appeals for the District of Columbia Circuit. Following the Court of Appeals' ruling in June 2015, the proceedings before the CMCR were once again stayed while the United States "explores options for re-nomination and re-confirmation of the military judges as U.S.C.M.C.R. judges". See, for example, Chief Prosecutor Brigadier General Mark Martins, "Chief Prosecutor Mark Martins Remarks at Guantanamo Bay", 19 July 2015, pp. 4-5, <https://www.scribd.com/fullscreen/272072414?access_key=key-6hd1qM9CF6q6kugujS8T&allow_share=true&escape=false&view_mode=scroll>; United States Court of Appeals for the District of Columbia Circuit, *In re: Abd Al-Rahim Hussein Muhammed Al-Nashiri*, "On Petition for Writ of Mandamus and Prohibition to the United States Court of Military Commission Review", Case No. 14-1203, 23 June 2015, <<https://www.justsecurity.org/wp-content/uploads/2015/06/14-1203-Judgment.pdf>>.

⁹³⁰ In 2013, 34 days of hearings were held and, on average, these hearings lasted less than five hours on the record each day. United States Military Commission, *United States of America v. Mohammad et al.*, AE 343 (KSM, WBA, RBS, AAA), "Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary", p. 27, Attachment B, Vaughn A. Ary, Convening Authority and Director, Office of Military Commissions, "Executive Summary for the Deputy Secretary of Defense – Assessment of Office of Military Commissions", 9 December 2014.

⁹³¹ See, for instance, United States Military Commission, *United States of America v. Al-Nashiri*, AE 045KK, "Order - 3rd Amended Litigation Schedule Order" 15 September 2014.

release[d]”.⁹³² This safeguard applies to pre-trial detention and runs from the time of initial arrest or detention, including before the individual is formally charged, through to “the time of judgment at first instance”.⁹³³ As discussed in relation to the presumption of innocence, many detainees tried by military commissions have been detained for many years before trial, in some cases the defendants have been in detention for 12 or 13 years.⁹³⁴ Accordingly, in addition to Article 14(3)(c) of the ICCPR, the US government has likely also violated Article 9(3) of the ICCPR.

d. Recommendations

- To ensure that any proceedings against Guantánamo detainees meet international fair trial standards on the right to be tried without undue delay;
- To ensure that any legislation applicable to the trial of any Guantánamo detainee guarantees the right to be tried without undue delay;
- To provide an effective remedy to any defendant whose right to trial without undue delay has been violated.

D. RIGHT TO LEGAL COUNSEL OF ONE’S CHOICE, TO ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF A DEFENCE, AND TO CALL, EXAMINE AND CROSS-EXAMINE WITNESSES

a. International Standards

383. Equality of arms is an essential component of fair criminal proceedings. It requires that the prosecution and the defence be provided with the same procedural rights unless distinctions are based on law, are justified on objective and reasonable grounds, are proportional, and do not entail “actual disadvantage or other unfairness” to the accused.⁹³⁵ It also requires that persons charged with a criminal offence benefit from a number of procedural guarantees in the proceedings against them.⁹³⁶ These include the rights to have adequate time and facilities for the preparation of their defence, the right to confidentially communicate with counsel of their own choosing or independent and competent legal assistance assigned to them, and the right to “examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]”, among others.⁹³⁷ These guarantees

⁹³² Please see Part 1-A of this report for more details on this rule. ICCPR, Art. 9(3).

⁹³³ UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 37.

⁹³⁴ This detention includes detention in both Guantánamo and secret CIA detention facility. Al-Nashiri has been detained since 2002, while al Shibh, Khalid Shaikh Mohammad, al Baluchi, bin ‘Attash and al Hawsawi have been in detention since 2003. Al-Iraqi has been detained since 2006. Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 458-461; “The Guantánamo Docket”, The New York Times website, *op. cit.*, note 88; Rosenberg, “Who’s still being held at Guantánamo”, *op. cit.*, note 88; Rosenberg, “By the Numbers”, *op. cit.*, note 88.

⁹³⁵ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 13; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, paras. 79, 109.

⁹³⁶ UN HRC, General Comment No. 32, *ibid.*, paras. 3, 32, 39.

⁹³⁷ ICCPR, Art. 14(3)(b), (d) and (e).

are enshrined in several human rights instruments, such as Article 14(3)(b), (d) and (e) of the ICCPR and OSCE commitments.⁹³⁸

384. Accused persons are entitled to prompt access to counsel of their own choosing at all stages of criminal proceedings,⁹³⁹ including “during interrogations and prior to appearance in court”.⁹⁴⁰ Those who are unable to afford an attorney are entitled to be provided one by the state without payment, when the interests of justice so require.⁹⁴¹ It is for example crucial in death penalty cases.⁹⁴² Restrictions on access to counsel are to be specified in law, limited to extraordinary circumstances, temporary and assessed on a case-by-case basis.⁹⁴³ This access should not be delayed for more than a matter of days so as to not create a situation where the accused is effectively held in incommunicado detention.⁹⁴⁴ Restrictions on a defendant’s ability to choose his or her counsel are also to be justified on reasonable and objective grounds.⁹⁴⁵ An accused is however not entitled to an unrestricted choice of assigned counsel when the state is paying the costs.⁹⁴⁶ With regards to military tribunals, it is recommended that a defendant be able to choose his or her counsel if they do not wish to be assisted by a military lawyer.⁹⁴⁷ In cases where a military lawyer is provided to a defendant, states should fully guarantee the possibility for an accused to opt for a civilian attorney.⁹⁴⁸

⁹³⁸ Relevant OSCE commitments include OSCE Vienna Document, *op. cit.*, note 90, para. 13.9; OSCE Copenhagen Document, *op. cit.*, note 80, para. 5.17; OSCE Moscow Document, *op. cit.*, note 90, para. 23.1; OSCE “Brussels Declaration on Criminal Justice Systems”, *op. cit.*, note 550. See, also, ACHR, Art. 8; UDHR, Art. 11.

⁹³⁹ ICCPR, Art. 14(3)(b); UN HRC, General Comment No. 32, *op. cit.*, note 648, paras. 32, 34, 38; “Body of Principles”, *op. cit.*, note 89, Principle 18; “Basic Principles on the Role of Lawyers”, Havana, 7 September 1990, Principles 1, 8, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>>; OSCE Vienna Document, *op. cit.*, note 90, para. 13.9; OSCE Copenhagen Document, *op. cit.*, note 80, para. 5.17; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 78; UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 74.

⁹⁴⁰ UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *ibid.*, para. 78. See, also, UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 35: “States parties should permit and facilitate access to counsel for detainees in criminal cases, from the outset of their detention.”

⁹⁴¹ ICCPR, Art. 14(3)(d); UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 38; “Body of Principles”, *op. cit.*, note 89, Principle 17. See, also, “Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, New York, 20 December 2012, <http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf>.

⁹⁴² UN HRC, General Comment No. 32, *ibid.*; UN HRC, *Frank Robinson v. Jamaica*, Communication No. 223/1987, 30 March 1989, para. 10.3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f35%2fd%2f223%2f1987&Lang=en>.

⁹⁴³ “Body of Principles”, *op. cit.*, note 89, Principle 18; *Human Rights in Counter-Terrorism Investigations*, *op. cit.*, note 120, p. 90; UN HRC General Comment No. 29, *op. cit.*, note 111, para. 4; UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, para. 40.

⁹⁴⁴ “Body of Principles”, *ibid.*, Principle 15; UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *ibid.*

⁹⁴⁵ UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *ibid.*

⁹⁴⁶ UN HRC, *Kenneth Teesdale v. Trinidad and Tobago*, Communication No. 677/1996, 1 April 2002, para. 9.6, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f74%2fd%2f677%2f1996&Lang=en>; UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *ibid.*, para. 41.

⁹⁴⁷ Decaux Principles, *op. cit.*, note 647, para. 53; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 75.

⁹⁴⁸ UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *ibid.*, para. 77.

385. Accused persons are to be provided with adequate time and facilities to communicate and consult with their attorney for the preparation of their defence.⁹⁴⁹ To facilitate the exercise of this right, states should ensure attorney's ability to travel and to consult with the accused freely, including abroad.⁹⁵⁰ International bodies and experts have reiterated on numerous occasions that it is essential to ensure that attorneys can meet with their clients in private, and communicate with them in full confidentiality.⁹⁵¹ Monitoring of communications is to remain exceptional and assessed on a case-by-case basis.⁹⁵² Whereas attorney-client meetings may be within sight, they should never be within the hearing of law enforcement officials.⁹⁵³ In this regard, it has been recommended that attorneys' files and documents be protected from seizure and inspection by law and in practice, and that their electronic communications be free from interception.⁹⁵⁴ According to the Special Rapporteur on human rights and counter-terrorism, safeguards need also to be in place to ensure that any information that is subject to attorney-client privilege cannot be deliberately or inadvertently used by the prosecution.⁹⁵⁵ Furthermore, attorneys should be able to carry out their functions without "restrictions, influence, pressure or undue interference from any quarter".⁹⁵⁶
386. The Human Rights Committee has clarified that the right to have adequate facilities for the preparation of a defence encompasses access to documents and other evidence, in particular all exculpatory material and other materials that the prosecution intends to offer in court against the defendant.⁹⁵⁷ Exculpatory material includes material establishing a defendant's innocence but also any other evidence which may assist the defence, such as indications of a coerced confession or information that may be relevant to sentencing.⁹⁵⁸ If a defendant alleges that evidence was obtained through torture or ill-treatment, information on the circumstances in which it was obtained must be provided.⁹⁵⁹

⁹⁴⁹ ICCPR, Art. 14(3)(d); UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 32; "Body of Principles", *op. cit.*, note 89, Principle 18.

⁹⁵⁰ "Basic Principles on the Role of Lawyers", *op. cit.*, note 939, Principle 16.

⁹⁵¹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 34; "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rule 93; "Body of Principles", *op. cit.*, note 89, Principle 18; "Basic Principles on the Role of Lawyers", *ibid.*, Principles 8, 22; OSCE "Brussels Declaration on Criminal Justice Systems", *op. cit.*, note 550; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 78; UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 74; UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, Report to the Human Rights Council, A/HRC/13/37/Add.2, 14 October 2009, para. 36, <<http://www.ohchr.org/EN/Issues/Terrorism/Pages/Visits.aspx>>.

⁹⁵² UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, para. 39.

⁹⁵³ *Ibid.*; "Body of Principles", *op. cit.*, note 89, Principle 18; "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rule 93; "Basic Principles on the Role of Lawyers", *op. cit.*, note 939, Principle 8.

⁹⁵⁴ UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Report to the General Assembly, A/64/181, 28 July 2009, para. 110(b), <<http://www.ohchr.org/Documents/Issues/Judiciary/A-64-181.pdf>>.

⁹⁵⁵ UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, para. 39.

⁹⁵⁶ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 34. See, also, "Basic Principles on the Role of Lawyers", *op. cit.*, note 939, Principle 16; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/64/181, *op. cit.*, note 954, para. 108.

⁹⁵⁷ UN HRC, General Comment No. 32, *ibid.*, para. 33. See, also, OSCE "Brussels Declaration on Criminal Justice Systems", *op. cit.*, note 550: "Lawyers (...) should have access to all relevant evidence and records".

⁹⁵⁸ UN HRC, General Comment No. 32, *ibid.*

⁹⁵⁹ *Ibid.*

387. In criminal proceedings before military tribunals, violations of the principle of equality of arms may, for example, occur “when the prosecution fails to disclose to the defence all material evidence in its possession for or against the defendant on account of the classified character of such information”.⁹⁶⁰ Non-disclosure of information may affect the overall fairness of any trial.⁹⁶¹ It should therefore remain limited to situations where it is strictly necessary and proportionate, and where it is accompanied by adequate safeguards to ensure that a fair hearing is guaranteed.⁹⁶² Additionally, the appropriateness of non-disclosure should be determined by a judge and reviewed throughout the proceedings “in light of the significance of the information, the adequacy of the safeguards and the impact on the fairness of the proceedings as a whole”.⁹⁶³ In this regard, the Human Rights Committee has held that the use of summaries of information redacted for security concerns did not render proceedings unfair where steps had been taken to ensure that the defendant was aware of and able to respond to the case made against him, to present his own case and to cross-examine witnesses.⁹⁶⁴ Ultimately, it is crucial to make sure that accused persons cannot be convicted on the basis of evidence that they or their attorney did not have full access to.⁹⁶⁵
388. Persons charged with a criminal offence also have a right to “examine, or have examined, the witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]”.⁹⁶⁶ Thus, the defence is to have the “same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution”.⁹⁶⁷ However, this right is limited to the attendance of witnesses who are relevant for the defence and to the proper cross-examination of witnesses at “some stage of the proceedings”.⁹⁶⁸ Furthermore, the Human Rights Committee has held that the right to a fair trial may not be violated if “all possible steps are taken, unsuccessfully, to secure the presence of a witness in court, though this may depend on the nature of the evidence”.⁹⁶⁹ Accordingly, where “repeated efforts” are made to secure the attendance of a witness deemed to be crucial, Article 14(3) is not automatically violated.⁹⁷⁰ It should be noted that international bodies have raised concerns about the admissibility of hearsay evidence in court,⁹⁷¹ because it undermines defendants’ ability to cross-examine witnesses against them.⁹⁷²

⁹⁶⁰ UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 80.

⁹⁶¹ *Ibid.*, para. 81.

⁹⁶² *Ibid.*, paras. 80-81.

⁹⁶³ *Ibid.*, para. 81.

⁹⁶⁴ UN HRC, *Mansour Ahani v. Canada*, Communication No. 1051/2002, 29 March 2004, para. 10.5,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f80%2fD%2f1051%2f2002>.

⁹⁶⁵ UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/64/181, *op. cit.*, note 954, para. 41; UN HRC, Concluding Observations, Canada, CCPR/C/CAN/CO/5, 20 April 2006, para. 13, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/413/62/PDF/G0641362.pdf?OpenElement>>.

⁹⁶⁶ ICCPR, Art. 14(3)(e).

⁹⁶⁷ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 39.

⁹⁶⁸ *Ibid.*

⁹⁶⁹ UN HRC, *Clifford McLawrence v. Jamaica*, Communication No. 702/1996, 18 July 1997, para. 5.8,

<<http://juris.ohchr.org/Search/Details/861>>.

⁹⁷⁰ *Ibid.*

⁹⁷¹ Hearsay evidence is understood as a statement, other than one made by the witness while testifying at trial, offered in evidence to prove the truth of the matter asserted. See, for example, *Rule-of-Law Tools for Post-Conflict States, Prosecution initiatives*

389. International humanitarian law also guarantees that an accused has the necessary rights and means of defence and the right to examine and have examined witnesses by virtue of Common Article 3,⁹⁷³ Article 75(4) of API and relevant provisions of the Third and Fourth Geneva Conventions. The necessary rights and means of defence include the right of a defendant to be assisted by a lawyer of his or her choice, the right to free legal assistance where the interests of justice so require, the right to sufficient time and facilities for the preparation of a defence, and the right to communicate freely with his or her attorney, among other things.⁹⁷⁴ The Geneva Conventions however only prescribe that defendants should have access to counsel during and before trial, without setting a strict time limit for access following the initial deprivation of liberty.⁹⁷⁵

b. Domestic Standards

390. Upon ratification of the ICCPR, the United States entered an understanding stipulating that “subparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense.”⁹⁷⁶

391. The Fifth Amendment to the US Constitution provides for guarantees of due process of law.⁹⁷⁷ The Sixth Amendment protects the rights of an accused in criminal proceedings “to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense”.⁹⁷⁸ The attorney-client privilege is also considered as one of the “oldest and most established evidentiary privileges known to [common] law”.⁹⁷⁹ The applicability of both the Fifth and Sixth Amendments to the military commissions has not been definitively ruled upon by a domestic court.

392. Any military commission defendant is entitled to have a military defence counsel assigned to his case free of charge “as soon as practicable”.⁹⁸⁰ An accused can choose a specific

(New York and Geneva: United Nations, 2006), p. 24,

<<http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>>.

⁹⁷² See, for example, UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 28.

⁹⁷³ Common Article 3(1)(d); ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić*, *op. cit.*, note 789, para. 678.

⁹⁷⁴ API, Art. 75(4)(a), (g); Third Geneva Convention, Arts. 84, 99, 105; Fourth Geneva Convention, Art. 72; “Customary International Humanitarian Law, Rule 100”, ICRC website, *op. cit.*, note 643.

⁹⁷⁵ “Customary International Humanitarian Law, Rule 100”, ICRC website, *ibid.*, referring to the Third Geneva Convention, Art. 105(3), which stipulates that counsel representing a prisoner of war should have at least two weeks to prepare before the beginning of a trial, and Fourth Geneva Convention, Art. 72(1), which mentions that counsel must enjoy the necessary facilities for preparing a defence.

⁹⁷⁶ US reservations to the ICCPR, *op. cit.*, note 327, para. II(4).

⁹⁷⁷ US Constitution, Fifth Amendment. The Fourteenth Amendment also prohibits the deprivation of liberty without due process, but it relates to state action, which is not addressed in this report.

⁹⁷⁸ US Constitution, Sixth Amendment.

⁹⁷⁹ United States Supreme Court, *United States v. Jicarilla Apache Nation*, Case No. 10-382, 13 June 2011,

<<https://supreme.justia.com/cases/federal/us/564/10-382/>>.

⁹⁸⁰ MCA 2009, § 948k(3).

military counsel if the latter is “reasonably available”, i.e. if he or she has already been assigned to the Office of the Military Commissions to carry out defence work at the time of the request.⁹⁸¹ In general, an accused is also entitled to be assisted by a civilian attorney if he or she is provided at no costs to the government.⁹⁸² In death penalty cases, a defendant has the right to be represented by “at least one additional counsel who is learned in applicable law relating to capital cases” (“learned counsel”).⁹⁸³ This learned counsel may be a civilian.⁹⁸⁴ Both military and civilian defence counsel must fulfil a number of criteria of eligibility to defend an accused before military commissions. For example, a civilian attorney has to be a US citizen with at least a SECRET clearance, membership in a state or territorial bar and no disciplinary record.⁹⁸⁵ Provisions on the attorney-client privilege are included in the MCRE.⁹⁸⁶

393. The MCA 2009 states that “the fairness and effectiveness of the military commissions system (...) will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, particularly in the case of capital cases”, and that “defense counsel in military commission cases, particularly in capital cases, (...) should be fully resourced”.⁹⁸⁷

394. Pursuant to the MCA 2009, any accused has the right “to present evidence in [his] defense, to cross-examine the witnesses who testify against [him], and to examine and respond to evidence admitted against [him] on the issue of guilt or innocence and for sentencing”.⁹⁸⁸ Contrary to rules generally applicable in courts-martial, the MCA 2009 does not guarantee that the defence and prosecution have an equal opportunity to obtain witnesses and other evidence.⁹⁸⁹ Rather, it stipulates that defence counsel is to be afforded a “reasonable opportunity”, which is to be comparable to the opportunity given to criminal defendants in federal courts.⁹⁹⁰ Both parties are to have an “adequate opportunity to prepare [their] case and no party may unreasonably impede the access of another party to a witness or evidence”.⁹⁹¹

395. With regards to access to evidence more specifically, the MCA specifies that any exculpatory evidence which is “known or reasonably should be known” to any prosecutor

⁹⁸¹ MCA 2009, § 949c(b)(2); RMC, Rule 506(a) and (c)(1).

⁹⁸² RMC, Rule 506(a).

⁹⁸³ RMC, Rule 506(b).

⁹⁸⁴ *Ibid.*

⁹⁸⁵ MCA 2009, § 949c(b)(3); RMC, Rule 502(d)(3).

⁹⁸⁶ MCRE, Rule 502: “(a) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client’s representative and the lawyer or the lawyer’s representative, (2) between the lawyer and the lawyer’s representative, (3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client. (...) (b) (...) (4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”

⁹⁸⁷ MCA 2009, Sec.1807.

⁹⁸⁸ MCA 2009, § 949a(b)(2)(A).

⁹⁸⁹ Elsea, “The Military Commissions Act of 2009”, *op. cit.*, note 621, p. 26, referring to 10 U.S.C. § 846 : “the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence (...)”.

⁹⁹⁰ MCA 2009, § 949j(a); RMC, Rule 703.

⁹⁹¹ RMC, Rule 701(j).

or investigator of the case should be disclosed to the defence.⁹⁹² This includes the disclosure of any information which: (1) would reasonably tend to “negate the guilt of the accused (...) or reduce the degree of guilt of the accused”, (2) could reasonably affect the credibility of a prosecution witness. This disclosure is to occur “as soon as practicable”.⁹⁹³ Additionally, any evidence that may reasonably be viewed as mitigation evidence is to be disclosed “as soon as practicable upon a finding of guilt”.⁹⁹⁴ All of the information admitted into evidence under any rule is to be provided to the defendant.⁹⁹⁵

396. The military commission rules for the protection of classified information are similar to those applied in federal terrorism trials.⁹⁹⁶ Classified information⁹⁹⁷ is to be protected from disclosure if its disclosure would “be detrimental to the national security”.⁹⁹⁸ Where potential evidence is classified, the prosecution is to work with the original classification authority to declassify the information to the maximum extent possible.⁹⁹⁹ In case the defence reasonably expects to disclose or cause the disclosure of information “known or believed to be classified” during the proceedings, it should provide timely written notice to the prosecution and military judge, with a brief description of the information.¹⁰⁰⁰ Whenever the prosecution wishes to protect classified information from disclosure, it should submit a declaration to the military judge explaining the damage that the discovery or access to this information could reasonably be expected to cause.¹⁰⁰¹ In such cases, the military judge may only authorize the disclosure of the information if he or she determines that it would be “noncumulative, relevant and helpful” to any part of the defence’s case.¹⁰⁰² Furthermore, the judge is to authorize the government to delete or withhold specified portions of classified information, substitute a summary of the information or a statement setting forth the facts the classified information would tend to prove whenever he or she finds that “the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information”.¹⁰⁰³ The application for these protective measures may be submitted on an *ex parte* basis.¹⁰⁰⁴ The MCA 2009 does not appear to allow defence counsel to have access to the classified information that serves as the basis of these protective measures, nor to file a motion for reconsideration once the military judge has authorised the use of protective measures if the judge’s order was entered pursuant to an *ex*

⁹⁹² MCA 2009, § 949j (b).

⁹⁹³ *Ibid.*

⁹⁹⁴ *Ibid.*

⁹⁹⁵ MCA 2009, § 949p-1(b); MCRE, Rule 505(a)(2).

⁹⁹⁶ MCA 2009, § 949p-1(d); MCRE, Rule 505(a)(4); Elsea, “The Military Commissions Act of 2009”, *op. cit.*, note 621, pp. 26, 30.

⁹⁹⁷ Classified information is to be understood as “(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security. (B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).” MCA 2009, § 948a(2); MCRE, Rule 505(b)(1).

⁹⁹⁸ MCA 2009, § 949p-1(a); MCRE, Rule 505(a)(1).

⁹⁹⁹ However, decisions not to declassify are not subject to review by the military judge. MCA 2009, § 949p-1(c). See, also, Elsea, “The Military Commissions Act of 2009”, *op. cit.*, note 621, p. 26.

¹⁰⁰⁰ MCA 2009, § 949p-5; MCRE, Rule 505(g)(1).

¹⁰⁰¹ This declaration is to be signed by “a knowledgeable United States official possessing authority to classify information”.

MCA 2009, § 949p-4(a)(1); MCRE, Rule 505(f)(1)(A).

¹⁰⁰² MCA 2009, § 949p-4(a)(2); MCRE, Rule 505(f)(1)(B).

¹⁰⁰³ MCA 2009, § 949p-4(b)(1), (3); MCRE, Rule 505(f)(2)(A), (C).

¹⁰⁰⁴ MCA 2009, § 949p-4(b)(2); MCRE, Rule 505(f)(2)(B).

parte request.¹⁰⁰⁵ Additionally, the MCA 2009 prescribes that the prosecution may request the issuance of a protective order to prevent the disclosure of any classified information that has been disclosed to or otherwise obtained by the accused or counsel.¹⁰⁰⁶

397. With regards to the calling and examination of witnesses, the MCA 2009 specifies that both parties are entitled to the production of “any available witness” whose testimony is “relevant and necessary”.¹⁰⁰⁷ The military judge discretionarily assesses whether a witness is “available”.¹⁰⁰⁸ If the testimony of an unavailable witness is central to the resolution of an issue at the core of a fair trial, and if no adequate substitute to his or her testimony is found, the military judge is to grant continuance or other relief to attempt to secure the witness’ presence, or to abate the proceedings if he or she finds that the “reason for the witness’ unavailability is within the control of the United States”.¹⁰⁰⁹ Additionally, should the defence wish to produce witnesses, it is required to submit a list of witnesses to the prosecution. In turn, the prosecution will arrange for their presence unless it considers that their production is not required, is protected by classification rules or involves the production of privileged government information.¹⁰¹⁰ This list of witnesses should not only include the contact details of a witness but also “a synopsis of [his or her] expected testimony”.¹⁰¹¹ If the prosecution refuses to produce the witness, a request may be submitted to the military judge.¹⁰¹² The process to compel witnesses to testify is by subpoena. The RMC state that “a subpoena may be issued by the military judge [or] the Chief Prosecutor or his designee”, *inter alia*, but does not mention the defence.¹⁰¹³ However, the 2011 Regulation for Trial by Military Commission specifies that “[a] civilian may not be compelled by subpoena to leave the United States and travel to a foreign country; therefore, a subpoena issued to a civilian to testify at Guantanamo Bay may not be enforced in the United States”.¹⁰¹⁴ Moreover, the RMC prescribe that requests for government funding of expert witnesses are to be submitted to the Convening Authority and include a “complete statement of reasons why the employment of the expert is necessary”.¹⁰¹⁵ In cases where the Convening Authority denies the request, it can be renewed before the military judge.¹⁰¹⁶

398. The MCA 2009 allows for the admissibility of hearsay evidence, including in certain circumstances where courts-martial rules forbid its admissibility.¹⁰¹⁷ Hearsay evidence may be admitted in a military commission trial when: the adverse party is notified sufficiently in advance; the adverse party receives information on the “particulars of the evidence”, including the circumstances under which it was obtained; and the military judge, after

¹⁰⁰⁵ MCA 2009, § 949p-4(c); MCRE, Rule 505(f)(3); Elsea, “The Military Commissions Act of 2009”, *op. cit.*, note 621, pp. 26, 31.

¹⁰⁰⁶ MCA 2009, § 949p-3; MCRE, Rule 505(e).

¹⁰⁰⁷ RMC, Rule 703(b)(1).

¹⁰⁰⁸ RMC, Rule 703(b)(3)(A).

¹⁰⁰⁹ RMC, Rule 703(b)(3)(B).

¹⁰¹⁰ RMC, Rule 703(c).

¹⁰¹¹ RMC, Rule 703(c)(2)(B).

¹⁰¹² *Ibid.*

¹⁰¹³ RMC, Rule 703(e).

¹⁰¹⁴ RTMC 2011, Regulation 13-5(b).

¹⁰¹⁵ RMC, Rule 703(d).

¹⁰¹⁶ *Ibid.*

¹⁰¹⁷ MCA 2009, § 949a(b)(3)(D); MCRE, Rule 803(b).

looking at “all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, its indicia of reliability within the statement itself, and whether the will of the declarant was overborne” determines that the “(I) the statement is offered as evidence of a material fact; (II) the statement is probative (...); (III) direct testimony of the witness is not available as a practical matter (...); and (IV) the general purposes of the rules of evidence and the interests of justice will be best served by admission of the statement into evidence”.¹⁰¹⁸ Furthermore, the MCRE prescribe that “hearsay within hearsay is not excluded”.¹⁰¹⁹ Disclosure of information relating to hearsay evidence is subject to the restrictions on disclosure of classified information.¹⁰²⁰

c. Findings and analysis

399. All seven detainees currently facing military commission proceedings are “high-value detainees” who were detained and interrogated in incommunicado detention as part of the CIA RDI programme.¹⁰²¹ As a result, they were denied access to counsel for periods ranging from at least several months to several years.¹⁰²² Such denial of access to legal representation violates Article 14(3) of the ICCPR.¹⁰²³ While the Geneva Conventions do not set a strict time limit for access to a lawyer following the initial deprivation of liberty,¹⁰²⁴ it has been recognized that defendants have a right to legal counsel before trial.¹⁰²⁵ Further, international humanitarian law prescribes that, before and during his trial, a defendant should have all necessary means to prepare his defence.¹⁰²⁶ Therefore, where the delay in legal representation impeded the ability of the accused to prepare his defence, it also violated international humanitarian law.
400. The MCA 2009 and its implementing regulation provide for a defendant’s right to choose the military defence counsel who will represent him at the costs of the government.¹⁰²⁷ While this choice is reportedly very limited in practice,¹⁰²⁸ a defendant may also choose to

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ MCRE, Rule 805.

¹⁰²⁰ MCRE, Rule 803(c).

¹⁰²¹ ICRC Report, *op. cit.*, note 182, p. 5; Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 458-461; Gerry J. Gilmore, “High-Value Detainees Moved to Gitmo; Bush Proposes Detainee Legislation”, United States Department of Defense website, 6 September 2006, <<http://www.defense.gov/news/NewsArticle.aspx?ID=721>>; “Defense Department Takes Custody of a High-Value Detainee”, United States Department of Defense website, 27 April 2007, *op. cit.*, note 181; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 398.

¹⁰²² ICRC Report, *ibid.*, pp. 7-8; Senate Study on the CIA RDI Programme, Executive Summary, *ibid.*, pp. 458-461.

¹⁰²³ See, also, UN HRC, *Luciano Weinberger v. Uruguay*, Communication No. 28/1978, 29 October 1980, paras. 12, 16, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f11%2fd%2f28%2f1978&Lang=en>; UN HRC, *Leopoldo Buffo Carballal v. Uruguay*, Communication No. 33/1978, 27 March 1981, paras. 9, 13, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f12%2fd%2f33%2f1978&Lang=en>; UN HRC, *Paul Anthony Kelly v. Jamaica*, Communication No. 537/1993, 17 July 1996, para. 9.2, <http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/57/D/537/1993>; UN HRC, *Adolfo Drescher Caldas v. Uruguay*, Communication No. 43/1979, 21 July 1983, paras. 13.3, 14, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f19%2fd%2f43%2f1979&Lang=en>.

¹⁰²⁴ “Customary International Humanitarian Law, Rule 100”, ICRC website, *op. cit.*, note 643.

¹⁰²⁵ Third Geneva Convention, Art. 105(3); Pejic, “The protective scope of Common Article 3”, *op. cit.*, note 145, pp. 211-214.

¹⁰²⁶ API, Art. 75(4)(a); Third Geneva Convention, Arts. 84, 99, 105; Fourth Geneva Convention, Art. 72; Common Article 3(1)(d); ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić*, *op. cit.*, note 789, para. 678;

“Customary International Humanitarian Law, Rule 100”, ICRC website, *op. cit.*, note 643.

¹⁰²⁷ MCA 2009, § 949c(b)(2); RMC, Rule 506(a) and (c)(1).

¹⁰²⁸ “The (...) small pool of attorneys assigned to the defense office, coupled with the real potential for conflicts arising from an attorney representing more than one detainee renders the statutory language effectively meaningless”. Glazier, “Destined for an

engage a civilian attorney.¹⁰²⁹ Those accused facing capital military commissions are also entitled to be assisted by “at least one additional” learned counsel.¹⁰³⁰ ODIHR takes the view that a number of limitations placed on the defendants’ ability to choose a civilian counsel appear justified by reasonable and objective criteria, including the requirement to have a security clearance and not to have a disciplinary record.

401. In order to prepare their defence, accused persons are to have adequate time and facilities to communicate and consult with their lawyer.¹⁰³¹ Yet, information obtained by ODIHR points to numerous obstacles to an adequate and free attorney-client communication. Firstly, limitations are placed on lawyers’ ability to meet with or otherwise communicate with their clients. The remoteness of the base, and policies in place at Guantánamo, have impeded counsel’s ability to meet with their client in person. For example, attorneys must provide notice of every visit at least two weeks in advance, and meeting requests are reportedly often denied.¹⁰³² Moreover, attorney-client meetings are generally limited in duration and can only occur at certain hours of the day.¹⁰³³ Whereas 16 meeting rooms are available for attorney-client meetings, it has been reported that only four to six meetings with “high-value detainees” can occur at the same time.¹⁰³⁴ Accordingly, many counsel involved in military commission proceedings or *habeas corpus* petitions pertaining to the 16 “high-value detainees” have to compete for the meeting slots available.¹⁰³⁵ In addition to these obstacles to frequent visits, defence counsel cannot communicate by telephone with defendants considered “high-value detainees”.¹⁰³⁶ These limitations undermine the

Epic Fail”, *op. cit.*, note 709, p. 932. In meetings with ODIHR, representatives of the Office of the Chief Defense Counsel explained that, in practice, the only way defendants could choose their military defence counsel is to fire the one who has been detailed to their case to obtain a new one. They also stressed that the Office is understaffed: at the time of the meeting, it was authorized to have 51 military attorneys but only had 35. ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914.

¹⁰²⁹ RMC, Rule 506(a).

¹⁰³⁰ RMC, Rule 506(b). In this regard, representatives of the Office of Chief Defense Counsel however specified that the Government will only fund one civilian learned counsel per accused. ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914. In interviews with ODIHR, defence counsel have stressed that in ordinary federal courts, there are always at least two or more lawyers with experience in death penalty cases *per* defendant. ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725.

¹⁰³¹ ICCPR, Art. 14(3)(d); UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 32; “Body of Principles”, *op. cit.*, note 89, Principle 18.

¹⁰³² Mark Denbeaux *et al.*, “Spying on attorneys at GTMO: Guantanamo Bay Military Commissions and the Destruction of the Attorney-Client Relationship”, 12 April 2013, p. 8.

<http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/spying_on_attorneys_at_GTMO.pdf>; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725; ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914; United States Military Commission, *United States of America v. Mohammad et al.*, AE 008 (MAH), *op. cit.*, note 845, p. 7.

¹⁰³³ ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *ibid.*; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *ibid.* See, also, United States Military Commission, *United States of America v. Mohammad et al.*, AE 008 (MAH), *ibid.*, p. 8, referring to ten meetings slots available in any given week.

¹⁰³⁴ United States Military Commission, *United States of America v. Mohammad et al.*, AE 008 (MAH), *ibid.*, p. 7; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *ibid.*; ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *ibid.*

¹⁰³⁵ United States Military Commission, *United States of America v. Mohammad et al.*, AE 008 (MAH), *ibid.*, p. 7; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *ibid.*

¹⁰³⁶ “Requests to Improve the Conditions of Confinement in Guantánamo”, Office of the Chief Defense Counsel, *op. cit.*, note 424, p. 10; Wells Bennett, “Another Order in the 9/11 Case, This One On Legal Mail”, Lawfare website, 6 November 2013,

right of the defendants to communicate with counsel of their choosing and impair their right to adequately prepare their defence.¹⁰³⁷

402. Secondly, ODIHR is troubled by reports of violations of defendants' right to communicate with their attorneys in full confidentiality.¹⁰³⁸ For example, Colonel John Bogdan, then-Commander of the Joint Detention Group at Guantánamo acknowledged in February 2013 that several attorney-client meeting rooms contained hidden listening devices¹⁰³⁹ and two cameras.¹⁰⁴⁰ The ability of courtroom microphones to capture confidential conversations between attorneys and their clients, even when attorneys purposefully muted one of them, has also been of concern. ODIHR notes Judge Pohl's conclusion in 2013 that "no monitoring has occurred for at least the prior two years" in meeting rooms.¹⁰⁴¹ US assurances that there are currently no listening devices in rooms used for attorney-client meetings,¹⁰⁴² that private conversations between counsel and their client in the courtroom remain private and are not recorded, transmitted or shared with anyone outside the privileged attorney-client relationship are welcome.¹⁰⁴³ The policies prohibiting the use of the zoom feature of cameras during attorney-client meetings and in the courtroom (except under carefully controlled circumstances) are similarly welcome.¹⁰⁴⁴ However, ODIHR is concerned that the disguised appearance of the listening devices and other repeated allegations of breaches of attorney-client privilege contribute to creating a climate of suspicion capable of hindering the attorney-client relationship. ODIHR indeed wishes to

<<http://www.lawfareblog.com/2013/11/another-order-in-the-911-case-this-one-on-legal-mail/>>; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *ibid.*; ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *ibid.*

¹⁰³⁷ See, also, UN Working Group on arbitrary detention, *Tariq Aziz v. Iraq and United States of America*, Opinion No. 33/2006, 17 November 2006, paras. 8, 19, <[http://www.unwgadatabase.org/un/Document.aspx?id=2313&terms=\(+tariq+aziz+\)](http://www.unwgadatabase.org/un/Document.aspx?id=2313&terms=(+tariq+aziz+)>)>: "8. Since then, Tariq Aziz has had sporadic meetings with his defence counsel (...). These meetings take place under circumstances which render the effective preparation of a defence case very difficult. The defence counsel is not allowed to see his client at dates he requests. Instead, he is informed at very short notice (never more than a day) by the United States authorities of a meeting date. (...) 19. (...) Also the right to 'communicate with counsel of his own choosing' enshrined in article 14(3)(b) ICCPR is seriously undermined, as the meetings take place at unforeseeable intervals as dictated by the United States authorities (...); UN HRC, *Hicks v. Australia*, "Individual Communication", *op. cit.*, note 754, para. 214.

¹⁰³⁸ ODIHR interview with Human Rights Watch, *op. cit.*, note 821; ODIHR interview with the Center for Constitutional Rights, 5 August 2013.

¹⁰³⁹ The hidden microphones are inside devices that look like smoke detectors. United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of the hearing dated 2/13/2013 from 10:28 AM to 12:02 PM", p. 2203; United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of the hearing dated 2/12/2013 from 1:00 PM to 2:37 PM", pp. 1984-1985; Denbeaux *et al.*, "Spying on attorneys at GTMO", *op. cit.*, note 1032, p. 1.

¹⁰⁴⁰ United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of the hearing dated 2/13/2013 from 10:28 AM to 12:02 PM", *ibid.*, pp. 2181-2182, 2203, 2227-2228, 2239-2240; Denbeaux *et al.*, "Spying on attorneys at GTMO", *ibid.*, pp. 1-3. See, also, United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of the hearing dated 2/12/2013 from 1:00 PM to 2:37 PM", *ibid.*, pp. 1984, 1971-1972; Carol Rosenberg, "Attorney-client meeting room was bugged, Navy lawyer testifies at Guantánamo", Miami Herald website, 12 February 2013, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1947210.html>>.

¹⁰⁴¹ United States Military Commission, *United States of America v. Al-Nashiri*, AE 149K, "Order - Defense Motion for Appropriate Relief: Determine the Extent of Past Monitoring at Camp Echo II and Order that No Future Monitoring Occur in JTF-GTMO Facilities", 5 August 2013, p. 4.

¹⁰⁴² US comments to the draft report.

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ United States Military Commission, *United States of America v. Mohammad et al.*, AE 297 (AAA), "Defense Motion For Order that Cameras in Courtroom #2 Not Zoom in on Defense Materials", 7 May 2014; United States Military Commission, *United States of America v. Mohammad et al.*, AE 297B (AAA), "Withdrawal of Defense Motion For Order that Cameras in Courtroom #2 Not Zoom in on Defense Materials", 10 June 2014.

reiterate that privileged attorney-client communications should never take place within the hearing of law-enforcement officials.¹⁰⁴⁵ Video-monitoring should not be used to circumvent the prohibition of audio-monitoring by reading documents and revealing the content of confidential attorney-client discussions. Instead, effective measures should be taken to ensure the confidentiality of attorney-client communications.¹⁰⁴⁶

403. In recent years, the establishment and implementation of security procedures enabling military officials to search for and eliminate contraband has led to several allegations of seizures of confidential attorney-client materials and inspection of the content of attorney-client written communications. ODIHR notes with concern two 2011 Memoranda which allegedly allowed military officials to review and read all written correspondence between co-defendants in the Mohammad *et al.* case and their attorneys.¹⁰⁴⁷ The then-Chief Defense Counsel prohibited defence attorneys from using the legal mail system for privileged communications, in order to ensure that they would not violate their ethical obligations by complying with the newly established rules.¹⁰⁴⁸ As a result, defence counsel in the Mohammad *et al.* case reported being unable to exchange confidential written communications with their clients for two years.¹⁰⁴⁹ Seizures of privileged mail in defendants' cells also allegedly occurred on multiple occasions in the Mohammad *et al.* and Al-Nashiri cases,¹⁰⁵⁰ to the extent that defence counsel characterized them as "systematic".¹⁰⁵¹ The materials seized are said to have included attorney-client notes and "confidential letters delineating trial and motion strategy".¹⁰⁵² ODIHR is concerned by these allegations of acts that would constitute an invasion of privileged attorney-client communications. The inspection of detainees' legal papers to ensure that they do not contain contraband should not lead to such invasions. Legal files and documents should at

¹⁰⁴⁵ "Body of Principles", *op. cit.*, note 89, Principle 18; "Standard Minimum Rules for the Treatment of Prisoners", *op. cit.*, note 280, Rule 93; "Basic Principles on the Role of Lawyers", *op. cit.*, note 939, Principle 8; UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, para. 39.

¹⁰⁴⁶ UN CAT, Concluding Observations of the Committee against Torture, Jordan, CAT/C/JOR/CO/2, *op. cit.*, note 130, para. 12.

¹⁰⁴⁷ JTF-GTMO Commander, "Memorandum For See Distribution - Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions", 27 December 2011,

<https://www.aclu.org/files/assets/gitmo_orders_20111227.pdf>; Jamie Reese, "Guantanamo Chief Defense Counsel Refuses to Allow Review of Attorney Letters", Jurist website, 12 January 2012, <<http://jurist.org/paperchase/2012/01/guantanamo-chief-defense-counsel-refuses-to-allow-review-of-attorney-letters.php>>; ODIHR interview with Marine Corps Major Derek Poteet, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, 3 June 2014.

¹⁰⁴⁸ Chief Defense Counsel Colonel Jeffrey P. Colwell, "Effective immediately: ethics instruction against execution of either JTF-GTMO-CDR order acknowledgment, and against allowing legal mail to be subjected to review by the privilege team", 8 January 2012, <http://www.aclu.org/files/assets/colwell_email_on_attorney-client_communication_monitoring_at_guantanamo.pdf>; Reese, "Guantanamo Chief Defense Counsel Refuses to Allow Review of Attorney Letters", *ibid.*

¹⁰⁴⁹ ODIHR interview with Marine Corps Major Derek Poteet, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 1047. See, also, United States Military Commission, *United States of America v. Mohammad et al.*, AE 008 (MAH), *op. cit.*, note 845, pp. 8-9; Bennett, "Another Order in the 9/11 Case, This One On Legal Mail", *op. cit.*, note 1036. ODIHR notes that a written communication management order was adopted in the case in November 2013, and takes note of US assurances that the prosecution is not involved in reviewing any detainee's legal mail, does not communicate with JTF-GTMO personnel concerning the review of materials, and is not privy to the information contained in the legal mail. United States Military Commission, *United States of America v. Mohammad et al.*, AE 018U "Order - Privileged Written Communications", 6 November 2013. US comments to the draft report.

¹⁰⁵⁰ "Requests to Improve the Conditions of Confinement in Guantánamo", Office of the Chief Defense Counsel, *op. cit.*, note 424, p. 5; ODIHR interview with Navy Commander Brian Mizer, *op. cit.*, note 614; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725.

¹⁰⁵¹ "Requests to Improve the Conditions of Confinement in Guantánamo", Office of the Chief Defense Counsel, *ibid.*

¹⁰⁵² *Ibid.*

all times be protected from seizure or inspection of their content,¹⁰⁵³ and defendants should be allowed to correspond with their legal counsel confidentially.¹⁰⁵⁴

404. Reports further indicate that several IT-related failures imperilled the confidentiality of communications in 2012-2013. In one particular case, internal defence emails were disclosed by IT technicians to the prosecution following overly broad searches of archive electronic communications which mistakenly included results from defence email mailboxes – instead of being limited to prosecutors’ email mailboxes.¹⁰⁵⁵ In this regard, ODIHR notes the Chief Prosecutor’s assurances that attorneys in his office fully respect the attorney-client privilege, and that “[a]t no time did any prosecutor actually view the content of any privileged defense communications”.¹⁰⁵⁶ In another instance, a folder containing emails of a former trial counsel was reportedly “available to the Office of the Chief Defense counsel personnel on the Defense computer ‘shared drive’”.¹⁰⁵⁷ The Office of Defence Counsel subsequently took steps to disable that access without viewing content.¹⁰⁵⁸ While some of the IT-related failures were the result of human errors and reportedly did not lead to a violation of the confidentiality of communications, the mere ability of one party to access electronic communication of the adverse party is of concern. Additionally, ODIHR notes that measures taken by defence counsel to mitigate the risk of improper disclosure following IT-related failures, which included not using their email system until it was secure, placed an extra-burden on their ability to prepare the defence of the accused.¹⁰⁵⁹ Colonel Karen Mayberry, the then-Chief Defense Counsel, testified in September 2013 that over the eight or nine months preceding her testimony, the time

¹⁰⁵³ UN Special Rapporteur on the Independence of Judges and Lawyers, Report to the General Assembly, A/64/181, *op. cit.*, note 954, para. 110(b).

¹⁰⁵⁴ See, for instance, UN Special Procedures of the Human Rights Council, Letter to the United States, USA 31/2012, 30 November 2012, p. 3, <[https://spdb.ohchr.org/hrdb/22nd/public_-_UA_USA_30.11.12_\(31.2012\).pdf](https://spdb.ohchr.org/hrdb/22nd/public_-_UA_USA_30.11.12_(31.2012).pdf)>.

¹⁰⁵⁵ This disclosure occurred in appellate proceedings in the *al-Qosi* case. The searches resulted in over 500,000 hits. The exact number of emails delivered to the prosecution is unknown. United States Military Commission, *United States of America v. Al-Nashiri*, “Unofficial/unauthenticated transcript of the hearing dated 6/12/2013 from 10:51 AM to 12:13 PM”, pp. 2042-2247; United States Military Commission, *United States of America v. Mohammad et al.*, AE 154, “Government Notice of Events Related to Protection of Privileged Materials”, 8 April 2013, pp. 1-3; “Requests to Improve the Conditions of Confinement in Guantánamo”, Office of the Chief Defense Counsel, *op. cit.*, note 424, p. 5.

¹⁰⁵⁶ Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 10 June 2013, pp. 2-3, <<http://www.lawfareblog.com/wp-content/uploads/2013/06/Chief-Prosecutor-Statement-10-June-2013.pdf>>.

¹⁰⁵⁷ United States Military Commission, *United States of America v. Mohammad et al.*, AE 154, *op. cit.*, note 1055, p. 3.

¹⁰⁵⁸ *Ibid.*

¹⁰⁵⁹ United States Military Commission, *United States of America v. Mohammad et al.*, “Unofficial/unauthenticated transcript of the hearing dated 9/18/2013 from 11:06 AM to 12:47 PM”, pp. 5426-5428; Wells Bennett, “9/18 Session # 3: More Mayberry”, Lawfare website, 18 September 2013, <<http://www.lawfareblog.com/2013/09/18-session-3-more-mayberry/>>; Wells Bennett, “9/18 Session #2: the Chief Defense Counsel on IT”, Lawfare website, 18 September 2013, <<http://www.lawfareblog.com/2013/09/18-session-2-the-chief-defense-counsel-on-it/>>; Natalie Salvaggio, “The continued abrogation of due process and fair trials (military commissions perspective)”, *The Champion*, July 2013, <<https://www.nacdl.org/champion.aspx?id=29519>>. In this regard, ODIHR takes note of the military judge’s conclusion that “[n]o evidence supports the Accused’s concern [that] the purported loss of data or problems with communication were the result of any attempt by the Prosecution or DoD to compromise Defense files or encumber Defense efforts to represent their respective clients.” In 2015, the judge denied a defence motion to reconsider this ruling. United States Military Commission, *United States of America v. Mohammad et al.*, AE 155II, “Order – Joint Defense Motion to Abate Proceedings and Renew Defense Motions AE 155”, 1 October 2013; Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 19 July 2015, *op. cit.*, note 929, p. 4.

necessary to draft and file any defence pleading increased at least three- to fourfold due to IT issues.¹⁰⁶⁰

405. Furthermore, ODIHR is highly concerned by revelations that FBI agents secretly questioned the defence security officer and linguist of al Shibh and Khalid Shaikh Mohammad's defence teams, respectively, and attempted to enlist the former into a "relationship with the FBI".¹⁰⁶¹ It notes the initial assumption that the questioning of the defence security officer was part of an investigation into wrongdoing of the defence teams themselves.¹⁰⁶² Months after the revelation, and while the investigation was said to have been closed, defence attorneys were still unaware of who had been investigated and why.¹⁰⁶³ It is reasonable to assume that the fear of criminal prosecution hampered defence attorney's ability to zealously and effectively represent their clients.¹⁰⁶⁴ Accordingly, such FBI conduct not only compromised the confidentiality of attorney-client communications, but also constituted an undue interference with attorneys' ability to perform their function.¹⁰⁶⁵ In this regard, ODIHR wishes to reiterate that authorities should not hinder attorneys "from fulfilling their task effectively"¹⁰⁶⁶ but rather ensure that they do not "suffer, or [are] threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".¹⁰⁶⁷
406. In a similar vein, ODIHR is concerned by reports of February 2015 alleging that an interpreter newly and temporarily assigned to the defence in the Mohammad *et al.* case formerly worked in a CIA secret detention facility where at least two of accused were detained. This information came to light after one of the defendants, Ramzi Bin al Shibh, told the judge at the outset of a pre-trial hearing that he had recognized the interpreter, who was sitting next to him.¹⁰⁶⁸ Not only could this negatively affect the defendants and

¹⁰⁶⁰ United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of the hearing dated 9/18/2013 from 11:06 AM to 12:47 PM", *ibid.*, pp. 5426-5428; Bennett, "9/18 Session # 3: More Mayberry", *ibid.*

¹⁰⁶¹ United States Military Commission, *United States of America v. Mohammad et al.*, AE 292QQ, *op. cit.*, note 915, pp. 1, 11, 14, 30.

¹⁰⁶² *Ibid.*, pp. 13-14, 26; Carol Rosenberg, "Accusation of FBI spying stalls 9/11 hearing", Miami Herald website, 14 April 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/article1962835.html>>; Ryan J. Reilly, "FBI Not Investigating Publication Of 9/11 Mastermind's Letter, DOJ Tells Guantanamo Judge", Huffington Post website, 21 April 2014, <http://www.huffingtonpost.com/2014/04/21/guantanamo-fbi-ksm_n_5187728.html>.

¹⁰⁶³ United States Military Commission, *United States of America v. Mohammad et al.*, AE 292QQ, *op. cit.*, note 915, p. 13;

Daphne Eviatar, "Secret Order Cancels Guantanamo Hearing on FBI Spying - Government 'Transparency' in Action", The World Post website, 16 October 2014, <http://www.huffingtonpost.com/daphne-eviatar/secret-order-cancels-guan_b_5998624.html>; Daphne Eviatar, "FBI Infiltration Of 9/11 Defense Continues to Delay Guantanamo Trial", The World Post website, 14 August 2014, <http://www.huffingtonpost.com/daphne-eviatar/fbi-infiltration-of-911-d_b_5679432.html>.

¹⁰⁶⁴ Eviatar, "FBI Infiltration Of 9/11 Defense Continues to Delay Guantanamo Trial", *ibid.*; Daphne Eviatar, "The FBI's Secret Investigation of the 9/11 Defense Teams: The Mystery Continues, and Could Compromise the Case", The World Post website, 16 June 2014, <http://www.huffingtonpost.com/daphne-eviatar/the-fbis-secret-investiga_b_5500217.html>; United States Military Commission, *United States of America v. Mohammad et al.*, "Unofficial/unauthenticated transcript of the hearing dated 4/14/2014 from 09:15 AM to 09:51 AM", p. 7762.

¹⁰⁶⁵ UN HRC, General Comment No. 32, *op. cit.*, note 648, paras. 34, 38; "Basic Principles on the Role of Lawyers", *op. cit.*, note 939, Principle 16.

¹⁰⁶⁶ UN HRC, General Comment No. 32, *ibid.*

¹⁰⁶⁷ "Basic Principles on the Role of Lawyers", *op. cit.*, note 939, Principle 16.

¹⁰⁶⁸ See, for example, Daphne Eviatar, "9/11 Defendants Claim Military Commission Translator Assisted CIA Torture", Human Rights First website, 10 February 2015, <<http://www.humanrightsfirst.org/blog/911-defendants-claim-military-commission-translator-assisted-cia-torture>>; Carol Rosenberg, "Guantánamo hearing halted by supposed CIA 'black site' worker serving as

adversely impact their relationship with their defence team, but these allegations are also particularly concerning when viewed in combination with reported attempts to infiltrate defence teams and several other allegations of breaches of the confidentiality of attorney-client communications described above.

407. International standards require that defence counsel be granted access to documents and other evidence to prepare their case.¹⁰⁶⁹ International bodies and experts have for example specified that accused persons should not be convicted on the basis of evidence to which they or their attorney did not have full access to.¹⁰⁷⁰ In this regard, ODIHR welcomes the inclusion in the MCA 2009 of a provision stating that all of the information admitted into evidence at trial under any rule is to be provided to the defendant.¹⁰⁷¹ It also welcomes the interpretation of this provision by the military judge in the Al-Nashiri case, clarifying that “every piece of information, no matter what the classification, admitted into evidence against Mr. al-Nashiri will be provided to him and his team of defense attorneys”.¹⁰⁷² In addition, it notes US assurances that the government has taken extensive efforts to declassify relevant documents.¹⁰⁷³
408. However, ODIHR wishes to reiterate that defence counsel’s access to documents and other evidence also includes material establishing a defendant’s innocence as well as any other evidence which may assist the defence, such as indications of a coerced confession or information that may be relevant to sentencing.¹⁰⁷⁴ On this point, ODIHR shares concerns raised by the IACHR that, in military commission proceedings, the obligation to disclose exculpatory evidence prior to a finding of guilt is limited to “any evidence that reasonably tends to (...) negate the guilt of the accused (...) or reduce [his] degree of guilt”.¹⁰⁷⁵ Similarly, it is also concerned that the burden to demonstrate the discoverability of evidence is on the defence, even though they may not be aware of the existence of such evidence.¹⁰⁷⁶
409. With regard to the discovery of classified information, the MCA 2009 provides for circumstances where the government may delete or withhold specified portions of the classified information from the defence, substitute a summary of the information or a

war court linguist”, Miami Herald website, 9 February 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article9600110.html#storylink=cpy>>; Carol Rosenberg, “Pentagon: 9/11 defense team linguist was CIA asset”, Miami Herald website, 10 February 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article9705209.html>>.

¹⁰⁶⁹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 33. See, also, OSCE “Brussels Declaration on Criminal Justice Systems”, *op. cit.*, note 550.

¹⁰⁷⁰ UN HRC, Concluding Observations, Canada, CCPR/C/CAN/CO/5, *op. cit.*, note 965, para. 13; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/64/181, *op. cit.*, note 954, para. 41.

¹⁰⁷¹ MCA 2009, § 949p-1(b); MCRE, Rule 505(a)(2). See, also, UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, Report to the Human Rights Council, A/HRC/16/51/Add.1, 14 February 2010, para. 213, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.51.Add.1_EFSonly.pdf>.

¹⁰⁷² United States Military Commission, *United States of America v. Al-Nashiri*, AE 1811, “Order – Defense Motion to Dismiss Capital Referral of All Charges Where the Defendant Has Not Been, And Will Not Be, Granted Access to Classified Evidence Presented to the Commission as Required by Due Process and the Eighth Amendment”, 9 December 2014.

¹⁰⁷³ US comments to the draft report.

¹⁰⁷⁴ UN HRC, General Comment No. 32, *op. cit.*, note 648.

¹⁰⁷⁵ MCA 2009, § 949j (b), IACHR, “Towards the Closure of Guantanamo”, *op. cit.*, note 245, para. 246.

¹⁰⁷⁶ MCA 2009, § 949j (b), IACHR, “Towards the Closure of Guantanamo”, *ibid.*

statement setting forth the facts the classified information would tend to prove.¹⁰⁷⁷ On this matter, interlocutors told ODIHR that there have been a very high number of *ex parte* submissions by the prosecution where evidence is completely unavailable to the defence, who is not aware of what the judge ruled on or of any of the arguments that led to the ruling.¹⁰⁷⁸ The MCA 2009 does not appear to allow defence counsel to request reconsideration of the summaries after the military judge ruled that they are adequate following an *ex parte* showing.¹⁰⁷⁹ Whereas the use of summaries of classified information may not automatically render proceedings unfair,¹⁰⁸⁰ ODIHR reiterates that the appropriateness of non-disclosure should be kept under review throughout the proceedings “in light of the significance of the information, the adequacy of the safeguards and the impact on the fairness of the proceedings as a whole”.¹⁰⁸¹

410. In light of the above, ODIHR takes note of the military judge’s discovery order requiring the prosecution to provide Al-Nashiri’s defence team with, among other things, all records, photographs, videos and summaries documenting his conditions of confinement and transportation at and between CIA secret detention sites; copies of the standard operating procedures, policies or guidelines on the treatment and transportation of “high-value detainees” and unredacted copies of requests and decisions on the use of such “enhanced interrogation techniques” on Al-Nashiri.¹⁰⁸² Indeed, this information may enable Al-Nashiri’s attorneys to investigate, present evidence of, and seek relief for, his treatment in CIA detention, where appropriate.

411. ODIHR also welcomes the declassification and public release of the executive summary, findings, and conclusions of the Senate Study on the CIA RDI Programme, and takes note of statements made at the time of its declassification, announcing that it may lead to “significant changes in the classification policies pertaining to much of the evidence and information” in the ongoing military commission cases.¹⁰⁸³ It might accelerate the provision of material to the defense, allow “the accused [to] see and consult with defense counsel about certain information not previously available to them” and result in

¹⁰⁷⁷ MCA 2009, § 949p-4(b)(1), (3); MCRE, Rule 505(f)(2)(A), (C).

¹⁰⁷⁸ ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914.

¹⁰⁷⁹ MCA 2009, § 949p-4(c); MCRE, Rule 505(f)(3); Elsea, “The Military Commissions Act of 2009”, *op. cit.*, note 621, pp. 26-27, 31.

¹⁰⁸⁰ See, for example, UN HRC, *Mansour Ahani v. Canada*, *op. cit.*, note 964, para. 10.5.

¹⁰⁸¹ UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 81.

¹⁰⁸² The discovery order also requires the prosecution to share with the defence team a chronology of where Al-Nashiri was secretly detained by the CIA; a description of his transportation between different secret detention sites; the identities of medical personnel, guard force personnel, and interrogators who were substantially involved in his treatment and transportation. ODIHR notes that this order adopted in February 2014 was amended in June 2014. The prosecution has sought, and in a number of cases was granted, the possibility to provide substitutions and other relief to comply with the June order, rather than sharing the raw classified information with the defence. In those cases, the military judge reportedly found that “[t]he proposed substitutions and summaries will provide the Accused with substantially the same ability to make a defense as would discovery of, or access to, the underlying classified information”. See, for example, Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 25 January 2015, p. 2, <<https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2015/01/Statement-of-the-Chief-Prosecutor-for-25-January-2015.pdf>>. See, also, Marty Lederman, “Declassification of the CIA interrogation program: Developments on three fronts”, Just security website, 26 May 2014, <<https://www.justsecurity.org/10834/declassification-cia-program-three-fronts/>>.

¹⁰⁸³ United States Military Commission, *United States of America v. Mohammad et al.*, AE 331, “Trial Conduct Order”, 12 December 2014, para. 1.

amendments to the protective orders.¹⁰⁸⁴ According to the US government, the declassification of the executive summary also increases the likelihood that evidence of treatment in CIA detention presented by the defence in court (for instance, to challenge the admissibility of statements that the prosecution might seek to introduce as evidence) will be more open to the public.

412. ODIHR notes, nonetheless, that the executive summary, findings and conclusions of the Senate Study do not contain detailed information about all detainees currently facing prosecution before the military commissions, and does not fully depict all abuses the defendants were subjected to under the CIA RDI programme. Indeed, whereas less than 600 pages of the Study have been declassified at the time of writing, the full Study is more than 6,000 pages long and reportedly “includes details of each detainee in CIA custody, the conditions under which they were detained, [and] how they were interrogated”, *inter alia*.¹⁰⁸⁵ Therefore, ODIHR calls on the United States government to provide each defence team with full access to the portions of the entire Study which concern their client.¹⁰⁸⁶
413. Additionally, ODIHR is concerned by news reports indicating the newly discovered existence of approximately 14,000 classified photographs allegedly depicting external and internal shots of former secret detention facilities where the CIA held “high-value detainees” as well as photographs taken during the transportation of detainees.¹⁰⁸⁷ The fact that the prosecution may have only recently learnt about the existence of such documents and may not have yet been able to review them raises the question of whether the CIA is being cooperative with the prosecutors.¹⁰⁸⁸ Similarly, ODIHR is troubled that the Office of the Chief Prosecutor of military commissions has been authorized to review the full Senate Study on the CIA RDI Programme since February 2015 only.¹⁰⁸⁹ ODIHR’s concerns about the limited access of defence teams to relevant documents and evidence, as explained above, are compounded by the possibility that relevant information may be withheld from the prosecution in the first place.¹⁰⁹⁰

¹⁰⁸⁴ Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 13 December 2014, *op. cit.*, note 927, p. 2. See, also, *ibid.*, para. 4.

¹⁰⁸⁵ United States Senator Dianne Feinstein, “Feinstein Statement on CIA Detention, Interrogation Report”, Dianne Feinstein website, 13 December 2012, <<http://www.feinstein.senate.gov/public/index.cfm/2012/12/feinstein-statement-on-cia-detention-interrogation-report>>.

¹⁰⁸⁶ In this regard, ODIHR takes note of the prosecution’s assurances that, after obtaining the full Senate Study on the CIA RDI Programme in February 2015, their efforts to review it for potentially discoverable information are “well underway”. US comments to the draft report. Nevertheless, this information does not fully alleviate ODIHR concerns explained in the report.

¹⁰⁸⁷ Adam Goldman, “CIA photos of ‘black sites’ could complicate Guantanamo trials”, The Washington Post website, 27 June 2015, <https://www.washingtonpost.com/world/national-security/cia-photos-of-black-sites-could-complicate-guantanamo-trials/2015/06/27/7b1177bc-1912-11e5-93b7-5eddc056ad8a_story.html?tid=hpModule_9d3add6c-8a79-11e2-98d9-3012c1cd8d1e>.

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ US comments to the draft report. The study was approved by the Senate Select Intelligence Committee and sent to the executive branch for comments in December 2012. In April 2014, the Senate Select Committee on Intelligence voted to declassify the executive summary, findings and conclusions. At the time, Dianne Feinstein, then-Chairman of the Committee, stated that “for the past several months, the Committee staff has reviewed all comments by the CIA as well as minority views by committee Republicans and made changes to the report as necessary to ensure factual accuracy and clarity”. United States Senator Dianne Feinstein, “Feinstein Statement on CIA Detention, Interrogation Report”, *op. cit.*, note 1085; United States Senator Dianne Feinstein, “Intelligence Committee Votes to Declassify Portions of CIA Study”, Dianne Feinstein website, 3 April 2014, <<http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=de39366b-d66d-4f3e-8948-b6f8ec4bab24>>.

¹⁰⁹⁰ As mentioned in the international standards section above, violations of the principle of equality of arms may occur “when the prosecution fails to disclose to the defence all material evidence in its possession for or against the defendant on account of

414. With regard to the disclosure of classified information by the defence, the MCA 2009 prescribes that the defence has to provide timely notice to the military judge and prosecution when it reasonably expects to disclose or cause the disclosure of information “known or believed to be classified” during the proceedings. The defence’s notice should also include a brief description of the information.¹⁰⁹¹ Defence attorneys may therefore have to reveal information shared by their client to the military judge as well as the government, the same which is investigating and prosecuting them in the first place.¹⁰⁹² This would not only adversely impact the preparation of a defence; it would also undermine the right of an accused to communicate in full confidentiality with his lawyer.¹⁰⁹³
415. In 2014, defence counsel also reported a lack of clarity as to what information is in fact classified and/or its level of classification.¹⁰⁹⁴ They explained that, as a consequence, they may not be able to disclose information which is in fact not classified, and have to litigate to learn whether information is properly classified or not.¹⁰⁹⁵ The fear of criminal prosecution - should they knowingly or unknowingly reveal classified information - may have a chilling effect on their ability to provide as effective a representation as possible.¹⁰⁹⁶ In this regard, the United States should ensure that defence counsel do not “suffer, or [are] threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”, in line with the Basic Principles on the Role of Lawyers.¹⁰⁹⁷
416. ODIHR takes note of the evolution of the protective orders issued in the ongoing military commission cases. Protective orders are adopted to prohibit “all persons who have access to or come into possession of classified documents or information in connection with [a] case”, including the detainees themselves and their counsel, from disclosing classified

the classified character of such information”. Non-disclosure of information may affect the overall fairness of any trial. UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, paras. 80-81.

¹⁰⁹¹ MCA 2009, § 949p-5; MCRE, Rule 505(g)(1).

¹⁰⁹² UN Special Procedures, Letter to the United States, *op. cit.*, note 1054, p. 3.

¹⁰⁹³ *Ibid.*; UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 34; “Body of Principles”, *op. cit.*, note 89, Principle 18; “Basic Principles on the Role of Lawyers”, *op. cit.*, note 939, Principles 8, 22; OSCE “Brussels Declaration on Criminal Justice Systems”, *op. cit.*, note 550; UN Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, A/68/285, *op. cit.*, note 647, para. 78; UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 74.

¹⁰⁹⁴ ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725.

¹⁰⁹⁵ ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *ibid.*

¹⁰⁹⁶ *Ibid.* The Second Amended Protective Order #1 in the Mohammad *et al.* case and the Amended Protective Order #1 in the Al-Nashiri case for example both stipulated that “Any unauthorized disclosure of classified information may constitute a violation of United States criminal laws. Additionally, any violation of the terms of this [Amended] Protective Order shall immediately be brought to the attention of the Commission and may result in disciplinary action or other sanctions, including a charge of contempt of the Commission and possible referral for criminal prosecution”. United States Military Commission, *United States of America v. Mohammad et al.*, AE 013DDD, “Second Amended Protective Order #1”, *op. cit.*, note 851, para. 9(a); United States Military Commission, *United States of America v. Al-Nashiri*, AE 013M, “Amended Protective Order #1”, *op. cit.*, note 851, para. 48.

¹⁰⁹⁷ “Basic Principles on the Role of Lawyers”, *op. cit.*, note 939, Principle 16.

information.¹⁰⁹⁸ In particular, they prevent them from sharing classified information with the public.

417. In December 2011, a protective order in the Al-Nashiri case provided for the “presumptive classification” of all statements of the accused,¹⁰⁹⁹ requiring that all statements of Al-Nashiri had to be treated as classified until a classification review occurred. Defence attorneys in the Mohammad *et al.* case also challenged this practice of presumptive classification in court.¹¹⁰⁰ This presumption of classification greatly impeded defence investigations by making them “practically impossible”.¹¹⁰¹ It made it “almost impossible” to locate and interview potential witnesses identified by the accused and prevented defence counsel from asking witnesses about specific information, since these witnesses do not possess the security clearance to view classified information.¹¹⁰²
418. In December 2013 and March 2014, amended protective orders were entered in both the Al-Nashiri and Mohammad *et al.* cases, putting an end to the practice of presumptive classification of all statements, to adopt an approach where certain categories of documents or information – including information acquired orally – are classified.¹¹⁰³ These orders stipulated that classified information included information about the defendants’ capture, the “enhanced interrogation techniques” applied to them during their CIA detention and their conditions of confinement until their transfer to Guantánamo, among others.¹¹⁰⁴
419. Despite the revision of the protective orders mentioned above, information available to ODIHR indicate that, in 2014, the classification rules, policies and practices have continued to significantly affect attorney-client communication and defence investigations,

¹⁰⁹⁸ See, for example, United States Military Commission, *United States of America v. Al-Nashiri*, AE 013M, “Amended Protective Order #1”, *op. cit.*, note 851, pp. 1-2.

¹⁰⁹⁹ United States Military Commission, *United States v. Al-Nashiri*, AE 013, “Protective Order #1”, 8 December 2011.

¹¹⁰⁰ In the Mohammad *et al.* case, the original government motion requesting the issuance of a protective order stated: “Because the Accused were detained and interrogated in the CIA program, they were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the Accused are in a position to reveal this information publicly through their statements. Consequently, any and all statements by the Accused are *presumptively* classified until a classification review can be completed.” [Emphasis added]. United States Military Commission, *United States of America v. Mohammad et al.*, AE 013, “Government Motion to Protect Against Disclosure of National Security Information”, 26 April 2012, para. 5g. Defence attorneys opposed it. In a supplemental government motion, the term was changed. The protective order later entered by the military judge did not provide for presumptive classification. Wells Bennett, “A ‘Retreat’ From Presumptive Classification in MiliComms?”, Lawfare website, 25 September 2012, <<http://www.lawfareblog.com/2012/09/a-retreat-from-presumptive-classification-in-milicomms/>>; United States Military Commission, *United States of America v. Mohammad et al.*, AE 009E, “Order - Mr. al Baluchi’s Motion to End Presumptive Classification”, 6 December 2012, para. 4; United States Military Commission, *United States of America v. Mohammad et al.*, AE 013P, “Protective Order #1”, 6 December 2012; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725; ODIHR interview with James G. Connell III and Air Force Lieutenant Colonel Sterling Thomas, *op. cit.*, note 607.

¹¹⁰¹ UN Special Procedures, Letter to the United States, *op. cit.*, note 1054, p. 2.

¹¹⁰² *Ibid.*

¹¹⁰³ United States Military Commission, *United States of America v. Mohammad et al.*, AE 013DDD, “Second Amended Protective Order #1”, 16 December 2013, *op. cit.*, note 851; United States Military Commission, *United States of America v. Al-Nashiri*, AE 013M, “Amended Protective Order #1”, *op. cit.*, note 851; Bennett, “A ‘Retreat’ From Presumptive Classification in MiliComms?”, *op. cit.*, note 1100.

¹¹⁰⁴ United States Military Commission, *United States of America v. Mohammad et al.*, AE 013DDD, “Second Amended Protective Order #1”, *ibid.*, para. 2(g)(4); United States Military Commission, *United States of America v. Al-Nashiri*, AE 013M, “Amended Protective Order #1”, *ibid.* para. 10(d).

including the interview of witnesses.¹¹⁰⁵ Indeed, significant impediments have continued to affect what attorneys can share with potential witnesses or experts of what their client tells them, even when this information is available in the public domain.¹¹⁰⁶ Reciprocally, attorneys have not able to share with their clients information deemed to be classified, even if this information involves them.¹¹⁰⁷ As a result, classification restrictions have reportedly impeded efforts to obtain the truth about the treatment of “high-value detainees” in CIA detention. Further, it would have prevented defence teams from using alleged or confirmed acts of torture or ill-treatment against the accused as mitigating evidence.¹¹⁰⁸ This raises grave concerns, as it has prevented the accused from complaining about human rights violations and seeking redress, but has also affected the ability of the attorneys to investigate and have adequate facilities to prepare a defence.¹¹⁰⁹

420. ODIHR notes that some progress has been made since the declassification of the executive summary, findings and conclusion of the Senate Study. In 2015, the prosecution moved the military commissions to amend the existing protective orders in the Al-Nashiri, Mohammad *et al.* and al-Iraqi cases in order to reflect that certain formerly classified information no longer required restrictive handling by those orders.¹¹¹⁰ The three judges granted the motions to amend the orders.¹¹¹¹ By way of example, the judges in the Al-Nashiri and Mohammad *et al.* cases removed two paragraphs from the previous protective orders, namely the ones regarding the application and description of “enhanced interrogation techniques” to the defendants in CIA secret detention, and the ones regarding the description of their conditions of confinement until their transfer to Guantánamo in September 2006.¹¹¹² As a result, these topics are no longer subject to the orders, with the

¹¹⁰⁵ Glazier, “Destined for an Epic Fail”, *op. cit.*, note 709, p. 937; ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914; ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725.

¹¹⁰⁶ ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *ibid.*

¹¹⁰⁷ ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914. See, also, ODIHR interview with Richard Kammen, *op. cit.*, note 614; ODIHR interview with Navy Commander Brian Mizer, *op. cit.*, note 614: at the time of these interviews, prior to the end of the presumptive classification regime in the Al-Nashiri case, defence attorneys informed ODIHR that they were prevented from sharing approximately 15% of the material that the prosecution deemed relevant to the case with Al-Nashiri. See, also, UN HRC, *Hicks v. Australia*, “Individual Communication”, *op. cit.*, note 754, para. 243.

¹¹⁰⁸ James G. Connell, III, “The United States’ Compliance with the Convention Against Torture with Respect to the Classification of Information Regarding the Ill-Treatment of Detainees in Secret Detention”, p. 1, OHCHR website, <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18485_E.pdf>. See, also, United States Military Commission, *United States of America v. Mohammad et al.*, AE 200 (MAH, RBS, WBA), “Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture”, 12 August 2013. On this point, ODIHR takes note that the prosecution had begun seeking declassification of relevant evidence regarding the CIA RDI programme. US comments to the draft report.

¹¹⁰⁹ See, also, “Rendered Silent, Denying defendants in military commission trials the right to complain of torture and enforced disappearance”, REDRESS, February 2014, paras. 26-27,

<<http://www.redress.org/downloads/publications/REDRESS%20USA%20Shadow%20Report%20-%20Final.pdf>>; UN HRC, *Hicks v. Australia*, “Individual Communication”, *op. cit.*, note 754, para. 243.

¹¹¹⁰ US comments to the draft report.

¹¹¹¹ *Ibid.*

¹¹¹² Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 22 February 2015, p. 2, <<https://www.justsecurity.org/wp-content/uploads/2015/02/Statement-of-the-Chief-Prosecutor-22-February-2015-1-copy.pdf>>; Chief Prosecutor Brigadier General Mark Martins, “Chief Prosecutor Mark Martins Remarks at Guantanamo Bay”, 19 July 2015, *op. cit.*, note 929, p. 3.

exception of information involving the place of apprehension, countries of detention and identities of the persons involved.¹¹¹³

421. Irrespective of the revision of the protective orders, defence attorneys will reportedly have to seek the declassification of defendants' memories of their treatment in CIA detention on a case-by-case basis, as such information will not be declassified all at once.¹¹¹⁴ In this perspective, the public release of 27 pages of interview notes between Majid Khan¹¹¹⁵ and his attorneys is an encouraging development. These notes, which provide his account of the treatment he was subjected to in CIA detention prior to September 2006, reveal details that were not previously disclosed by the executive summary of the Senate Study.¹¹¹⁶ ODIHR welcomes the declassification of these notes and calls on the United States government to allow more information about detainees' torture allegations to be unsealed without delay.
422. In spite of the recent changes mentioned above, and until all relevant documents and other evidence, including detailed information about defendants' treatment, are in fact available to the defence, ODIHR is concerned that the over-classification of information will remain an issue in military commissions proceedings.
423. Additionally, ODIHR is concerned that the right of military commission defendants "[t]o examine, or have examined, the witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]"¹¹¹⁷ is not adequately protected under the MCA and its implementing regulation. Indeed, the MCA 2009 only provides that defence counsel have a "reasonable opportunity to obtain witnesses and other evidence"¹¹¹⁸ whereas the rules generally applicable in courts-martial provide for an "equal opportunity".¹¹¹⁹ In this regard, ODIHR notes that the MCA 2009 now specifies that "[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a [federal] court".¹¹²⁰ Nevertheless, an intended deviation from the general rules, i.e. the substitution of "equal" by "reasonable", creates at least the perception that the defence cannot enjoy "in full equality" the right to examine and cross-examine witnesses.¹¹²¹

¹¹¹³ Jessica Schulberg and Ryan H. Reilly, "U.S. Government Starting To Allow CIA Torture Victims To Discuss Their Own Memories", Huffington Post website, 11 June 2015, <http://www.huffingtonpost.com/2015/06/11/guantanamo-cia-torture_n_7552314.html>, citing an email exchange between the Pentagon spokesman for detainee policy and the Huffington Post.

¹¹¹⁴ *Ibid.*

¹¹¹⁵ As previously mentioned in the introduction of Part 2 of this report, Majid Khan pled guilty in February 2012 to conspiracy, murder in violation of the law of war, attempted murder in violation of the law of war, providing material support for terrorism and spying. In exchange for the promise of a reduced sentence, Khan agreed to co-operate with the prosecution. His sentencing has been delayed to allow him time to co-operate in ongoing military commission cases.

¹¹¹⁶ Jessica Schulberg and Ryan H. Reilly, "U.S. Government Starting To Allow CIA Torture Victims To Discuss Their Own Memories", *op. cit.*, note 1113.

¹¹¹⁷ ICCPR, Art. 14(3)(e).

¹¹¹⁸ MCA 2009, § 949j(a)(1).

¹¹¹⁹ Elsea, "The Military Commissions Act of 2009", *op. cit.*, note 621, p. 26, referring to 10 U.S.C. §846: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence (...)".

¹¹²⁰ MCA 2009, § 949j(a).

¹¹²¹ ICCPR, Art. 14(3).

424. The RMC does not provide the defence with the power to subpoena witnesses, contrary to the prosecution.¹¹²² Instead, defence attorneys are required to submit synopses of the expected testimonies to the prosecution,¹¹²³ which leads them to disclose part of their strategy. The prosecution may then contend that the production of the defence witness is not required. Even though such requests may be renewed before the military judge,¹¹²⁴ ODIHR considers that these provisions do not allow for the defence to have “same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution”¹¹²⁵ and therefore violate Article 14(3)(e) of the ICCPR.
425. ODIHR further regrets the military judge’s conclusion that the “Commission is without legal authority to subpoena a civilian witness to personally appear at a Commission hearing at (...) Guantanamo”.¹¹²⁶ It notes the judge’s confirmation that the commission has the “authority to require a civilian witness, whose testimony is determined to be relevant and necessary, to testify at a site within the United States through the use of video teleconference or similar technology or attend a deposition”.¹¹²⁷ While testimony via video-links may be possible under certain limited circumstances,¹¹²⁸ it remains preferable to hear direct witness testimony.¹¹²⁹ Indeed, examining the demeanour of witnesses and assessing their credibility might prove more difficult via video-links. In this regard, defence counsel interviewed by ODIHR expressed concern that video-link testimony may not be as effective.¹¹³⁰ Furthermore, it is crucial to ensure that the use of video-link testimony does not result in prejudice or other unfairness to the defendants. If, for example, most prosecution witnesses were to testify in person from Guantánamo while most defence witnesses were to testify by video-link, the principle of equality of arms would be violated.¹¹³¹
426. A party is not entitled to the presence of a witness whom the military judge discretionarily deemed “unavailable”.¹¹³² The only exception is where a witness is central to the resolution of an issue at the core of a fair trial and there is no adequate substitute to his or her testimony.¹¹³³ Even in such case, however, the military judge is only required to grant

¹¹²² RMC, Rule 703(e)(2)(C).

¹¹²³ RMC, Rule 703(c)(2)(B).

¹¹²⁴ RMC, Rule 703(c)(2)(D).

¹¹²⁵ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 39.

¹¹²⁶ United States Military Commission, *United States of America v. Al-Nashiri*, AE 184B, “Order - Defense Motion for Appropriate Relief: To Issue Subpoena to Mr. Rodriguez in Accordance with R.M.C. 703(e)(2)(A)”, 26 February 2014, para. 3. The military judge found that there was no conflict between the provisions of the MCA of 2009, the Manual for Military Commissions of 2012, and the provision of the 2011 Regulation for Trial by Military Commission, stipulating that “a subpoena issued to a civilian to testify at Guantanamo Bay may not be enforced in the United States”. RTMC 2011, Regulation 13-5(b).

¹¹²⁷ *Ibid.*, para. 7.

¹¹²⁸ See, for example, Rome Statute, Art. 69(2); ICC Rules of Procedure and Evidence, Rule 67; ICTR Rules of Procedure and Evidence, Rule 75; ICTY Rules of Procedure and Evidence, Rule 75.

¹¹²⁹ ICTR, *The Prosecutor v Ildephonse Hategekimana*, Case No. 00-55B-R11bis, “Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis”, 4 December 2008, para. 26,

<http://www.haguejusticeportal.net/Docs/ICTR/Hategekimana_Appeals%20Decision%20on%20referral.pdf>; Rome Statute, Art. 69(2).

¹¹³⁰ ODIHR interview with Richard Kammen, *op. cit.*, note 614.

¹¹³¹ ICTR, *The Prosecutor v Ildephonse Hategekimana*, *op. cit.*, note 1129, para. 26. See, also, *Fair Trial Manual* (London: Amnesty International, second edition, 2014), p. 160, <<https://www.amnesty.org/en/documents/POL30/002/2014/en/>>.

¹¹³² RMC, Rule 703(b)(3)(A).

¹¹³³ RMC, Rule 703(b)(3)(B).

continuance or another relief to try to secure the witness' presence, or to abate the proceedings if "the reason for the witness' unavailability is within the control of the United States".¹¹³⁴ With regards to this particular rule, the Manual for Military Commissions further explains that the "witnesses located in foreign countries may be unavailable for many reasons outside the control of the United States, and Congress provided for the broad admissibility of hearsay precisely to allow for the introduction of evidence where the witnesses are not subject to the jurisdiction of the military commission or are otherwise unavailable".¹¹³⁵ Accordingly, it appears that the rules may allow for a trial to proceed in the absence of a crucial defence witness if this witness cannot be obtained by the United States.¹¹³⁶ ODIHR is concerned that such a possibility may violate a defendant's right to a fair trial, in particular in instances where the United States has not taken all possible steps to secure the presence of a crucial defence witness.¹¹³⁷ ODIHR positively takes note of the government efforts in the Al-Nashiri case to take and preserve through oral depositions the testimony of material witnesses who currently reside in Yemen,¹¹³⁸ should these witnesses ultimately be unable or unwilling to travel to Guantánamo. While reiterating that direct witness testimony remains preferable, ODIHR acknowledges that the use of video- or audio-recorded depositions, accompanied by the safeguards foreseen in this case (including the opportunity for the defence to question witnesses), is a more favourable option than the use of uncontested hearsay evidence.

427. It should also be noted that the defence does not have an independent source of funding for experts and is to make case-by-case requests to the Convening Authority.¹¹³⁹ US representatives informed ODIHR that the Convening Authority may grant a diverse array of support to the defence, such as multiple lawyers, mitigation specialists, investigators, translators, cultural consultants or medical experts when requests for such funding are deemed relevant and necessary.¹¹⁴⁰ Whereas the prosecution also has to request funding, concerns have been raised in past military commissions that the Convening Authority was denying defence requests routinely.¹¹⁴¹ In July 2009, a former Chief Defense Counsel, Colonel Peter Masciola, testified that "of the 56 requests for expert assistance filed in 11 cases, only nine [had] been granted."¹¹⁴² In general, defence's access to funding (not only

¹¹³⁴ *Ibid.*

¹¹³⁵ *Ibid.*, "discussion".

¹¹³⁶ UN HRC, *Hicks v. Australia*, "Individual Communication", *op. cit.*, note 754, para. 235.

¹¹³⁷ UN HRC, *Clifford McLawrence v. Jamaica*, *op. cit.*, note 969, para. 5.8.

¹¹³⁸ ODIHR takes note of the modalities proposed by the Government in AE 056, in particular as they relate to the ability of the accused to participate in the depositions in real-time from Guantánamo "to the fullest extent practical", to be accompanied and advised by counsel at this location at Guantánamo, to be represented by counsel at the deposition in Yemen, to be able to communicate privately via telephone with his counsel conducting the deposition, to be provided, if necessary, with real-time translation services, and that the two-way video and audio feed depositions be video and audio-recorded, thereby allowing some type of assessment of the reactions of each individual when used at trial. United States Military Commission, *United States of America v. Al-Nashiri*, AE 056, "Government Motion For Oral Depositions Pursuant to Rule for Military Commissions 702", 12 March 2012.

¹¹³⁹ RMC, Rule 703(d); Glazier, "Destined for an Epic Fail", *op. cit.*, note 709, p. 934.

¹¹⁴⁰ ODIHR meeting with the Department of Defense Office for the Convening Authority, *op. cit.*, note 841.

¹¹⁴¹ Glazier, "Destined for an Epic Fail", *op. cit.*, note 709, p. 32; United States Military Commission, *United States v. Mohammed Jawad*, "Declaration of Lieutenant Colonel Darrel J. Vandeveld", 22 September 2008, para. 5, <<http://perma.cc/KDE9-GP7J>>.

¹¹⁴² "Testimony of Peter R. Masciola, Colonel, United States Air Force – ANGUS, Chief Defense Counsel, Department of Defense, Office of Military Commissions, House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties", 30 July 2009, <http://judiciary.house.gov/_files/hearings/pdf/Masciola090730.pdf>.

for expert witnesses) and resources remains of concern,¹¹⁴³ even if some improvements have been reported.¹¹⁴⁴ Several interlocutors interviewed however told ODIHR that the defence does not have enough basic resources, including resources to investigate.¹¹⁴⁵ One defence team further stressed that they are not yet litigating to obtain equality of arms compared to the prosecution, but rather focusing on obtaining sufficient resources to properly and adequately represent their client in the first place.¹¹⁴⁶ The fact that the defence may be significantly under-resourced compared to the prosecution is of grave concern.¹¹⁴⁷ Indeed, the "[d]isproportionate aggregation of resources between the prosecution and the defence in terrorism cases is a matter that strikes at the heart of the principle of the equality of arms required in the safeguarding of a fair trial".¹¹⁴⁸

428. Whereas the current rules restrict hearsay use in comparison to the MCA 2006,¹¹⁴⁹ ODIHR is concerned that hearsay evidence and hearsay within hearsay may still be admitted in military commission proceedings.¹¹⁵⁰ By way of example, the prosecution in the Al-Nashiri case has notified to the defence its intention to present as evidence approximately 72 interviews or statement summaries of 66 absent witnesses. Reports and testimonies indicate that these witnesses, who were virtually all interrogated in October and November 2000 by Yemeni authorities and in conditions reported as "frequently improper and coercive", will not testify live. Instead, it appears that US law enforcement agents who

¹¹⁴³ ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725; ODIHR interview with Marine Corps Major Derek Poteet, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 1047; ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914; ODIHR interview with Stephen Vladeck, 24 February 2014. See, also, United States Military Commission, *United States of America v. Al-Nashiri*, "Unofficial/unauthenticated transcript of the hearing dated 5/28/2014 from 10:52 AM to 12:11 PM", *op. cit.*, note 927, p. 4358: "I just wanted to make a continuing record of the sort of grotesque disparity between the resources that are available to the prosecution team, and the resources that are -- the limited resources that have been made available to the defense. And I think that disparity is demonstrated by the fact that, for this case, they have 12 lawyers, we have five."

¹¹⁴⁴ ODIHR interview with Stephen Vladeck, *ibid.*

¹¹⁴⁵ ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914. See, also, ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 725; ODIHR interview with Marine Corps Major Derek Poteet, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *op. cit.*, note 1047.

¹¹⁴⁶ ODIHR interview with Cheryl Bormann, Air Force Captain Michael Schwartz, Navy Reserves Lieutenant Commander James Hatcher and Tim Jon Semmerling, *ibid.*

¹¹⁴⁷ See, also, Glazier, "Destined for an Epic Fail", *op. cit.*, note 709, p. 933: "Prosecutors routinely enjoy overall resource advantage vis-à-vis the defendants in most trials. Not surprisingly, Guantánamo practice features combined defense teams substantially outnumbered and with less resources than the prosecution. Of more concern is the inequality of the two sides before the commission."

¹¹⁴⁸ UN Special Rapporteur on human rights and counter-terrorism, Report to the General Assembly, A/63/223, *op. cit.*, note 55, para. 35; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 29.

¹¹⁴⁹ MCA 2006, § 949a(b)(2)(E): "(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title. (ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value." See, also, UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/16/51/Add.1, *op. cit.*, note 1071, para. 212.

¹¹⁵⁰ MCA 2009, § 949a(b)(3)(D); MCRE, Rule 803(b); MCRE, Rule 805. See, also, UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/16/51/Add.1, *ibid.*

interviewed them in 2001-2002 will testify to what they said at the time.¹¹⁵¹ In particular, ODIHR takes note of Saleh Hussein Mohammed Al-Akl's statement, which was provided by the prosecution to illustrate the type of hearsay it intends to offer at trial.¹¹⁵² It also notes the military judge's conclusion that Section 949a(b)(3)(D) of the MCA 2009 provides "a suitable alternative process to prevent the admission of unreliable evidence".¹¹⁵³ However, despite the restrictions placed by the MCA 2009, ODIHR remains concerned that hearsay evidence does not permit an accused to cross-examine the primary witnesses or question the surrounding circumstances of their testimony, thereby undermining the guarantee enshrined in Article 14(3) of the ICCPR.¹¹⁵⁴

429. In light of the above, ODIHR considers that the military commission proceedings do not guarantee equality of arms between the defence and the prosecution, and therefore violate Article 14(3) of the ICCPR and OSCE commitments.

d. Recommendations

- To ensure that, in any proceedings against Guantánamo detainees, the principle of equality of arms is fully respected in line with international fair trial standards;
- To ensure that any Guantánamo detainee suspected of a criminal offence is provided with adequate time and facilities to meet and otherwise communicate with his counsel;
- To ensure that oral communications between a defendant and his counsel are not subjected to audio-monitoring, audio-recording or other monitoring or recording that would allow authorities to discern the content of confidential attorney-client communications; to ensure confidential written communications between a defendant and his counsel are not intercepted, seized or read;
- To ensure that there is no undue interference with defence counsel's ability to carry out their duties, and that attorneys do not suffer or are not threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;
- To ensure that any Guantánamo detainee suspected of a criminal offence has access to all exculpatory material as well as other material evidence that the prosecution intends to offer in any proceedings against him;

¹¹⁵¹ United States Military Commission, *United States of America v. Al-Nashiri*, AE 263, "Motion for Disclosure of Impeachment and Brady Evidence Relevant to Government's Numerous Hearsay Witnesses", 1 April 2014; United States Military Commission, *United States of America v. Al-Nashiri*, AE 166, "Notice to the Defense of the Government's Intention to Offer Certain Items of Corroborated, Lawfully Obtained, Probative, and Reliable Hearsay Evidence Where the Declarants Are Unavailable, Hostilities Post Unique Circumstances, and Admission is in the Interest of Justice, Pursuant to the M.C.A., 10 U.S.C. §949a(b)(3)(D), and M.C.R.E. 803(b)(1)", 17 September 2013; ODIHR interview with Richard Kammen, *op. cit.*, note 614; ODIHR interview with Navy Commander Brian Mizer, *op. cit.*, note 614; Julian Brookes, "Make justice, not Gitmo", Human Rights Watch website, 13 March 2014, <<http://www.hrw.org/news/2014/03/13/make-justice-not-gitmo>>; Marilyn Odendahl, "Hossiers play integral roles in historic military commissions", The Indiana Lawyer website, 4 June 2014, <<http://www.theindianalawyer.com/article/print?articleId=34279>>.

¹¹⁵² United States Military Commission, *United States of America v. Al-Nashiri*, AE 166, *ibid.*

¹¹⁵³ United States Military Commission, *United States of America v. Al-Nashiri*, AE 109F, "Order – Defense Renewed Motion to Take Judicial Notice that the Confrontation Clause of the Sixth Amendment to the Constitution of the United States, as Interpreted by the United States Supreme Court Applies to this Capital Military Commission", 4 June 2014.

¹¹⁵⁴ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 28.

- To ensure that, in any proceedings against Guantánamo detainees, classification rules and policies are strictly proportionate to the need to protect national security; to ensure that the appropriateness of non-disclosure is reassessed throughout the proceedings, and that all measures to restrict access to classified information are accompanied by compensatory safeguards so that the defence is able to answer all aspects of the case;
- To ensure that, in any proceedings against Guantánamo detainees, the defence has full access to relevant portions of the entire Senate Study on the CIA RDI Programme;
- To ensure that any Guantánamo detainee charged with a criminal offence has the right to call and examine defence witnesses under the same conditions as prosecution witnesses, and to cross-examine witnesses against him.

E. EXCLUSION OF EVIDENCE OBTAINED BY TORTURE OR ILL-TREATMENT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

a. International Standards

430. Statements obtained through torture must “not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”.¹¹⁵⁵ This rule extends to other forms of cruel, inhuman or degrading treatment or punishment.¹¹⁵⁶ OSCE participating States reinforced this exclusionary rule by reaffirming their strong commitment to the CAT in OSCE commitments.¹¹⁵⁷
431. The purpose of the exclusionary rule is to remove the prime incentive for torture and ill-treatment, extracting information or confessions, and to help ensure that no innocent people are convicted based upon information obtained by such means given the unreliability of statements obtained through torture or ill-treatment.¹¹⁵⁸ To help prevent torture and ill-treatment, it is essential to include detailed provisions in procedural legislation on the inadmissibility of statements obtained in such a way.¹¹⁵⁹
432. According to the Human Rights Committee, this rule is, in principle, not limited to statements and confessions, but includes all other forms of evidence derived from torture or ill-treatment.¹¹⁶⁰ It is also not confined to statements made by the accused, as its scope includes statements made by any other person that were obtained by torture or ill-treatment

¹¹⁵⁵ CAT, Art. 15; ICCPR, Art. 7; UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 12.

¹¹⁵⁶ UN HRC, General Comment No. 20, *ibid.*; UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 6; UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 6; UN HRC, *Terrence Sahadeo v. Republic of Guyana*, Communication No. 728/1996, 1 November 2001, para. 9.3,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F73%2FD%2F728%2F1996&Lang=en>.

¹¹⁵⁷ OSCE Athens Document, *op. cit.*, note 80, paras. 1, 6.

¹¹⁵⁸ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 93.

¹¹⁵⁹ CAT, Arts. 2, 15; UN CAT, Report of the Committee against Torture, 26 June 1999, A/54/44, para. 45,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/54/44%28SUPP%29&Lang=En>; UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 41; UN CAT, *Nouar Abdelmalek v. Algeria*, Communication No. 402/2009, 23 May 2014, para. 11.9,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/52/D/402/2009&Lang=en>; OSCE Istanbul Document, *op. cit.*, note 279, para. 21; OSCE Ljubljana Document, *op. cit.*, note 90.

¹¹⁶⁰ UN HRC General Comment 32, *ibid.*, para. 6.

and that may be adduced as evidence against an accused.¹¹⁶¹ Both the Committee against Torture and the Human Rights Committee have stressed that this rule must be complied with in all circumstances, as it is non-derogable.¹¹⁶²

433. If a statement is allegedly obtained by torture or ill-treatment, a state is obligated to ascertain the veracity of the allegation and, if it fails to do so and admits the statement into any proceeding, Article 15 of the CAT is violated.¹¹⁶³ This duty to ascertain the veracity of allegations of torture or ill-treatment applies even when the state intending to rely on the evidence had no involvement in the torture or ill-treatment.¹¹⁶⁴ To invoke this obligation, the individual alleging torture or ill-treatment must only demonstrate that his or her allegation is well-founded.¹¹⁶⁵
434. The privilege against self-incrimination is enshrined in international treaties and standards,¹¹⁶⁶ as well as in OSCE commitments.¹¹⁶⁷ Article 14(3)(g) of the ICCPR provides that anyone charged with a criminal offence is entitled “[n]ot to be compelled to testify against himself or to confess his guilt”.¹¹⁶⁸
435. “[A]ny direct or indirect physical or undue psychological pressure” applied to the accused by the investigating authorities “with a view to obtaining a confession of guilt” is prohibited.¹¹⁶⁹ Thus, this privilege is not limited to statements at trial, but also applies to the investigation prior to trial.¹¹⁷⁰ Confessions obtained through conduct that violates

¹¹⁶¹ UN CAT, *P.E. v. France*, Communication No. 193/2001, 21 November 2002, para. 6.3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F29%2FD%2F193%2F2001&Lang=en>. See, also, Inter-American Court on Human Rights, *Teodoro Cabrera García and Rodolpho Montiel Flores v Mexico*, Case No. 12.449, 26 November 2010, paras. 166-167, <http://www.corteidh.or.cr/docs/casos/articulos/seriec_220_ing.pdf>; UN HRC, General Comment No. 32, *ibid.*

¹¹⁶² UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 6. See, also, UN HRC, General Comment No. 29, *op. cit.*, note 111, para. 7; UN HRC, General Comment No. 32, *ibid.*

¹¹⁶³ UN CAT, *Yousri Ktiti v. Morocco*, Communication No. 419/2010, 26 May 2011, para. 8.8, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F46%2FD%2F419%2F2010&Lang=en>.

¹¹⁶⁴ UN CAT, *P.E. v. France*, *op. cit.*, note 1161, para. 6.3: it is “an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture”; UN CAT, *G.K. v. Switzerland*, Communication No. 219/2002, 7 May 2003, para. 6.10, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F30%2FD%2F219%2F2002&Lang=en>: the exclusionary rule stems from the absolute prohibition of torture and implies “an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction” are the result of torture; Special Rapporteur on torture, Juan Mendez, Report to the Human Rights Council, A/HRC/25/60, 10 April 2014, para. 66, <<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>>.

¹¹⁶⁵ UN CAT, *G.K. v. Switzerland*, *ibid.*, para. 6.11.

¹¹⁶⁶ ICCPR, Art. 14(3)(g); ACHR, Art. 8(2)(g); “Body of Principles”, *op. cit.*, note 89, Principle 21; Decaux Principles, *op. cit.*, note 647, Principle 15.

¹¹⁶⁷ OSCE Moscow Document, *op. cit.*, note 90, para. 23.1(vii): “effective measures will be adopted (...) to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person”.

¹¹⁶⁸ ICCPR, Art. 14(3)(g).

¹¹⁶⁹ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 41.

¹¹⁷⁰ OSCE Moscow Document, *op. cit.*, note 90, para. 23.1(vii). See, for instance, UN HRC, *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, 21 July 2004, para. 7.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F81%2FD%2F1033%2F2001&Lang=en>; UN HRC, *Vladimir Dunaev v. Tajikistan*, Communication No. 1195/2003, 30 March 2009, paras. 7.2-7.3, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F95%2FD%2F1195%2F2003&Lang=en>.

Article 7 of the ICCPR regarding the prohibition of torture and ill-treatment also violate Article 14(3)(g).¹¹⁷¹ The state has the burden of proving that statements were made voluntarily.¹¹⁷²

436. Detainees may be subject to interrogation, but they are not to be compelled to plead guilty or to confess.¹¹⁷³ The Human Rights Committee has stated that torture and ill-treatment may not be used against the accused in order to “force them to make or sign, under duress, a confession admitting guilt”.¹¹⁷⁴ Moreover, a plea agreement may not be accepted unless the accused understands the consequences of pleading guilty and the accused was not subjected to any pressure to sign the agreement. Thus, the agreement must be entered into voluntarily. This means that the agreement must not be entered into as the result of “any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentences”.¹¹⁷⁵
437. The rule excluding evidence obtained by torture and ill-treatment is also applicable under international humanitarian law by virtue of Common Article 3 and Article 75 of API.¹¹⁷⁶ International humanitarian law also protects the privilege against self-incrimination.¹¹⁷⁷ The Third Geneva Convention stipulates that “no moral or physical coercion” may be used on a prisoner of war to elicit a confession of guilt.¹¹⁷⁸ Similarly, Article 75 of API lists the privilege against self-incrimination as one of the generally recognized principles of regular judicial procedure that must be respected in all criminal proceedings.¹¹⁷⁹

b. Domestic Standards

438. The Fifth Amendment to the US Constitution provides that “[n]o person (...) shall be compelled in any criminal case to be a witness against himself.”¹¹⁸⁰ The Fifth Amendment also prevents information obtained by torture or ill-treatment from being introduced into any federal criminal proceeding.¹¹⁸¹

¹¹⁷¹ Since Article 7 of the ICCPR is non-derogable, “no statements or confessions or, in principle, other evidence” elicited through torture or ill-treatment may be admitted in any proceedings except to show this treatment occurred. UN HRC, General Comment No. 32, *op. cit.*, note 648, paras. 6, 60.

¹¹⁷² UN HRC, General Comment No. 32, *ibid.*, para. 41; UN HRC, *Deollal v. The Republic of Guyana*, Communication No. 912/2000, 1 November 2004, paras. 5.1-5.2,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f82%2fD%2f912%2f2000&Lang=en>.

¹¹⁷³ ACHR, Art. 8(2)(g): “right not to be compelled (...) to plead guilty”; ACHR, Art. 8(3): “[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind”; “Report on Terrorism and Human Rights”, IACHR, *op. cit.*, note 104, para. 214.

¹¹⁷⁴ UN HRC, General Comment No. 32, *op. cit.*, note 648, para. 60.

¹¹⁷⁵ ICTR, *Jean Kambanda v. The Prosecutor*, Case No. ICTR 97-23-A, 19 October 2000, para. 61,

<<http://www.unict.org/sites/unict.org/files/case-documents/ictr-97-23/appeals-chamber-judgements/en/001019.pdf>>.

¹¹⁷⁶ Common Article 3; API, Art. 75(2). See, also, ICTY, *Prosecutor v. Anto Furundžija*, *op. cit.*, note 282, paras. 153-156.

¹¹⁷⁷ Third Geneva Convention, Art. 99; API, Art. 75(4)(f); Common Article 3.

¹¹⁷⁸ Third Geneva Convention, Art. 99.

¹¹⁷⁹ API, Art. 75(4)(f).

¹¹⁸⁰ US Constitution, Fifth Amendment.

¹¹⁸¹ UN HRC, Fourth periodic report of the United States of America, *op. cit.*, note 39, para. 547. See, also, UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 154.

439. The MCA 2009 prohibits the admission into evidence of any statement obtained through torture or ill-treatment, except against the person accused of such treatment to show that the statement was made.¹¹⁸² Both statements by the accused and third parties are inadmissible if these statements are elicited through torture or ill-treatment.¹¹⁸³ Prior to the MCA 2009, the MCA 2006 prohibited the admission of statements obtained by torture, but not by ill-treatment.¹¹⁸⁴ It allowed the admission of statements obtained through a degree of coercion that was disputed before the enactment of the DTA on 30 December 2005 if (1) the totality of circumstances rendered the statement reliable and probative and (2) the interests of justice would be served by admitting the statement.¹¹⁸⁵ Statements could also be admitted where the degree of coercion was disputed after the enactment of the DTA where (1) the totality of circumstances rendered the statement reliable and probative; (2) the interests of justice would be served; and (3) the interrogation methods did not amount to ill-treatment.¹¹⁸⁶
440. Evidence derived from statements obtained by torture or ill-treatment is admissible if certain conditions are present. The evidence may be admissible where the judge finds that: “(i) the evidence would have been obtained even if the statement had not been made; or (ii) use of such evidence would otherwise be consistent with the interests of justice”.¹¹⁸⁷ Evidence derived from other excludable statements of the accused is admissible if a military commission finds that: “(i) the totality of the circumstances renders the evidence reliable and possessing sufficient probative value; and (ii) use of such evidence would be consistent with the interests of justice”.¹¹⁸⁸
441. The scope of the privilege against self-incrimination as it applies to current Guantánamo detainees is expressly limited by the MCA 2009. The MCA 2009 states that “[n]o person shall be required to testify against himself or herself *at a proceeding* of a military commission.” [emphasis added]¹¹⁸⁹ Other statements may not be excluded on the grounds of compulsory self-incrimination as long as this section, Section 948r, is complied with.¹¹⁹⁰ Furthermore, Section 948b specifies that Articles 31(a), (b) and (d) of the UCMJ do not apply to military commissions.¹¹⁹¹ These excluded provisions state that no one may be compelled to incriminate oneself or to answer questions that may be incriminating. These provisions also require the person asking questions to inform the individual of the nature of the accusation and to explain that statements may be used as evidence against the

¹¹⁸² MCA 2009, § 948r(a).

¹¹⁸³ MCA 2009, § 948r(a); MCRE, Rule 304(a)(1) and Rule 304(a)(3)(C).

¹¹⁸⁴ MCA 2006, § 948r(b).

¹¹⁸⁵ MCA 2006, § 948r(c).

¹¹⁸⁶ MCA 2006, § 948r(d).

¹¹⁸⁷ MCRE, Rule 304(a)(5)(A).

¹¹⁸⁸ MCRE, Rule 304(a)(5)(B).

¹¹⁸⁹ The 2012 Manual for Military Commissions specifies that other witnesses, such as US citizens, may invoke the privilege against self-incrimination contained in the Constitution or the UCMJ, to the extent they apply. MCA 2009, § 948r(b); MCRE, Rule 301(a), “discussion”.

¹¹⁹⁰ “In making exceptions in the applicability in trials by military commission under this chapter from the procedure and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide (...) [a] statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination as long as the evidence complies with the provisions of section 948r of this title.” MCA 2009, § 949a(b)(3)(B).

¹¹⁹¹ MCA 2009, § 948b(d)(1)(B).

individual during trial. No statements obtained in violation of Article 31 of the UCMJ may be used at trial.¹¹⁹²

442. Under Section 948r(c) of the MCA 2009, other statements made by the accused which were not obtained by torture or ill-treatment may be admitted in certain circumstances. First, the totality of circumstances must render the statement reliable and probative. Second, the statement must either be (1) “made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement” and admitting the evidence would serve the interests of justice; or (2) voluntarily given.¹¹⁹³ The judge determines whether the statement was voluntary by considering the totality of circumstances, which includes assessing the details of how the statement was obtained, the accused’s characteristics and the specific circumstances of the questioning.¹¹⁹⁴ Statements by individuals other than the accused where the degree of coercion used to obtain the statement is disputed may be admitted if the “totality of circumstances renders the statement reliable and possessing sufficient probative value”, the interests of justice are best served by admission of the statement and the statement was not obtained through torture or ill-treatment.¹¹⁹⁵
443. All plea agreements must be entered into voluntarily.¹¹⁹⁶ Before a plea agreement is concluded, the judge must inform the accused of several rights and other information pertaining to the relevant offence(s). This information must include the nature of the offence and the maximum possible penalty.¹¹⁹⁷ The judge must also assess whether the plea agreement was entered into voluntarily and ensure that it was not “the result of force or threats or of promises apart from [the] plea agreement”.¹¹⁹⁸ The judge is prohibited from accepting a guilty plea without inquiring and subsequently being satisfied that there is a factual basis for the plea or that the accused is personally convinced that the Government could prove his guilt beyond a reasonable doubt in light of the evidence it intends to present against him.¹¹⁹⁹ As part of the plea agreement inquiry, the judge is to ensure that the accused understands the agreement and that the parties agree to its terms.¹²⁰⁰
444. The prosecution has the burden of establishing the admissibility of evidence once the defence has made an appropriate motion or objection challenging the voluntariness of a statement.¹²⁰¹

c. Findings and Analysis

445. ODIHR welcomes the addition in the MCA 2009 and related rules, in contrast to the MCA 2006, which specifically exclude all statements, in military commission proceedings, by

¹¹⁹² UCMJ, Art. 31.

¹¹⁹³ MCA 2009, § 948(c); MCRE, Rule 304(a)(2).

¹¹⁹⁴ MCA 2009, § 948r(d); MCRE, Rule 304(a)(4).

¹¹⁹⁵ MCRE, Rule 304(a)(3).

¹¹⁹⁶ RMC, Rule 705(c)(1)(A).

¹¹⁹⁷ RMC, Rule 910(c)(1).

¹¹⁹⁸ RMC, Rule 910(d).

¹¹⁹⁹ RMC, Rule 910(e).

¹²⁰⁰ RMC, Rule 910(f)(4).

¹²⁰¹ MCRE, Rule 304(d).

both the accused and third parties that are obtained through torture or ill-treatment.¹²⁰² The regulatory framework, however, still contains loopholes that allow for evidence obtained through such treatment or in violation of the privilege against self-incrimination to be admitted as evidence in proceedings.

446. First, since the definitions of torture and ill-treatment applicable in US law are narrower than the conduct covered by the CAT,¹²⁰³ evidence that is obtained by conduct falling outside the US definitions, but within the international human rights law definitions, may be admissible in proceedings in contravention of Article 15 of the CAT and Articles 7 and 14(3)(g) of the ICCPR. ODIHR notes, however, that Section 948r(c) of the MCA 2009 could be applied to prevent such a result.
447. Second, evidence derived from torture or ill-treatment or other excludable evidence may be admitted when the military judge determines that it is in the interests of justice.¹²⁰⁴ This rule may allow evidence derived from unlawful treatment to be admitted into the proceedings of a military commission based on the judge's broad discretion of when doing so is in the interests of justice. Such a rule effectively condones acts of torture and ill-treatment, particularly as obtaining information is one of the primary incentives for acts of torture or ill-treatment. Admitting such evidence into any proceedings encourages law enforcement, military personnel or intelligence agents to engage in unlawful conduct, legitimizes their conduct and undermines the absolute prohibition of torture and ill-treatment.¹²⁰⁵ ODIHR considers that admitting such information into evidence can never be in the "interests of justice".
448. Third, the provision relating to the privilege against self-incrimination, contrary to international obligations, is only applicable to statements made during military commission proceedings, not to those statements made prior to trial.¹²⁰⁶ Moreover, some UCMJ provisions governing compelled incriminating statements are specifically inapplicable to military commissions.¹²⁰⁷ For example, Hamdan was interrogated over thirty times in both Afghanistan and Guantánamo without adequate rights warnings. In his case, the military commission found that the privilege against self-incrimination applied only to statements made at trial and that the UCMJ provisions "against unwarned and coerced statements", as well as the exclusion of statements in violation of these provisions, were inapplicable to military commission proceedings.¹²⁰⁸ The risk of admission of involuntary incriminating statements made prior to trial may be mitigated by Section 948r(c) of the MCA 2009. While this provision would require the judge to inquire into whether the statement was made voluntarily, it does contain an exception when admitting the statement would serve

¹²⁰² MCA 2009, § 948r(a); MCRE, Rule 304(a)(1) and Rule 304(a)(3)(C).

¹²⁰³ MCRE 304(b)(3) defines torture in accordance with 18 U.S.C. § 2340. The definition of ill-treatment corresponds to the US reservation to the CAT.

¹²⁰⁴ MCRE, Rule 304(a)(5).

¹²⁰⁵ UN Special Rapporteur on torture, "Study on the phenomena of torture", *op. cit.*, note 283, paras. 30, 93, 95.

¹²⁰⁶ MCA, 2009, § 948r(b); MCRE, Rule 301(a).

¹²⁰⁷ MCA 2009, § 949a(b)(3)(B) and § 948b(d)(1)(B).

¹²⁰⁸ United States Military Commission, *United States of America v. Hamdan*, AE 213, "Ruling on Motion to Suppress Statements of the Accused (D-030)", 6 June 2008, pp. 1, 4; United States Military Commission, *United States of America v. Hamdan*, AE 148, "Defense Motion to Suppress Out-of-Court Statements of the Accused Due to Violation of Right Against Self-Incrimination", 4 April 2008.

the interests of justice and it was “made incident to lawful military conduct at the point of capture or during closely related active combat engagement”.¹²⁰⁹ No criteria are provided in the MCA or corresponding rules on what factors serve the interests of justice. The specific exclusion of these provisions to military commission proceedings raises concern that statements and confessions that violate the privilege against self-incrimination made prior to trial will be admitted as evidence. Admitting compelled confessions of guilt that were obtained prior to trial by investigating authorities is a violation of Article 14(3)(g) of the ICCPR.¹²¹⁰

449. Detainees were subjected to torture and ill-treatment in the CIA RDI programme and reportedly in Guantánamo. For example, Al-Nashiri and Abu Zubaydah were tortured in CIA detention facilities abroad.¹²¹¹ Among other things, detainees at Guantánamo have reported being subjected to regular and severe beatings, sleep deprivation, food deprivation, water deprivation, stress positions, exposure to constant loud noise and neon lights, prolonged solitary confinement and sexual humiliation.¹²¹² Hicks, for example, said he was “beaten, threatened and sleep-deprived” and that medical personnel withheld essential medical treatment. As a result, Hicks said “in the end I had to request an interrogation. In the end, I had to plead to an interrogator that I would do anything he wanted just to be treated”.¹²¹³ Similarly, Ait Idir said that water and medical treatment were withheld unless he would talk to an interrogator.¹²¹⁴ Murat Kurnaz recounted that: “[the interrogators] ordered and let the guards (...) beat us during the interrogations. They [always had] guards staying at the door, and if they wanted to beat us they had the guards come inside the interrogation room. Some of them would hold me while the other one was beating me to force me to answer.”¹²¹⁵ Given the European Court of Human Rights’ (ECtHR) findings that Al-Nashiri and Abu Zubaydah had been tortured in the CIA RDI programme, the recent release of the Senate Study on the interrogation tactics used in this programme and the fact that secret detention in itself is a violation of the CAT,¹²¹⁶ Article

¹²⁰⁹ MCA 2009, § 948(c); MCRE, Rule 304(a)(2).

¹²¹⁰ OSCE Moscow Document, *op. cit.*, note 90, para. 23.1(vii). See, for instance, UN HRC, *Nallarattam Singarasa v. Sri Lanka*, *op. cit.*, note 1170, para. 7.4; UN HRC, *Vladimir Dunaev v. Tajikistan*, *op. cit.*, note 1170, paras. 7.2-7.3.

¹²¹¹ ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, para. 511; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 516.

¹²¹² ODIHR interview with Murat Kurnaz, *op. cit.*, note 400; ODIHR interview with David Hicks, *op. cit.*, note 228; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217; “Interrogation Log, Detainee 063”, *op. cit.*, note 401; *Getting Away with Torture*, *op. cit.*, note 401, pp. 79-80; Woodward, “Guantanamo Detainee was Tortured, Says Official Overseeing Military Trials”, *op. cit.*, note 402.

¹²¹³ ODIHR interview with David Hicks, *ibid.*: “being beaten, being spat on, being beaten for hours on end, blind-folded, chained up, being threatened verbally, being threatened to be raped and stuff like that. (...) Sleep deprivation was also used in the actual interrogation, where you would be chained to the floor in the stress position, would have temperature extremes, very hot, very cold, but it would depend on individual detainees’ weaknesses.”

¹²¹⁴ During ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217, Ait Idir said the following: “The doctor once told me ‘Talk to your interrogator [to get some water].’ You [cannot] get water before you [talk] to your interrogator. (...) People would come to the doctor screaming and they would only get tablets or injections, but no [treatment]. ‘Talk to your interrogator.’ So I talked to my interrogator, and an FBI interrogator came to the hospital. He asked, ‘what do you want, do you want to talk to us or not?’ The doctor, nurses and medical staff were standing there. ‘Will you talk to us or not?’ In such pain, I replied, ‘No, I will not.’ They simply used that opportunity [to try to make me talk].”

¹²¹⁵ ODIHR interview with Murat Kurnaz, *op. cit.*, note 400.

¹²¹⁶ ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, para. 511; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 516; Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171; UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 11; UN CAT, Conclusions and Recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 17.

15 of the CAT and Article 7 of the ICCPR would be violated if statements elicited during detention in the CIA RDI programme were admitted in any military commission proceedings. The ECtHR said, however, that “there can be little doubt as to the fact that a large part of the important or even decisive evidence against him [Al-Nashiri] is necessarily based on his self-incriminating statements obtained under torture or (...) on other witnesses testimony by terrorist suspects likewise obtained by the use of torture or ill-treatment”.¹²¹⁷ Similarly, the numerous allegations of torture and ill-treatment of detainees at Guantánamo would at least trigger the duty of the United States to “ascertain the veracity of these allegations” before admitting their statements into evidence. Under the circumstances, judges are under the obligation to adequately assess the circumstances of how the statements were obtained before admitting them into any proceedings. Failure to do so would result in the violation of Article 15 of the CAT.¹²¹⁸

450. Similar allegations have been made regarding interrogation practices that sought to elicit confessions from detainees. David Hicks explained that abusive treatment at Guantánamo was initially used to gain information during interrogations and that “after two to two and a half years, instead the treatment became more about trying to force me to say something about being guilty, trying to [get me to] sign something”.¹²¹⁹ Lakhdar Boumediene recounted an interrogator telling him that “either you confess you were part of al Qaeda or you will be tortured and confined”.¹²²⁰ Murat Kurnaz recalled that “interrogations were always the same way. They tried to make me sign papers, tried to make me say that I [was] a member of al Qaeda, asking why I was hiding it, saying I was the most dangerous person in Guantánamo (...). They said that I was more dangerous because I didn’t admit that I was a member of the Taliban or [al] Qaeda”.¹²²¹ Given that various practices have reportedly been inflicted intentionally by US government officials to extract confessions from detainees, the use of such compelled confessions in any proceedings may violate both Article 15 of the CAT and the privilege against self-incrimination.

451. ODIHR notes that some statements elicited through torture, ill-treatment or coercion have been excluded from evidence in both military commissions and in federal courts, and have resulted in decisions not to refer charges. For instance, the military commission suppressed statements made by Hamdan during his detention in Panshir and Bagram due to highly coercive environments and conditions, but admitted statements given in other contexts.¹²²² Statements made to US authorities by Mohammed Jawad were suppressed as the commission determined that these statements were tainted as they were initially obtained by Afghan authorities under threat of death.¹²²³ A federal court hearing his *habeas corpus*

¹²¹⁷ ECtHR, *Al Nashiri v. Poland*, *ibid.*, para. 565.

¹²¹⁸ See, for instance, UN CAT, *Yousri Ktiti v. Morocco*, *op. cit.*, note 1163, para. 8.8.

¹²¹⁹ ODIHR interview with David Hicks, *op. cit.*, note 228.

¹²²⁰ ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216.

¹²²¹ Kurnaz also said they were “forcing me to sign papers (...) on which it was written that I was fighting together with the Taliban and that I am a member of al Qaeda and that I shot American guards and things like this. (...) [W]hen I refused they punished me. (...) They also tried to make me sign with electroshocks, beatings, depriving me of food, not giving me water and putting me in isolation”. ODIHR interview with Murat Kurnaz, *op. cit.*, note 400.

¹²²² United States Military Commission, *United States of America v. Hamdan*, AE 301, “Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices and Motion to Suppress Statements Based on Fifth Amendment”, 20 July 2008, p. 15.

¹²²³ United States Military Commission, *United States of America v. Mohammad Jawad*, AE 113, “Ruling on Defense Motion to Suppress Out-Of-Court Statements by the Accused Made While in U.S. Custody”, 19 November 2008, paras. 5-7.

case also ordered the suppression of all out-of-court statements he made since his apprehension as a product of torture.¹²²⁴ Susan J. Crawford, a former Convening Authority, said that charges were not referred against al Qahtani because he was tortured.¹²²⁵

452. In Khadr's case, the military commission rejected a motion to suppress statements obtained in Bagram and Guantánamo allegedly through torture, ill-treatment or coercion. These statements included a confession that he had thrown the grenade that resulted in the death of a US serviceman. Khadr argued that during his detention he was, *inter alia*, subjected to physical assaults, thrown to the ground repeatedly, terrorized by barking dogs, threatened to be sent to another country where he would be tortured and raped, held in stress positions for prolonged periods and subjected to extreme temperatures and prolonged solitary confinement.¹²²⁶ International bodies and foreign courts have raised concern over Khadr's treatment in detention. The IACHR granted precautionary measures for Khadr and asked the United States to respect the prohibition on admitting statements obtained through torture or ill-treatment.¹²²⁷ In finding that Canadian officials had participated in a process contrary to their international human rights obligations, the Canadian Supreme Court noted that Khadr was subjected to the "frequent flyer" programme¹²²⁸ while in US detention to make him less resistant to interrogation.¹²²⁹ In contrast, the military commission found that Khadr's statements were reliable, probative and voluntary, were not obtained through torture or mistreatment and that the admission of these statements was in the interests of justice.¹²³⁰ Khadr was only 15 years old at the time of his capture and had only received a limited formal education, but the military judge said that Khadr had sufficient training, education and experience to understand the circumstances he was in.¹²³¹ Given Khadr's age, his lack of access to counsel,¹²³² the findings of other bodies and the various allegations regarding the treatment of detainees in Bagram and in Guantánamo, ODIHR is concerned that his statements were compelled and therefore obtained in contravention of the privilege against self-incrimination and potentially in violation of the exclusionary rule.
453. The effect of past torture and other prohibited acts impacts on the admissibility of subsequent statements as future statements may be tainted by past abuse. As previously mentioned, Jawad's statements were suppressed as they were initially obtained by Afghan authorities under threat of death. This issue is especially relevant for the current cases

¹²²⁴ Days prior to the hearing, the US government informed the court that it was abandoning its reliance on these out-of-court statements and would not oppose the motion to suppress them. The judge granted the petitioner's motion to suppress "every statement made by petitioner since his arrest as a product of torture". United States District Court for the District of Columbia, *Saki Bacha v. Barack H. Obama et al.*, Case No. 05-2385, 17 July 2009, <<https://casetext.com/case/bacha-v-obama>>.

¹²²⁵ Woodward, "Guantanamo detainee was tortured, says official overseeing military trials", *op. cit.*, note 402.

¹²²⁶ See Khadr's submissions to the United States Military Commission. Many of these submissions are heavily redacted. See, for instance, United States Military Commission, *United States of America v. Omar Ahmed Khadr*, AE 200, "Defense Motion to Suppress Statements Procured Using Torture, Coercion and Cruel, Inhumane, and Degrading Treatment", 7 November 2008.

¹²²⁷ IACHR, "MC 8/06 Omar Khadr, United States", Organization for American States website, 21 March 2006, <<http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp>>.

¹²²⁸ See Part 1-II-A of this report for more information on the "frequent flyer" programme.

¹²²⁹ Canadian Supreme Court, *Prime Minister of Canada et al. v. Omar Ahmed Khadr*, Case No. 33289, 29 January 2010, <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7842/index.do?r=AAAAAQAFa2hhZHIAAAAAAQ>>.

¹²³⁰ United States Military Commission, *United States of America v. Khadr*, AE 200-G, "Suppression Motions", 17 August 2010, p. 9.

¹²³¹ *Ibid.*, pp. 1, 8.

¹²³² The Canadian Supreme Court also noted Khadr's age and the fact he had been denied counsel. Canadian Supreme Court, *Prime Minister of Canada v. Khadr*, *op. cit.*, note 1229.

before the military commissions as all seven detainees were detained and interrogated in incommunicado detention as part of the CIA RDI programme.¹²³³

454. The privilege against self-incrimination is also relevant to plea agreements as individuals are not to be compelled to confess guilt.¹²³⁴ In practice, the military commission judge questions the accused on the voluntariness of the agreement and on the factual basis of the offence.¹²³⁵ Multiple issues related to detention, however, raise questions about whether a plea agreement can truly be entered into voluntarily. In particular, the ongoing indefinite detention¹²³⁶ creates an incentive for detainees to agree to plead guilty, regardless of whether the allegations are true, as the agreement presents an opportunity to be released from Guantánamo at a specified time.¹²³⁷ The prospect of an unfair trial by a military commission that could result in the imposition of a long sentence or the death penalty creates another incentive to enter into a plea agreement.¹²³⁸ Various other factors also affect the voluntariness of entering into plea agreements, such as past and present treatment, including numerous intensive interrogations,¹²³⁹ detention conditions,¹²⁴⁰ inadequate medical care,¹²⁴¹ prolonged periods in a remote detention facility with limited or no contact with family and detention in Guantánamo itself.¹²⁴² The coercive nature of the detention conditions and prospect of protracted detention was highlighted in Hicks' case. Hicks described to ODIHR his decision to plead guilty:

“I was suicidal for a long time. (...) I was just waiting for the final good or bad news. And when the military lawyer left and told [me] the implications [that] I was facing years and years more, I decided to make the decision to kill myself. (...) My lawyers [later] came running into the room all excited and told me that if I said I was guilty to one offence then [I could] leave, guaranteed, in no later than 60 days to Australia. And that hadn't happened before. So I had to really think about this. So do I

¹²³³ ICRC Report, *op. cit.*, note 182, p. 5; Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 458-461; “Defense Department Takes Custody of a High-Value Detainee”, United States Department of Defense website, 27 April 2007, *op. cit.*, note 181; ODIHR interview with Navy Commander Brian Mizer, *op. cit.*, note 614: he referred to the fact that the government had indicated that it would only use statements obtained by the “clean teams” but that this continued to be problematic due to the fact that the evidence was tainted by past abuse; ODIHR interview with the Center for Victims of Torture, *op. cit.*, note 229: interlocutors expressed concern that information gathered by “clean teams” may still be tainted by torture as it has been gathered building on past abuses.

¹²³⁴ ICCPR, Art. 14(3)(g).

¹²³⁵ See, for instance, United States Military Commission, *United States of America v. al Darbi*, “Unofficial/unauthenticated transcript of the hearing dated 2/20/2014 from 9:12 AM to 11:27 AM”, 20 February 2014, pp. 20-83; ODIHR meeting with the Department of Defense Office of the Chief Prosecutor, *op. cit.*, note 722.

¹²³⁶ Please refer to Part 1-A on the effects of indefinite detention on detainees.

¹²³⁷ ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914; UN HRC, *Hicks v. Australia*, “Individual Communication”, *op. cit.*, note 754, para. 354; ODIHR interview with David Hicks, *op. cit.*, note 228; “Omar Khadr explains war-crimes guilty pleas in court filing”, CBC News website, 13 December 2013, <<http://www.cbc.ca/news/canada/omar-khadr-explains-war-crimes-guilty-pleas-in-court-filing-1.2463558>>: “if I wanted the chance to eventually return to my home of Canada, I would have to be found guilty of crimes as determined by the U.S. government, which could then lead to me serving my sentence in Canada”; Lieutenant Theresa Champ, “Post-Trial Press Conference Statement, *United States of America v. al Darbi*”, 20 February 2014, p. 3, <<http://media.miamiherald.com/smedia/2014/02/20/13/24/1vfiHb.So.56.pdf>>: “by pleading guilty today, Mr. al-Darbi exchanges the endless uncertainty that comes with being held at [Guantánamo] with the relative certainty that comes with a plea deal. Four more years in [Guantánamo] was a bitter pill for Mr. al-Darbi to swallow, especially after everything that he has gone through both here and in Bagram, but he welcomes the thought of finally having a date when he can return home to his family”.

¹²³⁸ UN HRC, *Hicks v. Australia*, “Individual Communication”, *op. cit.*, note 754, para. 353.

¹²³⁹ See Part 1-II-A of this report.

¹²⁴⁰ See Part 1-II of this report.

¹²⁴¹ See Part 1-II-C of this report.

¹²⁴² ODIHR meeting with the Department of Defense Office for the Convening Authority, *op. cit.*, note 841.

plead guilty and take the flak from the media for the rest of my life, or do I just go ahead and do it [commit suicide]. I was looking at my father and I just couldn't do it. So it was under those circumstances that I agreed.”¹²⁴³

455. Hicks subsequently pled guilty to providing material support for terrorism, which was not an offence triable by a military commission when the alleged conduct occurred.¹²⁴⁴ The factors outlined above not only place into question whether any of the plea agreements have been entered into voluntarily, but also whether the privilege against self-incrimination has been violated by these agreements.

456. Although not discussed in further detail in this report, several other aspects of plea agreements are concerning. These areas include the use of plea agreements for offences that are not triable before military commissions,¹²⁴⁵ the ability of the US government to continue to detain a detainee indefinitely even after the provisions of the plea agreement are met,¹²⁴⁶ the non-disclosure clauses,¹²⁴⁷ the waivers of appeals, collateral attacks and claims¹²⁴⁸ against the United States and the ability of military commissions to accept plea agreements whereby the prosecution is seeking the imposition of the death penalty.¹²⁴⁹

d. Recommendations

- To ensure that all evidence obtained by or derived from torture, ill-treatment or in violation of the privilege against self-incrimination is not admitted in any proceedings;
- To review all relevant factors concerning all plea agreements already made in order to ensure that their terms are fully compliant with international human rights obligations and were agreed to voluntarily. In the absence of such finding, to set aside convictions entered into pursuant to such plea agreements;
- To ensure that the terms of any future plea agreement are fully compliant with international human rights standards and are agreed to voluntarily.

¹²⁴³ ODIHR interview with David Hicks, *op. cit.*, note 228.

¹²⁴⁴ See Part 2-I-A of this report for more information.

¹²⁴⁵ *Ibid.*; ODIHR meeting with the Department of Defense Office of the Chief Defense Counsel, *op. cit.*, note 914.

¹²⁴⁶ The plea agreements of Ahmed al Darbi, Majid Khan, Noor Uthman Muhammed and Omar Khadr all stipulate that the Convening Authority does not have the authority to bind the US government to release the accused from law-of-war detention. See, for instance, United States Military Commission, *United States of America v. Khadr*, “Offer for Pre-trial Agreement,” 13 October 2010, para. 2(g). ODIHR however notes that, to date, the United States has not held convicted individuals in continued detention after the end of their sentences, on this basis.

¹²⁴⁷ In Majid Khan’s case, this clause is drafted extremely widely so as to encompass any information regarding the capture, detention or confinement of the detainee or other detainees. United States Military Commission, *United States of America v. Khan*, “Offer for Pretrial Agreement”, 13 February 2012, para. 26. See, also, United States Military Commission, *United States of America v. al Darbi*, “Offer for Pretrial Agreement”, 20 December 2013, para. 27.

¹²⁴⁸ Waiving claims arising from capture, detention or confinement conditions prevents detainees from seeking redress for serious violations of human rights. See Part 3-II-B of this report for more information on redress.

¹²⁴⁹ RMC, Rule 910(a)(1), as amended by the NDAA 2012.

III. FAIR TRIAL GUARANTEES AND THE DEATH PENALTY

a. *International Standards*

457. All requirements of Article 14 of the ICCPR must be strictly complied with in “any trial leading to the imposition of the death penalty” in all circumstances.¹²⁵⁰ Any sentence imposing the death penalty where the trial was not conducted in full compliance with Article 14 is a violation of both Article 14 and the right to life as protected by Article 6 of the ICCPR.¹²⁵¹ OSCE participating States that have not abolished the death penalty have committed themselves to only impose the death penalty in a manner that is not contrary to their international commitments.¹²⁵²
458. International humanitarian law prohibits the passing of sentences and carrying out of punishment, including the death penalty, where the trials were not conducted by regularly constituted courts that afford all the essential judicial guarantees.¹²⁵³ This is a rule of customary international law and is applicable to international and non-international armed conflicts.¹²⁵⁴ Imposing a sentence or carrying out an execution without providing a protected person with a “fair and regular trial” is a war crime.¹²⁵⁵

b. *Domestic Standards*

459. The Fifth Amendment of the US Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury (...) nor be deprived of life (...) without due process of law”.¹²⁵⁶ The Eighth Amendment prohibits cruel and unusual punishment.¹²⁵⁷
460. The MCA provides that an accused may be sentenced to the death penalty.¹²⁵⁸ This is only possible where the death penalty is expressly authorized for the offense the accused is

¹²⁵⁰ ICCPR, Arts. 6, 14; UN, HRC, General Comment No. 32, *op. cit.*, note 648, paras. 6, 59.

¹²⁵¹ ICCPR, Arts. 6, 14; UN, HRC, General Comment No. 32, *ibid.*, para. 59.

¹²⁵² OSCE Vienna Document, *op. cit.*, note 90, para. 24.

¹²⁵³ See, for instance: Common Article 3: “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”; Third Geneva Convention, Arts. 84, 102-108, 129; Fourth Geneva Convention, Arts. 5, 66-75, 146; API, Art. 75(4): “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”; “Customary International Humanitarian Law, Rule 100”, ICRC website, *op. cit.*, note 643.

¹²⁵⁴ “Customary International Humanitarian Law, Rule 100”, ICRC website, *ibid.*

¹²⁵⁵ Third Geneva Convention, Art. 130: “Grave breaches (...) shall be those involving any of the following acts, if committed against persons or property protected by the Convention (...) wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention”; Fourth Geneva Convention, Art. 147: “Grave breaches (...) shall be those involving any of the following acts, if committed against persons or property protected by the present Convention (...) wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention”; API, Art. 85(4)(e): “In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (...) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial”; Rome Statute, Art. 8(2)(a)(vi), 8(2)(c)(iv). “Customary International Humanitarian Law, Rule 156”, ICRC website, *op. cit.*, note 706.

¹²⁵⁶ US Constitution, Fifth Amendment.

¹²⁵⁷ US Constitution, Eighth Amendment.

¹²⁵⁸ MCA 2009, § 948d.

found guilty of, and where capital punishment was expressly sought in advance of trial,¹²⁵⁹ among other things.

c. Findings and Analysis

461. The five 9/11 suspects and Al-Nashiri are all currently charged with offences that could lead to the imposition of the death penalty.¹²⁶⁰ As outlined above, military commissions are not in full compliance with all essential judicial guarantees. Since international law requires that the guarantees contained in Article 14 be fully respected in any trial leading to the imposition of the death penalty, carrying out a death sentence following a conviction by a Guantánamo military commission would be a violation of Article 14, the right to life and OSCE commitments. Should international humanitarian law be applicable to any capital Guantánamo military commission case, carrying out the death penalty would amount to a war crime.

d. Recommendations

- In the event that the death penalty is sought in any proceedings against Guantánamo detainees before any court or tribunal, to ensure that international fair trial standards are stringently and rigidly met;
- In case there is any doubt as to the full compliance of these proceedings with international fair trial standards, the death penalty should not be sought.

¹²⁵⁹ MCA 2009, § 949m; MCA 2009, § 950t.

¹²⁶⁰ In light of the ECtHR judgment in *Al Nashiri v. Poland*, Poland has reportedly sought diplomatic assurances from the US government that Al-Nashiri would not be subjected to the death penalty. Poland has also announced pursuing diplomatic assurances that neither Al-Nashiri nor Abu Zubaydah will be exposed to a flagrant denial of justice. ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, paras. 584, 587-589; Carol Rosenberg, “Poland asks U.S. to spare alleged USS Cole bomber from execution”, Miami Herald website, 1 April 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article17141288.html>>.

PART 3: TOWARDS THE CLOSURE OF THE GUANTÁNAMO BAY DETENTION FACILITY

462. On 22 January 2009, President Obama signed Executive Order 13492, which ordered the closure of the Guantánamo Bay detention facility within one year.¹²⁶¹ Any detainee remaining in the facility after that year was to be transferred to a foreign country or transferred to a detention facility within the continental United States.¹²⁶² The Guantánamo Review Task Force was established to, among other things, ensure transfers would be consistent with national security and foreign policy interests, including post-transfer treatment concerns.¹²⁶³ By December 2009, the Obama administration had started looking into the possibility of using a detention facility in Illinois to hold detainees.¹²⁶⁴ On 22 January 2010, the Task Force determined that 36 detainees remained under investigation and subject to potential prosecution, that 48 detainees required continued detention under the AUMF because they were too dangerous to transfer and could not be prosecuted, that 30 Yemeni detainees should be conditionally detained due to security concerns in Yemen and that 126 detainees could be transferred “subject to appropriate security measures”.¹²⁶⁵
463. Two hundred forty-two detainees were imprisoned in Guantánamo when President Obama took office.¹²⁶⁶ As of 31 August 2015, more than six years later, 116 detainees are still being held in Guantánamo. Of these 116 detainees, 54 have been designated for transfer and 30 are still designated for “continued law-of-war detention”.¹²⁶⁷ Under the Bush administration, 780 detainees were brought to Guantánamo, and 533 detainees were subsequently released.¹²⁶⁸
464. In April 2013, President Obama renewed his pledge to close Guantánamo. He announced that he would work with Congress to examine every option to address the situation. He said: “Guantánamo is not necessary to keep America safe. It is expensive. It is inefficient. It hurts us in terms of our international standing. It lessens cooperation with our allies in counterterrorism efforts. It is a recruitment tool for extremists. It needs to be closed.”¹²⁶⁹

¹²⁶¹ Barack H. Obama, Executive Order 13492, *op. cit.*, note 83, § 3.

¹²⁶² *Ibid.*

¹²⁶³ This includes assessing whether an individual would be tortured following the transfer. *Ibid.*, § 4(c)(2); “Final Report”, Guantánamo Review Task Force, *op. cit.*, note 84, p. 15.

¹²⁶⁴ Garcia *et al.*, “Closing the Guantanamo Detention Center: Legal Issues”, *op. cit.*, note 84, p. 5.

¹²⁶⁵ The Task Force also said some detainees had been referred for prosecution in federal courts or military commissions. “Final Report”, Guantánamo Review Task Force, *op. cit.*, note 84, p. 10.

¹²⁶⁶ “The Guantánamo Docket”, The New York Times website, *op. cit.*, note 88.

¹²⁶⁷ As explained in more detail in Part I-A and Part 2 of this report, the remaining detainees are being tried by military commissions, serving sentences or are designated for potential future prosecutions. Of the initial 48 detainees designated for “continued law-of-war detention”, ten detainees were designated for transfer by the Periodic Review Board, five detainees were transferred to Qatar in exchange for Sergeant Bowe Bergdahl, two were transferred to Kuwait and Saudi Arabia and two detainees died.

¹²⁶⁸ The discrepancy in the numbers between the Bush administration, Obama administration and number of transfers is because five Guantánamo detainees died in detention during the Bush administration. Four detainees died in detention during the Obama administration. Peter Finn, “Most Guantanamo Detainees Low-Level Fighters, Task Force Report Says”, The Washington Post website, 29 May 2010, <<http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052803873.html?sid=ST2010052803890>>; “The Guantánamo Docket”, The New York Times website, *op. cit.*, note 88.

¹²⁶⁹ United States President Barack H. Obama, “News Conference by the President”, The White House website, 30 April 2013, <<http://www.whitehouse.gov/the-press-office/2013/04/30/news-conference-president>>.

Likewise, he reiterated his commitment to close the facility in his 2015 State of the Union Address, stressing that “[n]ow it is time to finish the job. And I will not relent in my determination to shut it down. It is not who we are.”¹²⁷⁰ President Obama also appointed two special envoys, a State Department Envoy and a Defense Department Envoy, to work closely together and to focus on transferring detainees and closing the facility.¹²⁷¹ Throughout his administration, no one has been transferred to Guantánamo for detention.

465. ODIHR has called for the closure of the Guantánamo Bay detention facility on several occasions, including in January 2012 and in January 2014. Specifically, ODIHR called for the swift closure of the facility, for Congress to remove all obstacles preventing its closure and for the release of detainees or the prompt prosecution of remaining detainees in line with international fair-trial standards.¹²⁷²
466. At the time of this report, impunity continues for human rights violations committed in the CIA RDI programme and in the detention and treatment of detainees at the Guantánamo Bay detention facility. The US government has thus far failed to hold perpetrators accountable and to provide redress for the treatment of detainees.¹²⁷³
467. Although a range of human rights violations have occurred at Guantánamo and in the CIA RDI programme, as outlined in Part 1 of this report, Part 3 focuses primarily on the prohibition of torture and ill-treatment when assessing compliance with the principle of non-refoulement (Part 3-I-B) and accountability (Part 3-II-A). In addition to the prohibition of torture and ill-treatment, redress for prolonged arbitrary detention is addressed in Part 3-II-B. Similarly, Part 3-I-A does not address all challenges relating to the closure of Guantánamo, but instead highlights a few of the most significant current issues.

I. RELEASE OF INDIVIDUALS DETAINED AT GUANTÁNAMO

A. CHALLENGES TO THE CLOSURE OF GUANTÁNAMO

468. Congress has played an active role in the Obama administration’s plans to transfer detainees, as evidenced by the NDAA restrictions discussed below, manifesting a clear divergence of views within the United States on the issue of the closure of Guantánamo. The November 2014 mid-term elections resulted in the Republican Party taking control of

¹²⁷⁰ United States President Barack H. Obama, “Remarks by the President in State of the Union Address”, The White House website, 20 January 2015, <<https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>>.

¹²⁷¹ President Obama had appointed Ambassador Daniel Fried as the State Department’s Special Envoy for Guantánamo Closure in early 2009. Fried was reassigned in January 2013, and the position remained vacant for several months. Clifford Sloan, the State Department’s former Special Envoy resigned in December 2014; ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244. Lee Wolosky was appointed as the new State Department’s Special Envoy for Guantánamo Closure on 30 June 2015. United States Secretary of State John Kerry, “Appointment of Lee Wolosky as Special Envoy for Guantanamo Closure”, United States Department of State website, 30 June 2015, <<http://www.state.gov/secretary/remarks/2015/06/244494.htm>>.

¹²⁷² “OSCE human rights chief dismayed at continued practice of detention without trial at Guantánamo”, OSCE website, *op. cit.*, note 5; “OSCE human rights chief again urges United States to close Guantanamo Detention Facility”, OSCE website, *op. cit.*, note 5.

¹²⁷³ During the meeting, a representative said that there had been multiple investigations by the Department of Defense and Senate Committee reports as well as independent investigations. Compensation had not been paid to any Guantánamo detainee. ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193.

both the Senate and House of Representatives as of January 2015. Some members of Congress have expressed their determination to prevent the closing of the facility and/or to increase transfer restrictions.¹²⁷⁴ ODIHR is concerned by the statements made by members of Congress who seek to prevent Guantánamo's closure and the possibility of increasing transfer restrictions.

a. Legislative Restrictions

469. Congress began enacting various restrictions on the transfer of detainees from Guantánamo in the 2010 version of the NDAA.¹²⁷⁵ Previous versions of the NDAA had not included any significant restrictions on the executive branch's actions in relation to its detention programme outside the United States.
470. One of the most significant restraints impeding the closure of Guantánamo has been the denial of funding for transferring detainees to the United States and for constructing or modifying facilities in the United States to house Guantánamo detainees. Since 2011, every version of the NDAA has prohibited the use of Defense Department funds for such a transfer, construction or modification of facilities.¹²⁷⁶ These prohibitions effectively preclude detainees from being detained, resettled or prosecuted in the United States.
471. In addition to prohibiting transfers to the United States, the NDAA in 2011, 2012 and 2013 prevented the use of Department of Defense funds to transfer a detainee to a foreign country unless a certification was provided to Congress 30 days before the transfer.¹²⁷⁷ The certification process required the Secretary of Defense to demonstrate that the receiving

¹²⁷⁴ For instance: Alexander Bolton, "Roberts vows to 'shut down the Senate' if Obama empties Gitmo", The Hill website, 10 October 2014, <<http://thehill.com/homenews/administration/220390-roberts-threatens-to-shut-down-the-senate-if-obama-tries-to-empty>>; Mike Lillis, "Pelosi's office blasts Boehner for 'politicizing' report on Gitmo closure", The Hill website, 10 October 2014, <<http://thehill.com/homenews/house/220453-pelosis-office-blasts-boehner-for-politicizing-gitmo-report>>; United States Senator Saxby Chambliss, "Chambliss Statement on Administration's Release of Additional Guantanamo Bay Detainees to Foreign Countries", Senator Saxby Chambliss website, 21 November 2014, <<http://www.chambliss.senate.gov/public/index.cfm/pressreleases?ID=367f2d01-22a3-481d-b3e2-c6591d8466ca>>; United States Congressman Tom Cotton, "Cotton Statement on Passage of the Department of Defense Appropriations Act", Congressman Tom Cotton website, 20 June 2014, <<http://cotton.house.gov/media-center/press-releases/cotton-statement-on-passage-of-the-department-of-defense-appropriations>>; United States Congresswoman Jackie Walorski, "Walorski Applauds House Passage of Defense Appropriations Legislation", Congresswoman Jackie Walorski website, 20 June 2014, <<http://walorski.house.gov/media-center/press-releases/walorski-applauds-house-passage-of-defense-appropriations-legislation>>; Jeremy Herb, "GOP senators move to keep Gitmo open", Politico website, 13 January 2015, <<http://www.politico.com/story/2015/01/repUBLICan-senators-guantanamo-114223>>.

¹²⁷⁵ The 2010 NDAA did contain provisions preventing the transfer of detainees to the United States, including a 45-days' notice and an accompanying plan to limit the risk of transfers and other similar requirements. NDAA for Fiscal Year 2010, 28 October 2009, § 1041, <http://www.intelligence.senate.gov/pdfs/military_act_2009.pdf>; Garcia *et al.*, "Closing the Guantanamo Detention Center: Legal Issues", *op. cit.*, note 84, pp. 3-4.

¹²⁷⁶ NDAA for Fiscal Year 2011, 7 January 2011, §§ 1032, 1034, <<http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt491/pdf/CRPT-111hrpt491.pdf>>; NDAA 2012, §§ 1026-1027; NDAA for Fiscal Year 2013, 2 January 2013, §§ 1022, 1027, <<http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310enr/pdf/BILLS-112hr4310enr.pdf>>; NDAA for Fiscal Year 2014, 26 December 2013, §§ 1033-1034, <<http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT-113HPRT86280.pdf>>; NDAA for Fiscal Year 2015, 19 December 2014, §§ 1032-1033, <<https://www.congress.gov/113/bills/hr3979/BILLS-113hr3979enr.pdf>>.

¹²⁷⁷ This restriction was not applicable where there was a domestic court order for the detainee's release. The NDAA 2012 also provided for an exception for plea agreements in a military commission case. These Acts also prohibited transfers to countries where a confirmed case of recidivism occurred after the transfer. NDAA 2011, § 1033; NDAA 2012, § 1028; NDAA 2013, § 1028.

state complied with several requirements, such as that the receiving state is not a state sponsor of terrorism and agrees to ensure that the detainee cannot engage in terrorism or threaten or harm the United States.¹²⁷⁸ Following the enactment of this provision in 2011, the number of detainees transferred decreased, falling from 24 transfers in 2010 to only one transfer in 2011.¹²⁷⁹

472. The Obama administration characterised the 2011 certification requirement as a violation of the constitutional separation of powers, as it interfered with the executive branch's ability to conduct "military, national security, and foreign relations activities".¹²⁸⁰ However, the administration did not veto any version of the NDAA that contained the certification provision. In the 2012 and 2013 versions, Congress eased the restrictions by inserting a national-security waiver that allowed the Defense Secretary to waive the certification requirements that related to the agreement by the receiving country to ensure that the detainee could not engage in terrorism or threaten or harm the United States. Instead, the waiver could be utilized when alternative actions were taken to address these concerns. To utilize this waiver, the Secretary of Defense was required to determine that the transfer was in the interests of national security and that alternative actions substantially mitigated the risks.¹²⁸¹ The Obama administration's views of the 2012 and 2013 certification requirements were substantially similar to its assessment of the 2011 version.¹²⁸² Only four detainees were transferred in 2012, while 11 detainees were transferred in 2013.
473. In the NDAA for 2014, Congress further relaxed the transfer restrictions by allowing the Defense Secretary to simply submit a notice to Congress 30 days before a transfer, stipulating that the proposed transfer was in the interests of national security and that sufficient precautions had been taken to substantially mitigate the risks posed to the United States and its allies.¹²⁸³ The 30 days' notice requirement enables Congress to ask questions, but does not allow Congress to prevent a transfer.¹²⁸⁴ Additionally, the NDAA 2014 allows the Defense Secretary to transfer detainees based on the PRB assessment that they no longer pose a "continuing significant threat to the security of the United States", i.e. a threat which cannot be "sufficiently mitigated through feasible and appropriate security measures".¹²⁸⁵ These provisions have been renewed in the NDAA and the Consolidated

¹²⁷⁸ NDAA 2011, §1033; NDAA 2012, § 1028; NDAA 2013, § 1028. See, also, Jennifer K. Elsea *et al.*, "The National Defense Authorization Act for FY2012 and Beyond: Detainee Matters", Congressional Research Service, 27 January 2014, pp. 28-32, <http://digital.library.unt.edu/ark:/67531/metadc276884/m1/1/high_res_d/R42143_2014Jan27.pdf>.

¹²⁷⁹ "The Guantánamo Docket", The New York Times website, *op. cit.*, note 88.

¹²⁸⁰ United States President Barack H. Obama, "Statement by the President on H.R. 1540", The White House website, 31 December 2011, <<http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>>.

¹²⁸¹ NDAA 2012, § 1028; NDAA 2013, § 1028.

¹²⁸² United States President Barack H. Obama, "Statement by the President on H.R. 6523", The White House website, 7 January 2011, <<http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523>>; Barack H. Obama, "Statement by the President on H.R. 1540", *op. cit.*, note 1280; United States President Barack H. Obama, "Statement by the President on H.R. 4310", The White House website, 3 January 2013, <<http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>>; United States President Barack H. Obama, "Statement by the President on H.R. 3304", The White House website, 26 December 2013, <<http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304>>.

¹²⁸³ NDAA 2014, § 1035(b), (d).

¹²⁸⁴ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244.

¹²⁸⁵ In this case, no written certification is required. NDAA 2014, § 1035(a); Elsea *et al.*, "The National Defense Authorization Act for FY2012 and Beyond", *op. cit.*, note 1278, pp. 42-44. "F.A.Q.", Periodic Review Secretariat website, <<http://www.prs.mil/FAQ.aspx>>.

and Further Continuing Appropriations Act for 2015.¹²⁸⁶ Although few transfers occurred during the first three quarters of 2014, these provisions were utilized to transfer 23 detainees in 2014, and 11 detainees between January and 31 August 2015.¹²⁸⁷ Moreover, according to the US Government Accountability Office, five other detainees were transferred in violation of the NDAA 2014.¹²⁸⁸

474. Although the NDAA's restrictions on transfers have gradually eased since 2011, these restrictions have played a significant role in preventing the closure of Guantánamo, as they have effectively prevented the transfer of detainees to the United States and have also made it difficult to transfer detainees to third countries.¹²⁸⁹ While the NDAA does significantly restrict the possibility of closing Guantánamo, ODIHR's view is that the Obama administration has not taken full advantage of the provisions allowing for the transfer of detainees to foreign countries. The national-security waiver in the 2012 and 2013 versions of the NDAA was never utilized.¹²⁹⁰ During meetings with ODIHR, US officials were not in a position to provide an explanation on the obstacles to using this waiver.¹²⁹¹ On the other hand, ODIHR commends the US government for its recent actions to transfer detainees to foreign countries, by utilizing both the 30 days' notice requirement and the provision relating to detainees who the PRB has determined no longer posed a continuing significant threat to national security, namely a threat which cannot be sufficiently mitigated.¹²⁹² ODIHR also positively notes that the United States has reportedly secured commitments from a dozen countries to accept nearly half of the remaining detainees designated for transfer.¹²⁹³
475. While ODIHR views the NDAA provision restricting transfers to the United States as a significant, if not insurmountable, barrier to the closure of Guantánamo, the current legislative provisions do provide reasonable opportunities¹²⁹⁴ to transfer detainees.

¹²⁸⁶ No alternative requirements are included in the NDAA 2015. NDAA 2015, §§ 1032-1033; Consolidated and Further Continuing Appropriations Act, 2015, 16 December 2014, § 8114, <<http://www.gpo.gov/fdsys/pkg/BILLS-113hr83enr/pdf/BILLS-113hr83enr.pdf>>.

¹²⁸⁷ In 2015, these provisions were utilized for the transfer of 10 detainees to Oman and one detainee to Estonia.

¹²⁸⁸ "Department of Defense - Compliance with Statutory Notification Requirement", United States Government Accountability Office, 21 August 2014, pp. 5-7, <<http://www.lawfareblog.com/wp-content/uploads/2014/08/govdoc-4537885.pdf>>.

¹²⁸⁹ NDAA 2011, §§ 1032-1034; NDAA 2012, §§ 1026-1028; NDAA 2013, §§ 1022, 1027-1028, NDAA 2014, §§ 1033-1035; NDAA 2015, §§ 1032-1033; Consolidated and Further Continuing Appropriations Act 2015, § 8114.

¹²⁹⁰ "National Defense Authorization Act for Fiscal Year 2014 Report", United States Senate Committee on Armed Services, Senate Report 113-033, 20 June 2014, <http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp113DzuqB&r_n=sr044.113&dbname=cp113&&sel=TOC_559020&>: "At the same time, the administration has yet to attempt to transfer any Guantánamo detainee under the certification requirements or to use the national security waiver (...) the certification requirements for such transfers were never intended to constitute an absolute prohibition on the transfer of Guantánamo detainees to countries other than the United States."; ODIHR interview with Amnesty International, *op. cit.*, note 818.

¹²⁹¹ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244.

¹²⁹² The PRB designated 6 detainees for transfer in 2014. Two of them, Fouzi Khalid Abdullah Al Awda and Muhammad Murdi Issa Al-Zahrani were subsequently transferred to Kuwait and Saudi Arabia, respectively. Between 1 January and 31 August 2015, the PRB designated five additional detainees for transfer. In 2015, none of the remaining nine detainees designated for transfer by the PRB have been transferred from Guantánamo. Other detainees transferred in 2014 (except for the five detainees transferred in exchange for Sergeant Bergdahl) and 2015 were transferred pursuant to the 30 days' notice requirement.

¹²⁹³ Matt Spetalnick and David Rohde, "U.S. steps up efforts to meet Obama goal to close Guantánamo prison", Reuters website, 7 August 2015, <<http://www.reuters.com/article/2015/08/07/us-usa-guantanamo-idUSKCN0QC2D020150807>>.

¹²⁹⁴ Several NGOs also expressed their views that the 2014 NDAA showed positive changes. For example, the American Civil Liberties Union said: "[i]t's a very good development that the Defense Department can step up its efforts to resettle and repatriate the vast majority of detainees who have never been charged with a crime. It's certainly a big step in the right direction, but

476. ODIHR notes with concern, however, ongoing discussions surrounding the adoption of the NDAA for 2016. At the time of writing, the current bill passed by the House and the Senate – but not yet agreed by both chambers in identical form¹²⁹⁵ – requires the Secretary of Defense to submit to Congress a report “setting forth a comprehensive plan on the disposition of detainees” held at Guantánamo.¹²⁹⁶ In the absence of such a plan, the NDAA for 2016 would extend the existing restrictions and impose additional ones on the transfer of detainees from Guantánamo, *inter alia* a ban on any transfer to the United States and to Yemen and the reintroduction of pre-2014 certification requirements on transfer to third countries.¹²⁹⁷ Should a plan be submitted to and approved by Congress, the NDAA 2016 would allow the transfer of detainees to foreign countries – except Yemen – in similar conditions than the current ones¹²⁹⁸ as well as to the United States for trial, imprisonment and continued detention (under specific requirements).¹²⁹⁹ In early June 2015, the Obama administration stated its strong objection to the provisions of the bill which would impede its efforts to close the facility, and stressed that the proposed process of congressional approval “is unnecessary and overly restrictive”.¹³⁰⁰ Nevertheless, the announcement made by the White House in July 2015 that the Obama administration is in the final stages of drafting a plan to safely and responsibly close the detention facility at Guantánamo Bay is a welcome commitment, which now needs to materialize. As of 31 August 2015, such a plan had not yet been submitted.¹³⁰¹ In August 2015, reports however indicated that assessment teams were visiting potential detention sites across the United States.¹³⁰²

certainly more needs to be done.” Amnesty International said: “The Senate’s provision that clarifies transfers to other countries is an important and welcome improvement that President Obama must leverage as soon as possible.” Human Rights First said: “It provides a path forward for foreign transfers that balances our security interests and our legal obligations.” Ryan J. Reilly, “Congress’ NDAA Deal Could Make It Easier For Obama To Finally Close Guantanamo”, Huffington Post website, 9 December 2013, <http://www.huffingtonpost.com/2013/12/09/ndaa-Guantanamo_n_4414799.html>.

¹²⁹⁵ “H.R. 1735: National Defense Authorization Act for Fiscal Year 2016”, Govtrack.us, <<https://www.govtrack.us/congress/bills/114/hr1735>>.

¹²⁹⁶ The report in question is to contain, *inter alia*, (a) a case-by-case determination of whether each detainee is intended to be transferred to a foreign country or the United States for civilian or military prosecution, or transferred to the United States or another country for continued detention under the law of armed conflict; (b) the specific facility or facilities intended to be used to hold individuals inside the United States (for trial, imprisonment post-trial or continued detention); (c) the estimated associated costs; (d) a description of the associated legal implications; (e) detailed assessments of the actions taken to mitigate the risks of transferring detainees to foreign countries; (f) if applicable, the additional authorities necessary to detain current Guantanamo detainees inside the United States as unprivileged enemy belligerents until the end of the hostilities or a future determination that they no longer pose a threat; (g) a plan for the disposition of any new individuals detained by the United States under the law of armed conflict after the date of the report, including a plan to detain and interrogate such individuals. NDAA 2016 (as of 18 June 2015), § 1032(g), <<http://www.gpo.gov/fdsys/pkg/BILLS-114hr1735eas/pdf/BILLS-114hr1735eas.pdf>>.

¹²⁹⁷ NDAA 2016 (as of 18 June 2015), §§ 1032(a), 1033, 1035.

¹²⁹⁸ NDAA 2016 (as of 18 June 2015), § 1032(i)(2).

¹²⁹⁹ NDAA 2016 (as of 18 June 2015), § 1032: “Limitation on the transfer or release of individuals detained at United States Naval Station, Guantanamo Bay, Cuba. (...) (b) Transfer for detention and trial. The Secretary of Defense may transfer a detainee described in subsection (a) to the United States for detention pursuant to the Authorization for Use of Military Force (Public Law 107–40), trial, and incarceration if the Secretary (1) determines that the transfer is in the national security interest of the United States; (2) determines that appropriate actions have been taken, or will be taken, to address any risk to public safety that could arise in connection with detention and trial in the United States; and (3) notifies the appropriate committees of Congress not later than 30 days before the date of the proposed transfer.”

¹³⁰⁰ Executive Office of the President, “Statement of Administration Policy – S. 1376 – National Defense Authorization Act for FY 2016”, The White House website, 2 June 2015,

<https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saps1376s_20150602.pdf>.

¹³⁰¹ See, for example, Margaret Brennan, “Ash Carter: Not confident Gitmo can be closed by end of Obama’s presidency”, CBS News website, 23 June 2015, <<http://www.cbsnews.com/news/ash-carter-not-confident-guantanamo-can-be-shut-by-end-of-obamas-presidency/>>; “White House finishing up latest plan for closing Guantánamo”, Miami Herald website, 22 July 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article28377574.html>>; Carol Rosenberg,

477. ODIHR regrets that Guantánamo remains open six years after President Obama first pledged to close the facility, and that 106 detainees continue to be detained there without charge. As a result, even those detainees who have been designated for transfer continue to be detained with no indication of when they may be released. In this perspective, ODIHR is troubled by the recent decision of the US government to oppose the *habeas corpus* petition of Tariq Ba Odah, a detainee designated for transfer in 2010, who has been on hunger strike for 9 years and whose medical condition is reportedly critical, as a granted *habeas corpus* petition would allow his transfer from Guantánamo. Such decision of the administration is in apparent contradiction with its renewed commitment to take steps to promptly close the detention facility.¹³⁰³
478. ODIHR strongly encourages the Defense Secretary to utilize current NDAA provisions to expedite the approval of detainee transfers. ODIHR would like to reiterate its call for Congress to remove all obstacles preventing the closure of Guantánamo. ODIHR also would like to call for the Obama administration to take all necessary steps to overcome any potential additional hindrances and meet its renewed commitment to close the detention facility. As the majority of Guantánamo detainees have not been charged with any crime and many have been designated for transfer or release for approximately five years, ODIHR is of the view that the United States will continue to be acting in violation of international standards by holding these detainees in arbitrary detention, unless significant changes are promptly made to US transfer policies.¹³⁰⁴ Additionally, the ongoing cases before military commissions remain at the pre-trial stage with no scheduled starting dates and have been repeatedly delayed.¹³⁰⁵ These delays further complicate the closure of Guantánamo as the detainees cannot currently be transferred to the US for detention or trial.

b. Periodic Review Board

479. Executive Order 13567 established the PRB process for Guantánamo detainees who were designated by the Guantánamo Review Task Force for continued detention under the AUMF or for potential prosecution if not already charged. The PRB is tasked with determining whether the continued detention of detainees is necessary to “protect against a continuing significant threat” to US national security.¹³⁰⁶ Detainees whose PRB reviews

“Pentagon: No deadline, progress on site surveys for Guantánamo closure plan”, Miami Herald website, 25 August 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article32380506.html>>.

¹³⁰² See, for example, “Washington Week on Human Rights: August 24, 2015”, Human Rights First website, 24 August 2015, <<http://www.humanrightsfirst.org/blog/washington-week-human-rights-august-24-2015>>; Rosenberg, “Pentagon: No deadline, progress on site surveys for Guantánamo closure plan”, *ibid*.

¹³⁰³ Laura Pitter, “Dispatches: Obama Administration Getting in its Own Way of Closing Gitmo”, Human Rights Watch website, 19 August 2015, <<http://www.hrw.org/news/2015/08/19/dispatches-obama-administration-getting-its-own-way-closing-gitmo>>.

¹³⁰⁴ Please see Part 1-I of this report for more information on the prohibition of arbitrary detention.

¹³⁰⁵ Proceedings in the Mohammad *et al.* case were most recently delayed by concerns over conflicts of interest between the defendants and their defence counsel after it was discovered that the FBI was secretly questioning members of al Shihb and Khalid Shaikh Mohammad’s defence teams. No trial start date has been set for any of the three cases being tried by the military commissions.

¹³⁰⁶ United States President Barack H. Obama, Executive Order 13567, “Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force”, 7 March 2011, <<http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>>. See, also, ODIHR interview with the American Civil Liberties Union, 24 February 2014, *op. cit.*, note 82.

resulted in recommendations for continued detention have their files reviewed every six months, with a full review process every three years.¹³⁰⁷ While Executive Order 13567 was signed by President Obama on 7 March 2011, the first PRB hearing was not held until November 2013.¹³⁰⁸ Since then, only 16 full reviews have been conducted. As of 31 August 2015, 11 reviews resulted in recommendations for detainees' release, but only two of those detainees have been transferred.¹³⁰⁹

480. According to some US representatives, the PRB process does not aim to accelerate transfers from Guantánamo, but only to make a good faith assessment of the threat posed by each detainee under review.¹³¹⁰ Nonetheless, ODIHR notes that the US administration has identified expediting the PRB process as a key priority as part of its overall efforts to close Guantánamo.¹³¹¹ Similarly, ODIHR's interlocutors have presented the PRB as creating a greater opportunity for release, as other NDAA transfer requirements¹³¹² do not need to be met once the PRB has determined that the detainee can be transferred.¹³¹³ However, the PRB has made slow progress between its establishment in March 2011 and the end of 2014, with only ten full reviews conducted. This slow pace, compounded by the fact that only two detainees have been released following a favourable review, has generated scepticism that this process will significantly further Guantánamo's swift closure. The US government has cited the lengthy declassification process¹³¹⁴ and the preparation time for attorneys as the key reasons behind the mechanism's slow progress.¹³¹⁵
481. ODIHR recognizes the importance of the periodic review process and welcomes the accelerated pace of hearings in 2015 with 6 full reviews completed, four additional hearings conducted without final determination yet and two hearings scheduled for

¹³⁰⁷ A full review involves a review by a panel that consists of anonymous representatives from six government agencies, including the director of National Intelligence, the Secretaries of Defense, Homeland Security, State and Justice Departments and members of the Joint Chiefs of Staff. The detainee is represented by two military personal representatives and may have a lawyer present. File reviews focus on any new information or changed circumstances that the PRB should consider. US representatives also specified during the meeting that if the file review finds a compelling reason to do so, the board will conduct another full review of the case prior to the expiration of the three-year deadline. ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244. See, also, "About the PRB", Periodic Review Secretariat website, <<http://www.prs.mil/AboutthePRB.aspx>>.

¹³⁰⁸ Barack H. Obama, Executive Order 13567, *op. cit.*, note 1306.

¹³⁰⁹ Fouzi Khalid Abdullah al Awda was transferred to Kuwait on 5 November 2014. Muhammad Murdi Issa Al-Zahrani was transferred to Saudi Arabia on 22 November 2014. Carol Rosenberg, "Former 'Forever Prisoner' Leaves for Kuwait", Miami Herald website, 5 November 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/Guantanamo/article3577768.html>>; "Full Review", Periodic Review Secretariat website, <<http://www.prs.mil/ReviewInformation/FullReviewpage.aspx>>; "The Guantánamo Docket", The New York Times website, *op. cit.*, note 88.

¹³¹⁰ US comments to the draft report.

¹³¹¹ Statement of Charles Trumbull, Acting Special Envoy for Guantánamo closure, United States Department of State, 154 Period of Sessions of the IACHR, Human Rights Situation of Persons Deprived of Liberty at the Guantánamo Naval Base, 16 March 2015, <https://www.youtube.com/watch?v=gBDhGP_s11U>.

¹³¹² NDAA 2014, § 1035(a); Elsea *et al.*, "The National Defense Authorization Act for FY2012 and Beyond", *op. cit.*, note 1278, pp. 42-44.

¹³¹³ ODIHR interview with Human Rights Watch, *op. cit.*, note 821; ODIHR interview with Human Rights First, *op. cit.*, note 709.

¹³¹⁴ The PRB process involves the declassification of information that is provided to the detainees' personal representatives and counsel and, where possible, to the detainee. ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194.

¹³¹⁵ *Ibid.*

September 2015.¹³¹⁶ ODIHR takes note of the hope expressed in March 2015 by the US administration that all remaining PRB hearings for eligible detainees will take place within twelve months.¹³¹⁷ However, since approximately 60 detainees were foreseen to undergo the PRB process as of September 2014,¹³¹⁸ this increased pace will not suffice to significantly progress toward the closure of Guantánamo. At the current annual rate of reviews, the initial reviews alone will take at least four additional years to complete.

482. ODIHR is concerned that detainees deemed no longer to be a continuing significant threat to US national security under the PRB process are not being released.¹³¹⁹ For instance, Mahmud Abd Al Aziz Al Mujahid was recommended for transfer in January 2014, but he is still being detained.¹³²⁰ ODIHR is worried that the PRB is primarily shifting detainees to another detention classification and, in some instances, can be used to detain indefinitely and without trial individuals who are determined to pose a significant threat to national security. It urges the United States government to facilitate detainee transfers and expedite the closure of Guantánamo.¹³²¹

c. Resettlement

483. Since Congress has so far effectively prohibited the transfer of detainees to the US through restrictions under the NDAA, the resettlement of detainees in other states is critical to Guantánamo's closure, particularly for those who may be at risk of torture if repatriated and for Yemeni detainees. In 2009, European states initially seemed willing to accept detainees and resettled 27 detainees in 2009 and 2010.¹³²² After several years of limited resettlements by OSCE participating States,¹³²³ Georgia and Slovakia resettled five detainees on 20 November 2014,¹³²⁴ Kazakhstan resettled five detainees on 30 December 2014¹³²⁵ and Estonia resettled one detainee on 14 January 2015.¹³²⁶ Separately, Oman, Qatar and Uruguay also resettled 21 other detainees between the beginning of 2014 and 31

¹³¹⁶ "Full Review", Periodic Review Secretariat website, *op. cit.*, note 1309.

¹³¹⁷ Statement of Charles Trumbull, 154 Period of Sessions of the IACHR, *op. cit.*, note 1311.

¹³¹⁸ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244.

¹³¹⁹ ODIHR interview with Human Rights Watch, *op. cit.*, note 821; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255.

¹³²⁰ "Full Review", Periodic Review Secretariat website, *op. cit.*, note 1309.

¹³²¹ See, also, "Statement of the UN Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay - Inter-American Commission on Human Rights", OHCHR website, *op. cit.*, note 108.

¹³²² Albania – three detainees; Belgium – one detainee; Bulgaria – one detainee; France – two detainees; Georgia – three detainees; Germany – two detainees; Hungary – one detainee; Ireland – two detainees; Latvia – one detainee; Portugal – two detainees; Slovakia – three detainees; Spain – three detainees; and Switzerland – three detainees. "The Guantánamo Docket", The New York Times website, *op. cit.*, note 88; Rosenberg, "By the Numbers", *op. cit.*, note 88.

¹³²³ Slovakia accepted three Uighur detainees in 2013, but other OSCE participating States had not resettled any detainees since 2010. Several interlocutors had expressed their views that other states' willingness to resettle detainees had declined in recent years (before the increase in transfers since the end of 2014) as the likelihood of Guantánamo's closure diminished. In contrast, US government representatives have said that a lot of countries want to help. ODIHR interview with the American Civil Liberties Union, 28 February 2014, *op. cit.*, note 255; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255; ODIHR interview with Human Rights Watch, *op. cit.*, note 821; ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244.

¹³²⁴ Georgia resettled three detainees and Slovakia resettled two detainees. Charlie Savage, "5 Guantánamo Inmates Are Sent to Eastern Europe", The New York Times website, 20 November 2014, <http://www.nytimes.com/2014/11/21/us/politics/us-resettles-guantamo-bay-prisoners-in-eastern-europe.html?_r=0>.

¹³²⁵ Helene Cooper, "Five Guantánamo Prisoners are Released to Kazakhstan", The New York Times website, 30 December 2014, <<http://www.nytimes.com/2014/12/31/world/middleeast/five-guantamo-prisoners-are-released-to-kazakhstan.html>>.

¹³²⁶ "The Guantánamo Docket", The New York Times website, *op. cit.*, note 88.

August 2015.¹³²⁷ In ODIHR's view, OSCE participating States should continue resettling detainees on humanitarian grounds.

484. ODIHR commends a number of OSCE participating States, namely Albania, Belgium, Bulgaria, France, Estonia, Georgia, Germany, Hungary, Ireland, Kazakhstan, Latvia, Portugal, Slovakia, Spain and Switzerland for accepting Guantánamo detainees for resettlement.

d. Yemeni Detainees

485. Following the attempted bombing of a Detroit-bound Northwest Airlines flight in December 2009 by a member of al Qaeda in the Arabian Peninsula, the US government became increasingly hesitant to transfer any detainees to Yemen. Consequently, President Obama issued a moratorium to prevent such transfers, which was lifted in May 2013.¹³²⁸ President Obama and Yemeni President Abd Rabuh Mansur Hadi agreed to co-operate to repatriate Yemeni detainees in 2013.¹³²⁹

486. Yemeni detainees remain one of the primary challenges to closing Guantánamo.¹³³⁰ Yemenis account for 69 of the 116 detainees currently held at Guantánamo.¹³³¹ Of the 54 detainees designated for transfer, 38 are Yemeni.¹³³² Despite President Obama lifting his own moratorium on transferring detainees to Yemen in 2013, no detainees have subsequently been transferred there.¹³³³ While there have been international discussions to establish a "rehabilitation centre" in Yemen, which may facilitate the repatriation of Yemeni detainees, creating such a facility will take time¹³³⁴ and any such facility must

¹³²⁷ Oman resettled a total of ten detainees in January and June 2015. Qatar resettled five detainees and Uruguay resettled six detainees. "The Guantánamo Docket", The New York Times website, *ibid.*; Charlie Savage, "Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade", The New York Times website, 31 May 2014, <<http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html>>; Charlie Savage, "Uruguay Accepts 6 Detainees Held at Guantánamo", The New York Times website, 7 December 2014, <http://www.nytimes.com/2014/12/08/world/americas/us-transfers-6-guantanamo-detainees-to-uruguay.html?_r=0>.

¹³²⁸ United States President Barack H. Obama, "Remarks by the President on Security Reviews", The White House website, 5 January 2010, <<http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews>>; Charlie Savage, "Obama Lifts Moratorium on Transfer of Detainees", The New York Times website, 23 May 2013, <http://www.nytimes.com/2013/05/24/us/politics/obama-lifts-moratorium-on-transfer-of-some-detainees.html?_r=0>.

¹³²⁹ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244; United States President Barack H. Obama and Yemeni President Abd Rabuh Mansur Hadi, "Joint Statement by President Barack Obama and President Abd Rabuh Mansur Hadi of Yemen", United States Government Publishing Office website, 1 August 2013, <<http://www.gpo.gov/fdsys/pkg/DCPD-201300545/pdf/DCPD-201300545.pdf>>.

¹³³⁰ US government representatives have said that the government fully recognizes the importance of transferring Yemenis and that the transfers of Yemenis are a high priority. ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244; ODIHR interview with Matthew O'Hara, *op. cit.*, note 255; ODIHR interview with Brent Rushforth, *op. cit.*, note 207; ODIHR interview with David Remes, *op. cit.*, note 255.

¹³³¹ Rosenberg, "By the Numbers", *op. cit.*, note 88.

¹³³² ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244; Rosenberg, "By the Numbers", *ibid.*

¹³³³ However, Yemeni detainees formerly held in Bagram were transferred to their home country in August 2014. Adam Goldman, "U.S. releases two Yemenis from military prison in Afghanistan", The Washington Post website, 27 August 2014, <http://www.washingtonpost.com/world/national-security/us-releases-two-yemenis-from-military-prison-in-afghanistan/2014/08/27/ce5af03a-2df2-11e4-bb9b-997ae96fad33_story.html>.

¹³³⁴ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255.

operate in line with international human rights standards. Meanwhile, the Yemeni detainees continue to be indefinitely detained in Guantánamo.

487. The onus appears to be on the Obama administration to demonstrate its commitment to the closure of Guantánamo by finding solutions to resolve all remaining issues relating to the repatriation of Yemeni detainees as a matter of extreme urgency. If the United States fails to promptly release detainees to Yemen, then every effort must be made to resettle these detainees elsewhere without further delay.

e. Recommendations

- To promptly release the remaining detainees or prosecute them before ordinary courts, in compliance with international fair trial standards;
- To remove all obstacles preventing the closure of the Guantánamo Bay detention facility, and swiftly close it;
- To amend legislation in order to allow for the possibility of transferring detainees to the United States for any purpose, including for detention, resettlement and for trials before ordinary courts;
- To take all available measures to ensure that legislation which bars the possibility of transferring detainees to the United States for any purpose, including for detention, resettlement and for trials before ordinary courts, is amended and not readopted in the future;
- To immediately repatriate or resettle detainees designated for transfer or release;
- To urgently review and address all practical and policy issues relating to the transfer of Yemeni detainees, with a view to ensuring their prompt release;
- To charge, without delay, detainees suspected of a criminal offence and transfer them to the United States for trial by ordinary courts;
- To take urgent measures to increase the effectiveness and speed of the Periodic Review Board process while still providing adequate time and facilities for the preparation of the detainees' cases. Detainees should be promptly released following a favourable decision;
- OSCE participating States should, whenever possible, resettle detainees in their own territory.

B. HUMAN RIGHTS SAFEGUARDS RELATED TO THE CLOSURE OF GUANTÁNAMO: NON-REFOULEMENT

a. International Standards

488. As it applies to the prohibition of torture and ill-treatment, the principle of non-refoulement is enshrined in customary international law, applicable to all states, and in several international legal instruments, such as Article 3 of the CAT.¹³³⁵ International bodies and

¹³³⁵ CAT, Art. 3: “1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”. See, also, ACHR, Art. 22(8); International Convention for the Protection of All Persons from Enforced Disappearances, Art. 16.

experts such as the Human Rights Committee also maintain that the principle of non-refoulement is guaranteed under the ICCPR.¹³³⁶ Furthermore, OSCE commitments require participating States to fully implement the CAT's provisions and to "act in full conformity with its principles",¹³³⁷ which includes Article 3.

489. Under the principle of non-refoulement, a state may not "expel, return or extradite" an individual to another state where substantial grounds exist for believing that the individual "would be in danger of being subjected to torture".¹³³⁸ The principle of non-refoulement is understood to apply also in situations where there is a risk of acts of cruel, inhuman or degrading treatment or punishment not amounting to torture.¹³³⁹
490. Substantial grounds for believing that an individual will be tortured if transferred to a particular state does not require the likelihood of torture to be highly probable. Nevertheless, the factual basis for the individual's belief must rise to a level beyond a mere theory or suspicion.¹³⁴⁰ Individuals must demonstrate that the basis for believing they will be tortured or ill-treated is substantial and that the "danger is personal and present".¹³⁴¹ Thus, the individual must show that the risk of torture or ill-treatment is foreseeable, real and personal.¹³⁴² Relevant considerations in assessing whether substantial grounds exist include, *inter alia*, whether public officials in the receiving state have committed, instigated, consented to or acquiesced to a pattern of gross, flagrant or mass human rights violations; whether the individual was previously tortured or ill-treated by that state; and whether the individual has been involved in activities that would increase his/her vulnerability in that state.¹³⁴³
491. The authorities of the transferring state are to carefully examine all existing circumstances that are reasonably related to a risk of torture or ill-treatment.¹³⁴⁴ When assessing whether substantial grounds exist, the State party's obligation is limited to what authorities knew or ought to have known at the time of the transfer. Subsequent events are relevant for determining what the state knew or ought to have known at the time of transfer.¹³⁴⁵

¹³³⁶ UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 9. See, also, UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 12.

¹³³⁷ OSCE Athens Document, *op. cit.*, note 80, paras. 1, 6.

¹³³⁸ CAT, Art. 3.

¹³³⁹ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 6; UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 9; UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 12.

¹³⁴⁰ UN CAT, General Comment No. 1: Implementation of Article 3 in the context of Article 22, A/53/44, Annex IX, 16 September 1998, para. 6,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f53%2f44&Lang=en>.

¹³⁴¹ UN CAT, General Comment No. 1, *ibid.*, para. 7; UN CAT, *Mostafa Dadar v. Canada*, Communication No. 258/2004, 5 December 2005, para. 8.4,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fc%2f35%2fd%2f258%2f2004&Lang=en>.

¹³⁴² UN CAT, *Sathurusinghe Jagath Dewage v. Australia*, Communication No. 387/2009, 14 November 2013, paras. 10.3-10.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fc%2f51%2fd%2f387%2f2009&Lang=en>.

¹³⁴³ CAT, Art. 3(2); UN CAT, General Comment No. 1, *op. cit.*, note 1340, paras. 3, 8.

¹³⁴⁴ UN CAT, *Régent Boily v. Canada*, Communication No. 327/2007, 14 November 2011, para. 14.4,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fc%2f47%2fd%2f327%2f2007&Lang=en>.

¹³⁴⁵ UN CAT, *Agiza v. Sweden*, *op. cit.*, note 497, para. 13.2.

492. When substantial grounds exist, the state seeking to remove an individual from its territory is obligated to refrain from transferring that person to a state where such grounds exist. This obligation is applicable regardless of whether the individual committed serious crimes, including when the individual is allegedly a member of a terrorist organization.¹³⁴⁶
493. Relying on diplomatic assurances alone, particularly where assurances have no mechanism for enforcement, generally does not provide sufficient protection when substantial grounds to believe the individual is at risk of being tortured or ill-treated are present.¹³⁴⁷ The need for diplomatic assurances in the first place demonstrates that the transferring state is concerned that a risk of torture or ill-treatment exists. If diplomatic assurances are to be accepted, they must eliminate all reasonable doubt regarding the risk of torture or ill-treatment and should be combined with stringent and effective monitoring and follow-up procedures.¹³⁴⁸ At a minimum, diplomatic assurances should include prompt access to a lawyer, recordings of interrogations, a “prompt and independent medical examination and forbidding incommunicado detention or detention at undisclosed places”. Effective monitoring procedures should involve prompt and regular private interviews by independent persons.¹³⁴⁹ Many experts maintain that diplomatic assurances are unreliable and ineffective and are used to “circumvent the absolute prohibition of torture and refoulement” and have taken the view that “post-return monitoring mechanisms have proven to be no guarantee against torture”.¹³⁵⁰ These assurances are particularly problematic where the receiving country has a documented history or pattern of engaging in torture or ill-treatment.
494. According to international bodies and experts, individuals claiming to be under a real risk of being tortured or ill-treated are to be provided with an opportunity for a judicial hearing and an appeal.¹³⁵¹ The Committee against Torture has found that Article 3 requires an effective, independent and impartial review of decisions to expel an individual. The failure

¹³⁴⁶ UN CAT, *Gorki Ernesto Tapia Paez v. Sweden*, Communication No. 39/1996, 28 April 1997, para. 14.5, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f18%2fD%2f39%2f1996&Lang=en>; in this case, the Committee against Torture said “the nature of activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention”; UN Special Rapporteur on torture, “General Recommendations of the Special Rapporteur on Torture”, *op. cit.*, note 313, para. o.

¹³⁴⁷ UN CAT, *Agiza v. Sweden*, *op. cit.*, note 497, para. 13.4.

¹³⁴⁸ UN CAT, *Toirjon Abdussamatov and 28 other complainants v. Kazakhstan*, Communication No. 444/2010, 1 June 2012, para. 13.10, <http://www.ohchr.org/documents/hrbodies/cat/jurisprudence/cat-c-48-d-444-2010_en.pdf>; UN CAT, *Boily v. Canada*, *op. cit.*, note 1344, para. 14.4; UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *op. cit.*, note 284, paras. 30-32.

¹³⁴⁹ UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *ibid.*, paras. 41-42; UN CAT, *Boily v. Canada*, *ibid.*, para. 14.5.

¹³⁵⁰ For instance: UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *ibid.*, para. 31; UN Special Rapporteur on torture, Manfred Nowak, Report to the Commission on Human Rights, E/CN.4/2006/6, 23 December 2005, paras. 11, 31, 32, <<http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/6>>; UN Special Rapporteur on torture, Manfred Nowak, Interim report to the General Assembly, A/60/316, 30 August 2005, para. 51, <<http://www.ohchr.org/EN/HRBodies/SP/Pages/GA60session.aspx>>; UN Special Rapporteurs on torture and on human rights and counter-terrorism, “UN rights experts on torture and counter-terrorism concerned about the fate of Guantánamo detainees”, OHCHR website, 10 December 2013, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14084&LangID=E%20-%20sthash.WQIzmpcv.dpuf>>; UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, Report to the Commission on Human Rights, E/CN.4/2005/103, 7 February 2005, para. 56, <<http://www2.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf>>.

¹³⁵¹ UN CAT, *Agiza v. Sweden*, *op. cit.*, note 497, para. 13.7; UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *ibid.*, para. 29.

to provide a judicial or independent administrative review is a breach of a State party's Article 3 procedural obligations. A breach of Article 3 also occurs where national-security concerns prevent such a review.¹³⁵²

495. International humanitarian law also incorporates the principle of non-refoulement.¹³⁵³ As Common Article 3 prohibits torture and ill-treatment, a transferee state would need to demonstrate that it is willing and able to prohibit all torture and ill-treatment before the individual could be transferred.¹³⁵⁴

b. Domestic Standards

496. Upon ratification of the CAT, the United States entered an understanding of Article 3, according to which the United States understands substantial grounds to require that "it is more likely than not" that an individual would be tortured if transferred to a particular state.¹³⁵⁵ The United States also expressed its view that the application of Article 3 of the CAT does not extend to Guantánamo.¹³⁵⁶ Additionally, the US government explained to the Human Rights Committee that it did not accept the Committee's view that the ICCPR imposes a non-refoulement obligation on State parties and that the United States does not consider the non-refoulement principle to extend to cruel, inhuman or degrading treatment or punishment.¹³⁵⁷
497. Although the United States considers that it does not have non-refoulement human rights treaty obligations with respect to persons in its custody at Guantánamo, US officials argue that US policy follows a standard similar to international obligations under Article 3 of the CAT.¹³⁵⁸ The United States maintains an overall policy "not to expel, extradite or otherwise effect the involuntary return of any person to a country" where "there are substantial grounds for believing the person would be in danger of being subjected to torture". This policy applies "regardless of whether the person is physically present in the United States".¹³⁵⁹ The Department of Defense Directive on the DoD Detainee Program also contains this policy, which stipulates that risks of ill-treatment, of persecution and of arbitrary deprivation of life are to be considered in transfer decisions.¹³⁶⁰ The Obama administration conveyed its commitment not to transfer Guantánamo detainees to states where they would more likely than not be tortured.¹³⁶¹

¹³⁵² UN CAT, *Agiza v. Sweden*, *ibid.*, paras. 13.7-13.8.

¹³⁵³ Third Geneva Convention, Art. 12; Fourth Geneva Convention, Art. 45.

¹³⁵⁴ Third Geneva Convention, Art. 12(2).

¹³⁵⁵ US reservations to the CAT, *op. cit.*, note 327, para. II(2).

¹³⁵⁶ US comments to the draft report.

¹³⁵⁷ "U.S. Government's 1-year Follow-Up Report to the Committee's Conclusions & Recommendations", United States Department of State archive website, 10 October 2007, <<http://2001-2009.state.gov/g/drl/rls/100740.htm>>; UN HRC, Concluding observations on the fourth periodic report of the United States of America, *op. cit.*, note 67, para. 13.

¹³⁵⁸ "U.S. Government's 1-year Follow-Up Report to the Committee's Conclusions & Recommendations", United States Department of State archive website, 10 October 2007, *ibid.*

¹³⁵⁹ Foreign Affairs Reform and Restructuring Act (FARRA), 21 October 1998, § 2242,

<<http://www.gpo.gov/fdsys/pkg/USCODE-2011-title8/pdf/USCODE-2011-title8-chap12-subchapII-partIV-sec1231.pdf>>.

¹³⁶⁰ Department of Defense Directive 2310.01E, *op. cit.*, note 14., 3(m)(6): "No detainee will be transferred to the custody of another country when a competent authority has assessed that it is more likely than not that the detainee would be subjected to torture".

¹³⁶¹ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, paras. 48-49.

498. A district court cannot prevent the transfer of a Guantánamo detainee to another country via a *habeas corpus* claim because it cannot “question the Government’s determination that a potential recipient country is not likely to torture a detainee”.¹³⁶² The court cannot “second-guess” the executive branch’s determination, and a detainee is thereby unable “to bar his transfer based upon the likelihood of his being tortured in the recipient country”.¹³⁶³

c. Findings and Analysis

499. ODIHR takes note with concern of the United States argument that Article 3 of the CAT does not apply to Guantánamo and that the ICCPR does not impose a non-refoulement obligation on States. ODIHR takes the contrary view, previously expressed by other international bodies and experts, that the United States should fully respect the principle of non-refoulement as provided by Article 3 of the CAT and interpreted under the ICCPR, including at Guantánamo Bay.¹³⁶⁴ For this reason, ODIHR’s analysis of US policy and practice on the matter relies primarily on these standards.

500. According to the US government, the US understanding of Article 3 submitted upon ratification of the CAT is only a clarification of the standard and does not “modify or restrict the legal effect” of Article 3.¹³⁶⁵ However, the United States’ narrow definition of torture and its exclusion of ill-treatment in its application of the principle of non-refoulement may still increase the likelihood that detainees will be transferred to a state where they will be tortured or ill-treated.¹³⁶⁶ The US definition of torture is narrower than

¹³⁶² United States Court of Appeals for the District of Columbia Circuit, *Kiyemba v. Obama*, Case Nos. 05-5487 and 05-5489, 7 April 2009, <http://scholar.google.com/scholar_case?case=17744177264046175322&hl=en&as_sdt=6&as_vis=1&oi=scholar>.

¹³⁶³ United States Supreme Court, *Mohammad Munaf v. Pete Geren*, Case Nos. 07-394 and 06-1666, 7 July 2008, <<http://www.brennancenter.org/sites/default/files/legacy/Justice/07-394and06-1666PetitionforRehearing.pdf>>; United States Court of Appeals District of Columbia Circuit, *Kiyemba v. Obama*, 7 April 2009, *ibid*.

¹³⁶⁴ UN HRC, Concluding observations, United States of America, CCPR/C/USA/CO/3/Rev.1, *op. cit.*, note 569, para. 16: “The State party should review its position, in accordance with the Committee’s general comments 20 (1992) on article 7 and 31 (2004) on the nature of the general legal obligation imposed on States parties. The State party should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of inter alia, their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.”; UN CAT, Conclusions and Recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 20: “The State party should apply the non-refoulement guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention.”; UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 55: “There have been consistent reports about the practice of rendition and forcible return of Guantánamo detainees to countries where they are at serious risk of torture. An example is the transfer of Mr. Al Qadasi to Yemen in April 2004. (...) On the basis of the information available to him, the Special Rapporteur takes the view that the United States practice of “extraordinary rendition” constitutes a violation of article 3 of the Convention against Torture and article 7 of ICCPR.”

¹³⁶⁵ “United States’ Response to the Questions Asked by the Committee Against Torture”, United States Department of State website, 5 May 2006, <<http://www.state.gov/j/drl/rls/68561.htm>>; “Diplomatic Assurances: Statement for the Record By John B. Bellinger, III, Legal Advisor to the Secretary of State Before the House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight”, United States Department of State website, 10 June 2008, pp. 2-3, <<http://www.state.gov/documents/organization/138858.pdf>>.

¹³⁶⁶ ODIHR interview with Human Rights First, *op. cit.*, note 709; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 17: “The Special Rapporteur supports initiatives to return detainees to their countries of origin, but also concludes that although the United States has advised that it will not do so in breach of the principle of non-refoulement, the current United States standard applied under this principle fails to comply with international law. While international law (primarily ICCPR, article 7) requires that a person not be returned to a country where there is a ‘real risk’ of torture, or any form of cruel, inhuman or degrading treatment, the United States applies a

the CAT definition and may allow US officials to determine that conduct is lawful even when it would qualify as torture under international law. Moreover, the US government does not recognize that the ICCPR also prohibits transfers to another state when the individual is at risk of cruel, inhuman or degrading treatment or punishment. Consequently, US government officials may still decide to transfer detainees even where there is a high probability that they will be subjected to acts amounting to torture or ill-treatment under international law.

501. The United States maintains that it takes the principle of non-refoulement very seriously and that it will not transfer a detainee if doing so would violate this principle.¹³⁶⁷ In deciding whether to transfer a detainee, the Department of State first assesses whether the individual can be repatriated to the detainee's home country before looking at other states for potential resettlement. According to the US government, these officials consider and analyse all available information, including the circumstances surrounding the transfer of other Guantánamo detainees to the same state, past allegations of torture, the state's human rights record, the state's capabilities and the terrorist threat stemming from the state.¹³⁶⁸ Diplomatic assurances are also discussed with a potential receiving state, which include both security and humane-treatment conditions. Humane-treatment assurances have been agreed to in all cases involving the transfer of Guantánamo detainees to date.¹³⁶⁹ If allegations of abuse arise following a transfer, the US government reports that diplomatic pressure would be immediately imposed and that future transfers to the country in question would be affected.¹³⁷⁰
502. ODIHR acknowledges and welcomes the US government's actions to resettle some detainees in third countries due to unstable conditions, such as war, or due to risks of torture or persecution in a detainee's home country. For instance, Maasoum Abdah Mohammad was sent to Bulgaria given the potential that he might be persecuted if he returned to Syria, as he is of Kurdish ethnicity.¹³⁷¹ The Uighur detainees were resettled in third countries based on the likelihood of abuse if returned to China. Similarly, Oybek Jamoldinovich Jabbarov and Shakhrukh Hamiduva were resettled in Ireland rather than returned to Uzbekistan.¹³⁷² When Lakhdar Boumediene and Sabir Mahfouz Lahmar could not be returned to Bosnia and Herzegovina, they were resettled in France rather than sent to their country of origin, Algeria.

lower threshold of non-return only where it is 'more likely than not' that a person will be subject to torture as narrowly defined by the United States itself."

¹³⁶⁷ ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193.

¹³⁶⁸ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244; ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *ibid.*; "UN Treaty Body Webcast, CAT 53rd session – United States of America, 3", *op. cit.*, note 77.

¹³⁶⁹ "UN Treaty Body Webcast, CAT 53rd session – United States of America, 3", *ibid.*; UN HRC, Replies of the United States of America to the List of Issues, CCPR/C/USA/Q/4/Add.1, 13 September 2003, para. 53,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fQ%2f4%2fAdd.1&Lang=en>.

¹³⁷⁰ ODIHR meeting with the Special Envoys for Guantánamo Closure and the National Security Council, *op. cit.*, note 244;

ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193; UN Treaty Body Webcast, CAT 53rd session – United States of America, 3", *ibid.*

¹³⁷¹ ODIHR interview with Matthew O'Hara, *op. cit.*, note 255.

¹³⁷² ODIHR interview with Michael E. Mone, *op. cit.*, note 207.

503. The United States typically does not provide information on the safeguards and monitoring procedures agreed to in diplomatic assurances, which makes it particularly difficult to assess whether the assurances it has obtained are sufficient to eliminate all reasonable doubt that a detainee would be subjected to torture or ill-treatment upon their transfer.¹³⁷³ According to the US government, decisions on diplomatic assurances account for the “totality of relevant factors” relating to both the individual and the receiving government, including past practice, political and legal developments and diplomatic relations.¹³⁷⁴ The US government has said it seeks guarantees of consistent, private access to transferred detainees through credible NGOs or sometimes through US officials.¹³⁷⁵ The US government maintains that it is not aware of any Guantánamo “cases in which humane treatment assurances have not been honored”.¹³⁷⁶
504. Despite the US government’s position on its use of diplomatic assurances, several practices raise concern in relation to the transfer of Guantánamo detainees. First, in an apparent contravention of Article 3 of the CAT interpreted as requiring the effective, independent and impartial review of any transfer decision by “at the very least” a competent judicial authority,¹³⁷⁷ the judiciary is usually unable to review diplomatic assurances, and the executive branch maintains that it is not for the judiciary to decide where an individual is more likely than not to be tortured.¹³⁷⁸ Second, the United States has sent detainees to countries such as Algeria, the Russian Federation, Tajikistan, Tunisia and Yemen, where allegations of torture or ill-treatment had subsequently arisen.¹³⁷⁹ Individuals interviewed by ODIHR suggested that the US government relies too heavily on diplomatic assurances and questioned the United States’ commitment to upholding the principle of non-refoulement.¹³⁸⁰ ODIHR is concerned about the United States’ use of diplomatic

¹³⁷³ UN HRC, Replies of the United States of America to the List of Issues, CCPR/C/USA/Q/4/Add.1, *op. cit.*, note 1369, para. 54; UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 81; UN CAT, Conclusions and Recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 21; UN CAT, Summary Record of the 1264th Meeting, United States of America, CAT/C/SR.1264, 17 November 2014, paras. 16, 40,

<http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/CAT_C_SR_1264_22881_E.pdf>; ODIHR interview with the Center for Victims of Torture, *op. cit.*, note 229; ODIHR interview with Human Rights First, *op. cit.*, note 709.

¹³⁷⁴ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *ibid.*, paras. 48-49. See, also, UN HRC, Replies of the United States of America to the List of Issues, CCPR/C/USA/Q/4/Add.1, *ibid.*, para. 53.

¹³⁷⁵ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *ibid.*, para. 82; UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, *op. cit.*, note 77; UN HRC, Replies of the United States of America to the List of Issues, CCPR/C/USA/Q/4/Add.1, *ibid.*, paras. 53-54.

¹³⁷⁶ UN HRC, Replies of the United States of America to the List of Issues, CCPR/C/USA/Q/4/Add.1, *ibid.*, para. 55.

¹³⁷⁷ UN CAT, *Agiza v. Sweden*, *op. cit.*, note 497, para. 13.8; UN Special Rapporteur on torture, Interim report to the General Assembly, A/59/324, *op. cit.*, note 284, para. 29

¹³⁷⁸ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, paras. 79, 81; UN CAT, Conclusions and Recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 21.

¹³⁷⁹ ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255; ODIHR interview with Matthew O’Hara, *op. cit.*, note 255; “The ‘Stamp of Guantanamo’”, Human Rights Watch, 29 March 2007,

<<http://www.hrw.org/es/node/10989/section/1>>; “Ill-Fated Homecomings”, Human Rights Watch, 5 September 2007,

<<http://www.hrw.org/en/reports/2007/09/04/ill-fated-homecomings>>; “Still at Risk: Diplomatic Assurances No Safeguard Against Torture”, Human Rights Watch, April 2005, pp. 28-40, <<http://www.hrw.org/sites/default/files/reports/eca0405.pdf>>.

¹³⁸⁰ Interlocutors cited several reasons for their concerns, including that some detainees were tortured after being transferred, that some detainees have been transferred to countries with patterns of human rights abuses, that the US government may rely only on assurances, that allegedly only a memorandum of understanding is signed that says that the detainees will be treated well, that there is no judicial review, that some detainees are not notified in advance of their transfer and that the determination process and diplomatic assurances are not publically available. ODIHR interview with Michael E. Mone, *op. cit.*, note 207; ODIHR interview with Matthew O’Hara, *op. cit.*, note 255; ODIHR interview with Physicians for Human Rights, *op. cit.*, note 472; ODIHR

assurances in transferring detainees, the secrecy and lack of transparency surrounding these assurances and the lack of an effective, independent and impartial review of these assurances.¹³⁸¹

505. In 2007, the US government sent three detainees, Rukniddin Fayziddinovich Sharipov, Sobit Valikhonovich Vakhidov and Mehrabanb Fazrollah, to Tajikistan despite the Tajik government allegedly threatening those individuals during visits to Guantánamo in 2002 and 2003.¹³⁸² At the time of their transfer, the United States Bureau of Democracy, Human Rights and Labor's 2006 report explained that Tajikistan's security officials engaged in "systematic beatings, sexual abuse, and electric shock to extort confessions during interrogations" and that courts regularly allowed confessions induced from torture and beatings. It also reported that members of extremist Islamist political organizations were tortured in Tajikistan.¹³⁸³ The United States' own reporting prior to their transfer to Tajikistan demonstrates that the US government was aware that torture was used during interrogations and that Islamist extremists were tortured in police custody. Based on these factors, ODIHR believes that the United States knew or ought to have known that substantial grounds existed for believing that the three detainees, who it accused of being members of an extremist Islamist terrorist group,¹³⁸⁴ would likely be subjected to torture or ill-treatment if returned to Tajikistan. Sharipov and Vakhidov were subsequently prosecuted in Tajikistan and sentenced to 17 years in prison after they were reportedly coerced into signing confessions through the use of torture.¹³⁸⁵ They continue to be held in prison.¹³⁸⁶
506. As the United States does not release information on diplomatic assurances, ODIHR is not aware of what assurances were given by Tajikistan's government before the three Tajik detainees were transferred. In 2009, however, Tajikistan's government reportedly denied US Embassy officials access to the detainees' for six weeks to three months.¹³⁸⁷ Rather than conducting a private follow-up interview when finally granted access, US Embassy officials reportedly performed interviews of the detainees' detention conditions in the presence of Tajik officials.¹³⁸⁸ While ODIHR cannot assess the diplomatic assurances

interview with the American Civil Liberties Union, 28 February 2014, *op. cit.*, note 255; ODIHR interview with the American Civil Liberties Union, 24 February 2014, *op. cit.*, note 82; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255; ODIHR interview with Human Rights First, *op. cit.*, note 709; ODIHR interview with the Center for Victims of Torture, *op. cit.*, note 229.

¹³⁸¹ See, also, UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 16; UN CAT, Conclusions and Recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 21.

¹³⁸² ODIHR interview with Matthew O'Hara, *op. cit.*, note 255; "Foreign Interrogators in Guantanamo Bay", Center for Constitutional Rights website, <<http://ccrjustice.org/learn-more/faqs/foreign-interrogators-guantanamo-bay>>; "Tajikistan", Freedom House website, 2011, <<http://www.freedomhouse.org/report/nations-transit/2011/tajikistan#.VDKDcfmSySo>>.

¹³⁸³ "Tajikistan", United States Department of State website, 6 March 2007, <<http://www.state.gov/j/drl/rls/hrrpt/2006/78843.htm>>.

¹³⁸⁴ Sharipov and Vakhidov were believed to be associated with the Islamic Movement of Uzbekistan, and Fazrollah was believed to have fought alongside the Taliban. "The Guantánamo Docket", The New York Times website, *op. cit.*, note 88.

¹³⁸⁵ ODIHR interview with Matthew O'Hara, *op. cit.*, note 255; "Tajikistan", Freedom House website, *op. cit.*, note 1382; *Promises to Keep Diplomatic Assurances Against Torture in US Terrorism Transfers* (New York: Columbia Law School Human Rights Institute, 2010), pp. 107- 108, <<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf>>.

¹³⁸⁶ ODIHR interview with Matthew O'Hara, *ibid.*

¹³⁸⁷ *Promises to Keep Diplomatic Assurances Against Torture*, *op. cit.*, note 1385, pp. 107- 108.

¹³⁸⁸ *Ibid.*

provided to the United States due to limited information, concerns remain that the assurances failed to eliminate all reasonable doubt that Sharipov and Vakhidov would be tortured for several reasons, including reports that US officials were sometimes denied access to the detainees for months, and that interviews were conducted in the presence of those responsible for any alleged torture.¹³⁸⁹ These circumstances preclude the operation of a reliable post-return monitoring mechanism. Thus, the United States likely violated international standards on non-refoulement by transferring these detainees to Tajikistan.

507. The forcible transfers of detainees to states allegedly practicing torture or ill-treatment highlights the lack of effective access detainees have to an independent body that can review the executive branch's determination on non-refoulement. Djamel Ameziane, an Algerian citizen, submitted a complaint to the IACHR, expressing his fear that he would be returned to Algeria where he would be subjected to ill-treatment. He alleged that the Algerian Ambassador to the United States told his lawyers that he would be considered a "serious security threat and subjected to further detention and investigation in Algeria".¹³⁹⁰ Additionally, Ameziane's family in Algeria had been suspected of terrorist ties due to his detention.¹³⁹¹ The Department of State's reports indicated that it was aware that individuals suspected of terrorism-related offences 'disappeared' for several days in Algeria and that Algerian security forces might be operating secret detention facilities.¹³⁹² Previously, detainees transferred to Algeria were held in incommunicado detention for 12 days.¹³⁹³ In Ameziane's case, the IACHR issued precautionary measures requesting that the United States take all necessary measures to provide Ameziane with an opportunity to examine all the circumstances of any potential transfer before a "competent, independent and impartial decision maker" to ensure that Ameziane was not deported to a state where he would be at risk of torture or other mistreatment.¹³⁹⁴ Ameziane did not receive an opportunity to have his case examined by an independent and impartial decision-maker.¹³⁹⁵ The US government transferred Ameziane to Algeria against his will in December 2013 in violation of the precautionary measures. The IACHR condemned the transfer as a violation of the principle of non-refoulement.¹³⁹⁶ The Special Rapporteur on torture and the Special Rapporteur on human rights and counter-terrorism also expressed their concern over this

¹³⁸⁹ *Ibid.*, pp. 21, 107-108.

¹³⁹⁰ IACHR, *Ameziane v. United States*, Report No. 17/12. Petition P-900-08, 20 March 2012, para. 22, <<http://www.oas.org/en/iachr/decisions/2012/USAD900-08EN.doc>>.

¹³⁹¹ *Ibid.*, para. 23.

¹³⁹² "Algeria 2012 Human Rights Report", United States Department of State website, March 2013,

<<http://www.state.gov/documents/organization/204564.pdf>>; "Algeria 2013 Human Rights Report", United States Department of State website, March 2014, <<http://www.state.gov/documents/organization/220557.pdf>>.

¹³⁹³ "US: Stop Returns of Guantanamo Detainees Fearing Mistreatment", Human Rights Watch website, 7 January 2011,

<<http://www.hrw.org/news/2011/01/06/us-stop-returns-Guantanamo-detainees-fearing-mistreatment>>; Carol Rosenberg, "U.S.

move to repatriate Guantanamo detainees to Algeria draws U.N. criticism", Miami Herald website, 10 December 2013,

<<http://www.miamiherald.com/news/nation-world/article1958380.html>>.

¹³⁹⁴ IACHR, *Djamel Ameziane*, "Precautionary Measures No. 211-08", 20 August 2008, <[http://ccrjustice.org/files/2008-08-](http://ccrjustice.org/files/2008-08-20%20IACHR%20Initial%20Response.pdf)

20%20IACHR%20Initial%20Response.pdf>; IACHR, "Precautionary Measures: Precautionary Measures Granted by the IACHR

In 2008", 20 April 2008, para. 37, <<http://cidh.org/medidas/2008.eng.htm>>; "Inter-American Commission on Human Rights

Moves to Halt Torture at Guantanamo", Center for Constitutional Rights website, 21 August 2008,

<[http://ccrjustice.org/newsroom/press-releases/inter-american-commission-human-rights-moves-halt-torture-Guantanamo%3A-](http://ccrjustice.org/newsroom/press-releases/inter-american-commission-human-rights-moves-halt-torture-Guantanamo%3A-orders)

orders>.

¹³⁹⁵ "Ameziane v. Obama / Ameziane v. United States", Center for Constitutional Rights website,

<<http://ccrjustice.org/Ameziane>>.

¹³⁹⁶ "IACHR Condemns Forced Transfer of Djamel Ameziane from Guantanamo to Algeria", Organization of American States website, 19 December 2013, <https://www.oas.org/en/iachr/media_center/PReleases/2013/103.asp>.

decision and called diplomatic assurances unreliable and ineffective.¹³⁹⁷ ODIHR is gravely concerned about the US government's decision to forcibly transfer Ameziane to Algeria, particularly given the IACHR's issuance of precautionary measures.

508. Detainees are not entitled to receive advanced notice of their transfer and do not have the right to challenge a transfer decision.¹³⁹⁸ Moreover, domestic courts determined in 2009 that courts could not review the executive branch's determination that a receiving state is not likely to torture a detainee, which bars detainees from challenging their transfer.¹³⁹⁹ Article 3 of the CAT, however, requires an effective, independent and impartial review of decisions to expel an individual and, failing to provide such a review, is a breach of a State party's procedural obligations.¹⁴⁰⁰ As a result, ODIHR views the absence of an effective, independent and impartial review of decisions to transfer detainees as a violation of the United States' international legal obligations.

d. Recommendations

- To ensure that no detainee is expelled, extradited or returned to a state where there are substantial grounds for believing that the detainee will be in danger of being subjected to torture or ill-treatment;
- To ensure that detainees have access to an effective, independent, impartial and individualized review in order to challenge government determination that they will not be subjected to torture or ill-treatment;
- To amend legislation to ensure that the definition of torture in US law complies with Article 1 of the CAT;
- To revisit the United States' view that substantial grounds for believing that a person will be subjected to cruel, inhuman or degrading treatment or punishment if transferred to a state does not fall within the principle of non-refoulement.

¹³⁹⁷ UN Special Rapporteurs on torture and on human rights and counter-terrorism, "UN rights experts on torture and counter-terrorism concerned about the fate of Guantánamo detainees", *op. cit.*, note 1350.

¹³⁹⁸ Resolution No. 2/11, "Regarding the Situation of the Detainees at Guantanamo Bay, United States MC 25902", Organization of American States, 22 July 2011, p. 4, <<http://www.cidh.oas.org/pdf%20files/Resolution%202-11%20Guantanamo.pdf>>; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255; ODIHR interview with Matthew O'Hara, *op. cit.*, note 255. On the contrary, US officials informed ODIHR that the usual practice is to inform detainee counsel of pending transfers, and that detainees are given the opportunity to raise any concerns about a transfer decision before the transfer is completed. US comments to the draft report.

¹³⁹⁹ United States Court of Appeals for the District of Columbia Circuit, *Kiyemba v. Obama*, 7 April 2009, *op. cit.*, note 1362.

¹⁴⁰⁰ UN CAT, *Agiza v. Sweden*, *op. cit.*, note 497, para. 13.8; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/6/17/Add.3, *op. cit.*, note 22, para. 36: "the removal of a person outside legally prescribed procedures amounts to an unlawful detention in violation of article 9 (1) of the ICCPR, and raises other human rights concerns if a detainee is not given a chance to challenge the transfer".

II. ACCOUNTABILITY AND REDRESS

A. ACCOUNTABILITY FOR TORTURE AND ILL-TREATMENT

a. *International Standards*

509. Accountability for torture is mandated in several international legal instruments, most clearly in the CAT.¹⁴⁰¹ Under the CAT, State parties must “ensure that all acts of torture are offences under its criminal law”, take measures to establish jurisdiction over torture offences, conduct prompt and impartial investigations into allegations of torture whenever there are “reasonable ground[s] to believe that an act of torture has been committed in any territory under its jurisdiction”, and prosecute or extradite “a person alleged to have committed any offence” of torture.¹⁴⁰² OSCE participating States have also committed themselves to holding perpetrators accountable for acts of torture and ill-treatment, including at Copenhagen in 1990 and at Budapest in 1994.¹⁴⁰³ Criminalization of torture should deter offenders, ensure that perpetrators do not enjoy impunity and prevent them from seeking refuge in any state.¹⁴⁰⁴
510. States are required to criminalize all acts of, and attempts to commit, torture, as well as acts of complicity or participation in torture.¹⁴⁰⁵ Provisions criminalizing torture are to encompass “directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture”.¹⁴⁰⁶ Concealment includes acts that hide or destroy torture evidence.¹⁴⁰⁷
511. Accountability for torture requires and enables states to establish jurisdiction over perpetrators in a variety of circumstances. First, states are to establish jurisdiction over acts of torture that occur in the territory under the state’s jurisdiction, including state-registered aircraft and ships.¹⁴⁰⁸ Second, states must exercise jurisdiction over their nationals that commit acts of torture, including military and intelligence officials.¹⁴⁰⁹ Third, relevant measures may be created by a state to authorize jurisdiction when torture is committed against one of its nationals.¹⁴¹⁰ Last, states must exercise jurisdiction when the perpetrator is “present in any territory under its jurisdiction”, unless it extradites the perpetrator to another state that can exercise jurisdiction.¹⁴¹¹ Any territory includes any area under the

¹⁴⁰¹ CAT, Arts. 4, 5, 6, 7, 12, 13; ICCPR, Art. 7; UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 13; UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 18; ACHR, Art. 5; Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Inter-Am Ct. H.R. (Ser. C) No. 4, 29 July 1988, para. 166, <http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf>.

¹⁴⁰² CAT, Arts. 4, 5, 7, 12.

¹⁴⁰³ OSCE Vienna Document, *op. cit.*, note 90, para. 23.4; OSCE Copenhagen Document, *op. cit.*, note 80, paras. 16.6-16.7; OSCE Moscow Document, *op. cit.*, note 90, para. 23.1; OSCE Budapest Document, *op. cit.*, note 3, para. 20; OSCE Ljubljana Document, *op. cit.*, note 90; OSCE Athens Document, *op. cit.*, note 80, paras. 1, 6.

¹⁴⁰⁴ ICJ, *Belgium v. Senegal*, *op. cit.*, note 285, paras. 68, 75.

¹⁴⁰⁵ CAT, Art. 4(1).

¹⁴⁰⁶ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 17.

¹⁴⁰⁷ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 47.

¹⁴⁰⁸ CAT, Art. 5(1)(a).

¹⁴⁰⁹ CAT, Art. 5(1)(b).

¹⁴¹⁰ CAT, Art. 5(1)(c).

¹⁴¹¹ CAT, Art. 5(2).

state's *de jure* or *de facto* effective control, including detention facilities and military bases.¹⁴¹²

512. Pursuant to the obligation to prosecute or extradite persons accused of torture, all alleged perpetrators within a State party's jurisdiction are to be investigated and prosecuted either domestically or in another state.¹⁴¹³ Therefore, once an alleged perpetrator is in the territory of a State party, the authorities must take the person into custody, or otherwise ensure his or her presence, conduct a preliminary investigation and prosecute the alleged perpetrator, unless the State party extradites the individual to another State party that will exercise jurisdiction over the individual.¹⁴¹⁴ The obligation to extradite or submit the case to the competent authorities for prosecution must be undertaken within a reasonable time.¹⁴¹⁵
513. The CAT effectively provides a basis for universal jurisdiction over acts of torture.¹⁴¹⁶ Universal jurisdiction applies to criminal acts that are considered peremptory norms or *jus cogens*, such as the prohibition of torture. It allows states to exercise jurisdiction over acts of torture regardless of the perpetrator's or victim's nationality and regardless of where the offence occurred. This aims to deny perpetrators of torture any jurisdictional safe havens.¹⁴¹⁷
514. The obligation to hold those responsible for torture and ill-treatment accountable imposes a duty on states to conduct prompt, independent, impartial, thorough and effective investigations.¹⁴¹⁸ This obligation applies irrespective of whether the alleged victim of torture or ill-treatment has made a formal complaint to authorities.¹⁴¹⁹ When there are reasonable grounds to believe that an act of torture or ill-treatment has taken place, a state is to take the alleged offender into custody or to take other legal measures to secure the alleged offender's presence and immediately conduct a preliminary inquiry into the situation.¹⁴²⁰ All investigations are to be conducted by a body that is independent of the

¹⁴¹² UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 16.

¹⁴¹³ CAT, Arts. 5(2), 7(1), 12.

¹⁴¹⁴ CAT, Arts. 5, 7(1); UN CAT, *Suleymane Guengueng et al. v. Senegal*, Communication No. 181/2001, 17 May 2006, paras. 3.2-3.7,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F36%2FD%2F181%2F2001&Lang=fr>; ICJ, *Belgium v. Senegal*, *op. cit.*, note 285, para. 68; UN Special Rapporteur on torture, "Study on the phenomena of torture", *op. cit.*, note 283, paras. 152-153; "The Legal Prohibition Against Torture", Human Rights Watch website, 11 March 2003, <<http://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#laws>>.

¹⁴¹⁵ ICJ, *Belgium v. Senegal*, *ibid.*, para. 114.

¹⁴¹⁶ *Ibid.*, paras. 74-75, 118; CAT, Art. 5(2).

¹⁴¹⁷ ICJ, *Belgium v. Senegal*, *ibid.*, paras. 68, 74-75.

¹⁴¹⁸ CAT, Arts. 6(2), 12; ICCPR, Art. 2; UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 15; ICJ, *Belgium v. Senegal*, *ibid.*, paras. 68, 72; "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *op. cit.*, note 280, Arts. 9, 10; "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", New York, 16 December 2005, Principles II, III, paras. 3(b), 4; Nowak, *CCPR Commentary*, *op. cit.*, note 93, pp. 180-181.

¹⁴¹⁹ CAT, Art. 13; UN CAT, *Imed Abdelli v. Tunisia*, Communication No. 188/2001, 14 November 2002, para. 10.6,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F31%2FD%2F188%2F2001&Lang=en>; UN CAT, *Bouabdallah Ltaief v. Tunisia*, Communication No. 189/2001, CAT/C/31/D/189/2001, 14 November 2002, para. 10.6,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F31%2FD%2F189%2F2001&Lang=en>.

¹⁴²⁰ CAT, Art. 6(1)-(2); UN Special Rapporteur on torture, "General Recommendations of the Special Rapporteur on torture", *op. cit.*, note 313, para. k.

perpetrator, which maintains investigative powers and which can forward its findings to the relevant authorities empowered to initiate criminal proceedings.¹⁴²¹ According to international bodies and experts, a prompt investigation requires authorities to commence an investigation “within hours or, at the most, within days” of the existence of reasonable grounds to believe acts of torture or ill-treatment occurred.¹⁴²² Officials that are the subject of investigation must be suspended during the time of investigation.¹⁴²³

515. Additionally, victims of torture and ill-treatment are to be able to file a complaint with authorities in a manner that will allow their allegations to be investigated without fear of reprisals.¹⁴²⁴ Verbal or written complaints should be sufficient.¹⁴²⁵ All public officials, including prison officials and medical personnel, should report their suspicions of torture or ill-treatment to the competent authorities.¹⁴²⁶ Even when a complaint is not filed, states have a duty to conduct an investigation where there are signs that torture or ill-treatment has occurred.¹⁴²⁷
516. Superior officials are to be held accountable for their instigation, encouragement, consent or acquiescence of torture or ill-treatment.¹⁴²⁸ These officials are criminally liable through complicity or acquiescence for the acts of their subordinates where they knew, or should have known, that unlawful conduct was happening or was likely to happen, and reasonable and necessary measures were not put in place to prevent such conduct.¹⁴²⁹ Subordinates are individually criminally liable for acts of torture and may not avoid liability by claiming compliance with superior orders.¹⁴³⁰ The Special Rapporteur on human rights and counter-

¹⁴²¹ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 111.

¹⁴²² UN CAT, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, 14 May 1998, paras. 8.5-9, <<http://juris.ohchr.org/Search/Details/246>>; UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 63.

¹⁴²³ Where officials are found guilty, they should be dismissed from their position, in addition to any other form of punishment imposed as a result of conviction. UN HRC, Concluding Observations, Serbia and Montenegro, CCPR/CO/81/SEMO, 12 August 2004, para. 9, <<http://tb.ohchr.org/default.aspx?Symbol=CCPR/CO/81/SEMO>>; *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners’ Guide* (Geneva: International Commission of Jurists, 2006), pp. 76-77, <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf>>.

¹⁴²⁴ CAT, Art. 13; UN Special Rapporteur on torture “Study on the phenomena of torture”, *op. cit.*, note 283, para. 112.

¹⁴²⁵ A victim need only bring the facts to the attention of a state authority. CAT, Art. 13; UN CAT, *Abdelli v. Tunisia*, *op. cit.*, note 1419, para. 10.6.

¹⁴²⁶ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 26: “those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures”; “Standard Minimum Rules for the Treatment of Prisoners”, *op. cit.*, note 280, Rule 25; Resolution 10/24, “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: the Role and Responsibility of Medical and Other Health Personnel”, Human Rights Council, 26 March 2009, pp. 1-2, <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_24.pdf>. See, also, “Principles of Medical Ethics”, *op. cit.*, note 313, Principles 1-2.

¹⁴²⁷ CAT, Art. 12; “Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, *op. cit.*, note 564, Principle 2.

¹⁴²⁸ CAT Art. 2(3); UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 26; UN Independent Expert to update the set of principles to combat impunity, Diane Orentlicher, Report to the Commission on Human Rights, Addendum, “Updated Set of principles for the protection and promotion of human rights through action to combat impunity”, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 27, <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10800>.

¹⁴²⁹ CAT, Art. 2(3); UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 26; UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, paras. 47, 142.

¹⁴³⁰ UN CAT, General Comment No. 2, *ibid.*, para. 26; UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, “Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human

terrorism has stressed that individuals are therefore obliged to refuse to follow orders that they know are unlawful.¹⁴³¹ The duty to conduct effective investigations when torture is alleged includes investigating and holding superior officers accountable when they give unlawful orders or fail to take all measures in their power to prevent, suppress or report misconduct by their subordinates.¹⁴³²

517. Penalties for acts of torture must reflect the grave nature of the offence.¹⁴³³ Administrative and disciplinary sanctions are insufficient. Instead, states must ensure that criminal penalties for torture are similar to those imposed for the most serious domestic offences. Additionally, the aim of such penalties should be to deter others from committing similar acts and to assist victims in their rehabilitation by providing a “meaningful acknowledgement of their suffering”.¹⁴³⁴
518. Amnesties, immunities, indemnities and statutes of limitations conflict with the duty to promptly investigate allegations of torture and prosecute alleged perpetrators.¹⁴³⁵ These provisions insulate perpetrators from accountability and should not apply to gross violations of international human rights law and serious violations of international humanitarian law, which include torture and ill-treatment.¹⁴³⁶ Since statutes of limitations may allow perpetrators to escape liability, the Committee against Torture has repeatedly called on State parties to amend legislation to ensure that the prohibition of torture is absolute and not subject to any statute of limitations. Applying a statute of limitations to acts of torture or ill-treatment has therefore been treated as amounting to a violation of Article 4 of the CAT.¹⁴³⁷ Additionally, a single instance of impunity is a violation of both the ICCPR and the CAT.¹⁴³⁸
519. Customary international law imposes liability on states that aid or assist “the commission of an internationally wrongful act”.¹⁴³⁹ A state engaging in such conduct incurs

rights by intelligence agencies while countering terrorism, including on their oversight”, A/HRC/14/46, 17 May 2010, Practice 17, para. 24, <<http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx>>.

¹⁴³¹ UN Special Rapporteur on human rights and counter-terrorism, “Compilation of good practices”, *ibid*.

¹⁴³² UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 26; *Human Rights in Counter-terrorism Investigations, op. cit.*, note 120, p. 126.

¹⁴³³ CAT, Art. 4(2); UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 49. The UN Committee against Torture’s “practice suggests custodial sentences between six and twenty years”.

¹⁴³⁴ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *ibid.*, paras. 49, 77.

¹⁴³⁵ UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 18; UN HRC, General Comment No. 20, *op. cit.*, note 282, para. 15; UN Special Rapporteur on torture, “General Recommendations of the Special Rapporteur on torture”, *op. cit.*, note 313, para k.

¹⁴³⁶ “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle IV, para. 6.

¹⁴³⁷ For instance: UN CAT, Concluding Observations on the Second Periodic Report of Japan, CAT/C/JPN/CO/2, 28 June 2013, para. 8, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=790&Lang=en>; UN CAT, Concluding Observations on the Combined Third to Fifth Periodic Reports of Latvia, CAT/C/LVA/CO/3-5, 23 December 2013, para. 8, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=809&Lang=en>; UN CAT, Concluding Observations on Guinea in the Absence of its Initial Report, CAT/C/GIN/CO/1, 20 June 2014, para. 8, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=890&Lang=en>; UN CAT, Concluding Observations on the Initial Report of Thailand, CAT/C/THA/CO/1, 20 June 2014, para. 9, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=890&Lang=en>.

¹⁴³⁸ CAT, Arts. 1, 4, 5; UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 134.

¹⁴³⁹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 420, <<http://www.icj-cij.org/docket/files/91/13685.pdf>>; “Draft articles on responsibility of States for internationally wrongful acts with commentaries”, International Law Commission, 2001, Art. 16, <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

international responsibility when: (i) it provides aid or assistance even though it knew the circumstances that made the conduct internationally wrongful; and (ii) the aid or assistance would have been internationally wrongful if committed by the assisting state.¹⁴⁴⁰ “[K]nowingly providing an essential facility” and “facilitating the abduction of persons on foreign soil” are examples of acts by an assisting state that may result in international responsibility.¹⁴⁴¹ International experts have found that a state may be implicated in the secret detention of a person where it has agreed to secretly detain a person or where it sends questions or solicits or receives information from a detainee held in secret detention.¹⁴⁴² While the state committing the internationally wrongful act bears primary responsibility, the assisting state is liable to the extent that it contributed to or caused the internationally wrongful act.¹⁴⁴³ Torture, as a peremptory norm, is an internationally wrongful act that leads to state responsibility.¹⁴⁴⁴

520. The criminalization of torture and ill-treatment is also provided for in international humanitarian law. Customary international humanitarian law and the Geneva Conventions impose individual criminal responsibility for war crimes, including torture and ill-treatment, in both international and non-international armed conflicts. Accordingly, states are under a duty to investigate and to prosecute war crimes committed by nationals or committed on their territory.¹⁴⁴⁵ Customary international humanitarian law also prevents the use of superior orders as a defence when the subordinate knew or should have known the act was unlawful.¹⁴⁴⁶ Even if these provisions were not contained in international humanitarian law, states would still be obligated to prosecute acts of torture during armed conflicts, as the prohibition on torture is non-derogable.¹⁴⁴⁷ In addition to constituting a war crime, torture may also amount to a crime against humanity.¹⁴⁴⁸

¹⁴⁴⁰ “Draft articles on responsibility of States for internationally wrongful acts with commentaries”, *ibid.*, Art. 16.

¹⁴⁴¹ “Draft articles on responsibility of States for internationally wrongful acts with commentaries”, *ibid.*, Art. 16, p. 66.

¹⁴⁴² UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, para. 159.

¹⁴⁴³ “Draft articles on responsibility of States for internationally wrongful acts with commentaries”, *ibid.*, Art. 16, p. 85. See, also, UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 55.

¹⁴⁴⁴ “Draft articles on responsibility of States for internationally wrongful acts with commentaries”, *ibid.*, Arts. 2, 26: Article 2 states: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”. Acts of torture are breaches of the CAT.

¹⁴⁴⁵ First Geneva Convention, Arts. 49-50; Second Geneva Convention, Arts. 50-51; Third Geneva Convention, Arts. 129-130; Fourth Geneva Convention, Arts. 146-147; API, Art. 85(1); “Customary International Humanitarian Law, Rule 151: Individual Responsibility”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule151>; “Customary International Humanitarian Law, Rule 102: Individual Criminal Responsibility”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule102>; “Customary International Humanitarian Law, Rule 158: Prosecution of War Crimes”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158>.

¹⁴⁴⁶ This norm is also contained in Additional Protocol I. API, Arts. 86(2), 87; “Customary International Humanitarian Law, Rule 152: Command Responsibility for Orders to Commit War Crimes”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule152>; “Customary International Humanitarian Law, Rule 155: Defence of Superior Orders”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule155>.

¹⁴⁴⁷ Harold Koh’s memorandum on the applicability of the CAT in armed conflict stated that where “the CAT may impose some (quite limited) additional obligations on a State beyond the traditional rules of armed conflict, within its substantive and geographic realm of application” the CAT controls. Harold Hongju Koh, “Memorandum Opinion on the Geographic Scope of the Convention against Torture and Its Application in Situations of Armed Conflict”, 21 January 2013, p. 90, <<http://justsecurity.org/wp-content/uploads/2014/03/state-department-cat-memo.pdf>>.

¹⁴⁴⁸ Rome Statute, Arts. 7-8.

b. Domestic Standards

521. Under federal law, criminal liability extends to those who aid, abet, counsel, command, induce or procure the commission of an offence.¹⁴⁴⁹ An accessory after the fact also incurs liability for assisting the offender to hinder or prevent authorities from bringing an offender to justice.¹⁴⁵⁰
522. US federal criminal jurisdiction is extended by 18 U.S.C. Section 7 to encompass the special maritime and territorial jurisdiction. Section 7 extends federal criminal jurisdiction to offences committed by or against US nationals in a variety of locations outside the United States, including Guantánamo, military bases, federal buildings and diplomatic missions.¹⁴⁵¹ No exception exists for situations where the victim is a terrorist suspect or the perpetrator is a federal agent. Accordingly, this provision has been determined to extend to the prosecution of a US national for the assault of a terrorist suspect during interrogations.¹⁴⁵²
523. Section 242 of Title 18 of the US Code enables the prosecution of individuals for wilfully depriving others of rights “protected by the Constitution or laws of the United States”, including cruel and unusual punishment, when the individual acted under the colour of law.¹⁴⁵³ This provision also applies when an individual subjects his or her victim to “different punishments, pains or penalties” on the ground that the victim is an alien, or by reason of color or race. The punishment for such an offence is a fine or imprisonment for no more than one year. However, higher sentences are applicable in some situations, such as if bodily injury or death result.¹⁴⁵⁴ Unless death results, the statute of limitations is five years.¹⁴⁵⁵

¹⁴⁴⁹ 18 U.S.C. § 2. See, also, UN CAT, Second Periodic Reports of State Parties Due in 1999, United States of America, Addendum, CAT/C/48/Add.3/Rev.1, 6 May 2005, para. 12, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=226&Lang=en>.

¹⁴⁵⁰ 18 U.S.C. § 3.

¹⁴⁵¹ 18 U.S.C. § 7; United States Court of Appeals for the Fourth Circuit, *United States of America v. David A. Passaro*, Case No. 07-4249 and 07-4339, 10 August 2009, <<http://www.ca4.uscourts.gov/Opinions/Published/074249.P.pdf>>; UN HRC, Fourth periodic report of the United States of America, *op. cit.*, note 39, para. 537.

¹⁴⁵² 18 U.S.C. § 113; United States Court of Appeals for the Fourth Circuit, *United States of America v. Passaro, ibid.*; UN CAT, Fourth periodic report of the United States of America, *ibid.* The United States has said this section also extended to other crimes such as murder under 18 U.S.C. § 1111 and sexual abuse under 18 U.S.C. § 2241.

¹⁴⁵³ There are several relevant Constitutional provisions. The Eighth Amendment to the US Constitution prohibits “cruel and unusual punishments”. The due process clauses of the Fifth and Fourteenth Amendments forbid governmental conduct that “shocks the conscience”, such as acts of torture and cruel or inhuman treatment. The Fourth Amendment provides protection from interrogations under torture.

¹⁴⁵⁴ “Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.” 18 U.S.C. § 242.

¹⁴⁵⁵ 18 U.S.C. § 3282.

524. The Torture Convention Implementation Act criminalizes torture, but not ill-treatment, *outside* the United States. Under the Act, individuals are liable for torture if they commit, attempt to commit or conspire to commit torture outside the United States. The United States can establish jurisdiction if the perpetrator is a US national or if the perpetrator is present in the United States, regardless of the nationality of the victim or the perpetrator.¹⁴⁵⁶ Since conspiracy to commit torture is included in the Act, conspiracies to transfer individuals between states outside the United States to be tortured may also be covered.¹⁴⁵⁷ Both military and civilian personnel may be prosecuted under this Act.¹⁴⁵⁸ The penalty is a fine or up to 20 years' imprisonment or both. If the offence, except for conspiracy, results in death, the perpetrator may be sentenced to death or imprisoned for life.¹⁴⁵⁹ The statute of limitations for torture is eight years unless the "offense resulted in, or created a foreseeable risk of, death or serious bodily injury". In this situation, there is no statute of limitations.¹⁴⁶⁰
525. The War Crimes Act extends federal criminal jurisdiction to US military personnel who have committed war crimes, including breaches of Common Article 3, inside or outside the United States.¹⁴⁶¹ After the War Crimes Act was amended in 2006, individuals were only liable for grave breaches of Common Article 3, which includes torture and ill-treatment.¹⁴⁶² Thus, when the perpetrators are US nationals or US military personnel, they are criminally liable for acts of torture against an individual in their custody or under their physical control when the act is committed, in the context of, and in association with, an international or non-international armed conflict. They are also liable for cruel and inhuman treatment under the same circumstances. Liability extends to those who commit, conspire to commit or attempt to commit torture or ill-treatment. However, acts of torture and ill-treatment must amount to a grave breach of Common Article 3 to trigger liability.¹⁴⁶³ The penalty for committing a war crime is a fine, imprisonment for a term up to life, both a fine and imprisonment or potentially the death penalty if the victim dies as a result of the crime.¹⁴⁶⁴ Like other federal crimes, the five-year statute of limitations is applicable to the War Crimes Act except in capital cases, where no limitation applies.¹⁴⁶⁵
526. The Torture Convention Implementation Act does not apply to acts of torture or ill-treatment committed within the United States. The War Crimes Act is not applicable to acts of torture or ill-treatment outside an armed conflict. Acts of torture or ill-treatment that do not fall within the jurisdictional scope of these Acts can, in certain circumstances, be

¹⁴⁵⁶ Torture Convention Implementation Act, 18 U.S.C. § 2340A.

¹⁴⁵⁷ *Ibid.*; Garcia, "U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques", *op. cit.*, note 348, pp. 7-8.

¹⁴⁵⁸ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 127.

¹⁴⁵⁹ Torture Convention Implementation Act, 18 U.S.C. § 2340A.

¹⁴⁶⁰ 18 U.S.C. § 3286. See, also, 18 U.S.C. § 2332b.

¹⁴⁶¹ War Crimes Act, 18 U.S.C. § 2441.

¹⁴⁶² The MCA 2006 amended the War Crimes Act by stating that only grave breaches of Common Article 3 are criminalized and more narrowly defining a grave breach. In effect, this provided for a more limited basis of criminal liability. See MCA, § 6(a), (b)(1)(B), 18 U.S.C. § 2441 note.

¹⁴⁶³ War Crimes Act, 18 U.S.C. § 2441(c)(1), (c)(3), (d)(1)(A), (d)(1)(B).

¹⁴⁶⁴ War Crimes Act, 18 U.S.C. § 2441(a).

¹⁴⁶⁵ 18 U.S.C. § 3282; Michael John Garcia, "The War Crimes Act: Current Issues", Congressional Research Service, 22 January 2009, p. 5, <<http://fas.org/sgp/crs/intel/RL33662.pdf>>; Charles Doyle, "Statutes of Limitation in Federal Criminal Cases: An Overview," Congressional Research Service, 1 October 2012, <<http://fas.org/sgp/crs/misc/RL31253.pdf>>.

prosecuted domestically as comparative federal crimes, such as mayhem, aggravated assault, battery or murder.¹⁴⁶⁶ Depending on the nature of the offence and the perpetrator's intent, these crimes could entail imprisonment for one to twenty years, a fine or both.¹⁴⁶⁷ Generally, the statute of limitations for these federal crimes is five years unless the crime is a capital offence.¹⁴⁶⁸

527. The UCMJ authorizes the prosecution of Armed Forces personnel for a variety of offences committed worldwide¹⁴⁶⁹ and can be utilized for prosecutions related to the torture and ill-treatment of detainees. For instance, the UCMJ contains some relevant prosecutable offences, including murder, cruelty, maiming, and assault.¹⁴⁷⁰ Under the UCMJ, members of the Armed Forces are liable where they commit, aid, abet, counsel, command, conspire, procure, solicit, attempt or act as an accessory after the fact.¹⁴⁷¹ Moreover, the UCMJ allows the military to prosecute non-capital federal offences in a court-martial.¹⁴⁷² As a result, offences included in the War Crimes Act and in the Torture Convention Implementation Act may be prosecuted in a court-martial.¹⁴⁷³ However, the most serious crimes under these acts, those where the victims die, are excluded, as these are capital offences.¹⁴⁷⁴ Penalties under the UCMJ depend on the gravity of the offence. Maiming, for instance, can result in imprisonment for up to 20 years.¹⁴⁷⁵ Similar to federal offences, UCMJ offences are generally subject to a five-year statute of limitations.¹⁴⁷⁶
528. The Military Extraterritorial Jurisdiction Act (MEJA) provides for the prosecution of offences committed by members of the Armed Forces or civilian employees and contractors for conduct that occurred within the special maritime and territorial jurisdiction contained in 18 U.S.C. Section 7. To be prosecuted under this Act, the offence must be one that is subject to imprisonment for more than one year. A member of the Armed Forces may only be prosecuted if the member is no longer subject to the UCMJ or if the offence was committed with at least one other defendant that was not subject to the UCMJ.¹⁴⁷⁷
529. US government personnel are protected under Section 1004 of the DTA in any criminal action in certain situations. Officials or agents who have used abusive detention or interrogation techniques are protected when those methods were considered lawful under domestic law and the official or agent "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know" they were unlawful. This provision explains that "good faith reliance on advice of counsel should be an important

¹⁴⁶⁶ UN HRC, Fourth periodic report of the United States of America, *op. cit.*, note 39, para. 173.

¹⁴⁶⁷ For instance, simple assault cannot result in imprisonment for more than one year but maiming with intent to torture could result in up to 20 years' imprisonment. 18 U.S.C. §§ 113, 114.

¹⁴⁶⁸ 18 U.S.C. § 3282; Doyle, "Statutes of Limitation in Federal Criminal Cases", *op. cit.*, note 1465, p. 1.

¹⁴⁶⁹ UCMJ, Art. 5; 10 U.S.C. § 805.

¹⁴⁷⁰ UCMJ, Arts. 93, 118, 124, 128; 10 U.S.C. §§ 893, 918, 924, 928.

¹⁴⁷¹ UCMJ, Arts. 77-78, 80-82; 10 U.S.C. §§ 877-878, 880-882.

¹⁴⁷² UCMJ, Art. 134; 10 U.S.C. § 934.

¹⁴⁷³ Major Mynda G. Ohman, "Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Criminal Justice", The George Washington University Law School, 22 May 2005, pp. 2, 6, 28, 31-32.

<<http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA435148>>.

¹⁴⁷⁴ *Ibid.*, p. 2.

¹⁴⁷⁵ "Manual for Courts-Martial United States", 2012 Edition, IV-84, <<http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>>.

¹⁴⁷⁶ Exceptions exist to this limitation, such as offences punishable by death. UCMJ, Art. 43; 10 U.S.C. § 843.

¹⁴⁷⁷ 18 U.S.C. § 3261.

factor (...) in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful”.¹⁴⁷⁸ In its latest periodic report to the Committee against Torture, the United States stated that superior orders may not be used as justification for torture.¹⁴⁷⁹

c. Findings and Analysis

LEGISLATION

530. The limitations of the US definition of torture and ill-treatment discussed in Part 1-II-A of this report restrict the ability of the US government to hold perpetrators accountable. As previously explained, the US definition of torture narrows the scope of torture as set out in international standards by requiring severe mental pain and suffering, by requiring specific intent and by limiting the applicability of acquiescence. Additionally, the definition of ill-treatment, as contained in the War Crimes Act, does not appear to incorporate degrading treatment. These limitations effectively narrow the scope of acts that may be prosecuted as the offences of torture or ill-treatment. Furthermore, the Torture Convention Implementation Act only applies to acts outside the United States.¹⁴⁸⁰ The War Crimes Act does cover acts of torture and ill-treatment that occur abroad or domestically, but it is limited to those associated with armed conflicts. While domestic criminal provisions such as assault may be used for prosecutions in relation to conduct amounting to torture or ill-treatment, defining and criminalizing torture as a separate offence draws attention to the gravity of the offence, emphasizes the need for appropriate punishment, strengthens deterrence, improves records that track the crime of torture, and allows for public monitoring of state action or inaction in relation to the CAT.¹⁴⁸¹ Narrowing the scope of torture so as to cover fewer acts than those defined in Article 1 of the CAT, raises concerns regarding the obligations of the United States under Article 4 (duty to ensure that all acts of torture are offences under criminal law) and Article 5 (duty to establish jurisdiction over all acts of torture) of the CAT.
531. ODIHR notes the extension of territorial jurisdiction through 18 U.S.C. Section 7, MEJA and the UCMJ. Except for the limitations identified above, the legal framework generally appears to allow for the prosecution of US officials, members of the armed forces and civilians for acts of torture and ill-treatment committed at Guantánamo Bay or other places abroad.
532. US legislation, particularly the 20-year sentence authorized by the Torture Convention Implementation Act, is in most cases capable of allowing for the imposition of sentences that reflect the gravity of the crime. Nevertheless, US legislation also allows a court to impose only a fine without mandatory imprisonment. The imposition of a fine fails to adequately punish a perpetrator of torture or ill-treatment. Additionally, acts of torture under the UCMJ and federal criminal legislation would typically be prosecuted as other

¹⁴⁷⁸ DTA, § 1004(a).

¹⁴⁷⁹ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 39.

¹⁴⁸⁰ Torture Convention Implementation Act, 18 U.S.C. §§ 2340-2340A; UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 13.

¹⁴⁸¹ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 11.

offences, such as assault. While holding perpetrators accountable under related criminal provisions can be utilized for acts of torture, such provisions often have more lenient sentences, including disciplinary action and fines, which do not adequately reflect the gravity of torture or ill-treatment. Inappropriate sanctions for torture undermine deterrence and do not provide any meaningful acknowledgement of the victims' suffering.¹⁴⁸²

533. The statutes of limitations contained in US legislation present restrictions on the ability to prosecute perpetrators of torture or ill-treatment, other than in cases where such conduct results in death, in which case, as capital offences, no statute of limitation applies. Given the limited number of investigations carried out by the US government and the subsequent lack of prosecutions, many cases of torture and ill-treatment allegedly perpetrated at Guantánamo Bay or under the CIA RDI programme are now likely barred by these statutes of limitations. For instance, Abu Zubaydah was subjected to torture and ill-treatment in 2002 during his detention in the CIA RDI programme¹⁴⁸³ which would now result in the statutes of limitations barring the prosecution of those responsible for his torture.¹⁴⁸⁴ Guantánamo began holding detainees in 2002, so some cases of torture and ill-treatment before 2006 are now likely also barred by the statutes of limitations. This is particularly problematic, as this period resulted in numerous allegations of acts of torture and ill-treatment and is frequently viewed as a period when some of the worst abuses were committed.¹⁴⁸⁵ Statutes of limitations should not apply to gross human rights violations as they allow for impunity. ODIHR believes that these statutes of limitation, in combination with the United States' failure to investigate and prosecute cases, allow for impunity and therefore violate international standards.
534. While the United States has reiterated that superior orders cannot be used to justify acts of torture,¹⁴⁸⁶ Section 1004 of the DTA enables US officials to avoid criminal liability involved in acts of torture and ill-treatment in specified circumstances. This provision, which relates specifically to the detention and interrogation of non-US citizens determined to be associated with international terrorist activity, provides a legal defence for those who engaged in abusive detention and interrogation techniques at a time when such techniques were considered lawful under domestic law. The provision stipulates that US officials can argue that they had no knowledge of the unlawful nature of the techniques and that "a person of ordinary sense and understanding" would not have known either. "Good faith reliance on advice of counsel" is mentioned as an important factor, among others, to assess whether a person of ordinary sense would have known that the techniques were illegal.¹⁴⁸⁷ As this provision may be used to negate criminal liability for subordinates involved in acts of torture, it conflicts with international law.

¹⁴⁸² See, for instance, UN Special Rapporteur on torture, "Study on the phenomena of torture", *op. cit.*, note 283, paras. 77-80.

¹⁴⁸³ Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171, pp. 40-47; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, para. 511.

¹⁴⁸⁴ Anthony D. Romero, "Letter to United States Attorney General Eric Holder, 'First Official Request of the New Administration for Appointment of an Independent Prosecutor for the Investigation and Prosecution of Any Violations of Federal Criminal Laws Related to the Interrogation of Detainees'", American Civil Liberties Union website, 17 March 2009, p. 6, <https://www.aclu.org/files/pdfs/safefree/lettertoholder_independentprosecutor.pdf>.

¹⁴⁸⁵ See, for instance, ODIHR interview with Matthew O'Hara, *op. cit.*, note 255; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 7.

¹⁴⁸⁶ UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, para. 39.

¹⁴⁸⁷ 42 U.S.C. § 2000dd-1.

INVESTIGATIONS AND PROSECUTIONS

535. During ODIHR's interviews with the Department of Defense Office of the General Counsel and Office of Detainee Policy, representatives explained that all allegations of abuse, including allegations of historical abuse, are now investigated immediately. Detainees can raise situations of abuse with the JTF-GTMO or the United States SOUTHCOM or through military commission, *habeas corpus* or PRB proceedings. JTF-GTMO usually conducts the initial investigation, although SOUTHCOM may also initiate their own investigation depending upon the nature and severity of the allegations. Under current procedures, the Office of Detainee Policy is notified of any serious allegations. However, they have no role in assessing the credibility of the allegations, since investigations are to stay independent from any policy office. According to the US officials interviewed by ODIHR, the procedure for transmitting serious allegations to the Office of Detainee Policy has not needed to be used since its inception.¹⁴⁸⁸ ODIHR asked for statistics on the number of allegations made and the subsequent results of the investigations during meetings with US officials and was informed that they had no such figures available at that stage.¹⁴⁸⁹
536. The Department of Defense and other agencies have conducted some investigations into allegations of abuse at Guantánamo. ODIHR was informed that Defense Department investigations are conducted by a military member who is not in the direct chain of command.¹⁴⁹⁰ For instance, in 2004, the Naval Inspector General conducted two reviews of intelligence and detention operations. Both reviews found only minor infractions. At the end of 2004, two general officers were appointed to conduct an investigation into FBI allegations of detainee abuse, which resulted in the so-called Schmidt Report.¹⁴⁹¹ According to a US summary of these reviews, the United States did not find evidence to substantiate claims of serious abuse. Instead, they only found minor infractions ranging from unusual haircuts given to two detainees to the use of pepper spray in one case. In the latter case, the accused individual underwent a special court-martial, where he was acquitted.¹⁴⁹² In 2007, Colonel Richard Bassett conducted an investigation into allegations of guards beating detainees. After interviewing approximately twenty people, who did not include any of the detainees allegedly beaten, Colonel Bassett concluded that there was insufficient evidence to proceed further.¹⁴⁹³ In accordance with Executive Order 13492, the Secretary of Defense tasked a Defense Department team to review Guantánamo's

¹⁴⁸⁸ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194.

¹⁴⁸⁹ *Ibid.*

¹⁴⁹⁰ *Ibid.*

¹⁴⁹¹ Although the investigation was in regard to FBI allegations of the mistreatment of detainees, it was conducted by military personnel in line with Army Regulation 15-6. Schmidt Report, *op. cit.*, note 522; UN CAT, Second Periodic Reports of State Parties Due in 1999, United States of America, *op. cit.*, note 1449, paras. 83-85.

¹⁴⁹² The information submitted to the Committee against Torture in 2013 did not include other specific investigations into allegations of abuse at Guantánamo or their results. UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162; UN CAT, Second Periodic Reports of State Parties Due in 1999, United States of America, *ibid.*, para. 86.

¹⁴⁹³ "Research Brief: Selected examples of Defence, Intelligence and Justice Investigation Reports into detention and interrogation practices", International Center for Transitional Justice, November 2008, p. 11, <<http://ictj.org/sites/default/files/ICTJ-USA-Accountability-AgencyInvestigations-ResearchBrief-Nov08.pdf>>; "'No evidence' of Guantanamo abuse", BBC News website, 7 February 2007, <<http://news.bbc.co.uk/2/hi/americas/6340457.stm>>.

conditions of confinement in 2009. The review concluded that the conditions conformed with Common Article 3, including with the humane treatment of all people.¹⁴⁹⁴ The FBI also surveyed FBI agents on whether they witnessed abuses at Guantánamo in 2007, and the Justice Department’s Inspector General reviewed FBI involvement in detainee abuse.¹⁴⁹⁵ Although some investigations have been conducted into allegations of abusive treatment by US personnel stationed at Guantánamo, the majority of investigations appear to be conducted by the Department of Defense itself, which raises concerns regarding the impartiality of these investigations.¹⁴⁹⁶

537. Additionally, FBI agents began raising concerns of detainee abuse to the FBI and to the Defense Department in 2002 and 2003.¹⁴⁹⁷ Yet, the reviews by the Defense Department and the Justice Department into these allegations only commenced in 2004.¹⁴⁹⁸ A prompt investigation is one that is commenced within hours or days after allegations of torture are made¹⁴⁹⁹ rather than years later.

538. Furthermore, limitations placed on the scope of investigations affect the accuracy of the outcome. For instance, the Schmidt Report was limited to FBI allegations of abuse for the most part¹⁵⁰⁰ and to determining whether the conduct described in the FBI allegations was authorized at the time.¹⁵⁰¹ Thus, it did not review the legal validity of the interrogation techniques authorized in the field manual or approved by the Secretary of Defense.¹⁵⁰²

539. ODIHR has considered information from a broad range of sources about substantiated credible allegations of acts amounting to torture and ill-treatment at Guantánamo. These interviews, cases and reports have consistently cited the use of similar techniques, including sleep deprivation for prolonged periods, extreme temperatures, beatings, threats, prolonged periods of solitary confinement, restraint in very painful positions, the use of violent cell extraction teams and painful force-feeding procedures. Allegedly, these techniques were frequently used in combination.¹⁵⁰³ Information provided on the majority of US investigations regarding allegations of abuses at Guantánamo, however, reveals that these investigations were not prompt, that detainees allegations were not necessarily considered, that the legal validity of interrogation techniques was not taken into account and that only minor infractions were found. ODIHR considers that in light of the above allegations, there are reasonable grounds to believe that acts of torture or ill-treatment were

¹⁴⁹⁴ Walsh Report, *op. cit.*, note 422, p. 4.

¹⁴⁹⁵ “Research Brief”, International Center for Transitional Justice, *op. cit.*, note 1493, p. 11.

¹⁴⁹⁶ UN Special Procedures, “Situation of detainees at Guantánamo Bay”, *op. cit.*, note 23, para. 56.

¹⁴⁹⁷ “A Review of the FBI’s Involvement and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq”, United States Department of Justice, Office of the Inspector General, May 2008, pp. x-xii, <<http://www.justice.gov/oig/special/s0805/final.pdf>>.

¹⁴⁹⁸ UN CAT, Second Periodic Reports of State Parties Due in 1999, United States of America, *op. cit.*, note 1449, paras. 83-85; “Research Brief”, International Center for Transitional Justice, *op. cit.*, note 1493, pp. 7, 11.

¹⁴⁹⁹ UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 63.

¹⁵⁰⁰ It should however be noted that, after submission of the first report of investigation in April 2005, the investigation was reopened, and subsequently considered some allegations which had been raised specifically by two detainees. Schmidt Report, *op. cit.*, note 522, pp. 3, 21-22.

¹⁵⁰¹ *Ibid.*, pp. 3-4; Mark Denbeaux, “Torture: Who Knew: An Analysis of the FBI and Department of Defense Reactions to Harsh Interrogation Methods at Guantanamo”, Seton Hall Law School Center for Policy and Research, 2010, p. 15, <http://law.shu.edu/publications/GuantanamoReports/torture_who_knew_final.pdf>.

¹⁵⁰² Schmidt Report, *op. cit.*, note 522, p. 4.

¹⁵⁰³ See Part 1-II-A of this report for more information on these practices.

committed at Guantánamo. However, official investigations conducted into allegations of abuse at Guantánamo do not appear to have been prompt, independent, impartial, thorough and effective and the United States may therefore violate the duty to conduct investigations as prescribed in international law.

540. Although US officials informed ODIHR that individuals who did not follow procedures were held accountable, ODIHR is unaware of any prosecutions of US officials alleged to have committed torture or ill-treatment at Guantánamo except for the case involving the use of pepper spray referred to previously. Additionally, ODIHR is not aware of any prosecutions of US officials for acts of torture or ill-treatment against Guantánamo detainees at the federal level.¹⁵⁰⁴ No prosecutions have been conducted under the Torture Convention Implementation Act regarding treatment at Guantánamo. During meetings with US officials, no details were provided on the total number of individuals held accountable, on what conduct allegedly took place, on where the conduct took place or on the penalties imposed if any convictions resulted.¹⁵⁰⁵ Similarly, the US report to the Committee against Torture cited an 86 per cent conviction rate for service members that have been court-martialled for mistreating detainees, but did not indicate the conduct involved, the resulting penalties or whether this mistreatment occurred in relation to treatment at Guantánamo.¹⁵⁰⁶ Based on the serious and credible allegations of torture and ill-treatment and insufficient information on corresponding prosecutions, ODIHR is concerned that perpetrators of acts of torture are not being held accountable and/or are not being given penalties that reflect the grave nature of their acts as required by international law.¹⁵⁰⁷
541. Both the executive and legislative branch of the US government have acknowledged that US officials committed acts of torture and ill-treatment as part of the CIA RDI programme. The Senate Study on the CIA RDI Programme found that the CIA tortured detainees, concealed details about the severity of its methods and took credit for critical pieces of intelligence that the detainees revealed without the use of harsh techniques.¹⁵⁰⁸ In the case of Abu Zubaydah, the Senate Select Committee on Intelligence discovered that the techniques used on him went beyond the authorization given by the Bush administration's Justice Department and that the CIA knowingly misled the White House, Congress and the Justice Department about the intelligence value of Abu Zubaydah in order to use harsher interrogation techniques.¹⁵⁰⁹ President Obama also recently admitted that “we tortured

¹⁵⁰⁴ ODIHR is aware that a civilian contractor, not a US official, David A. Passaro, was prosecuted in relation to acts committed in Afghanistan. See, for example, “Q&A: Private Military Contractors and the Law”, Human Rights Watch website, <<http://www.hrw.org/legacy/english/docs/2004/05/05/iraq8547.htm>>.

¹⁵⁰⁵ ODIHR meeting with the Department of Defense Office of the General Counsel and Office of Detainee Policy, *op. cit.*, note 194.

¹⁵⁰⁶ Similarly, during the United States' session with the UN CAT, the US delegation did not provide any information on prosecutions related to treatment at Guantánamo. “UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, *op. cit.*, note 77; UN CAT, Third to fifth periodic reports of States parties due in 2011, United States of America, *op. cit.*, note 162, paras. 127-134.

¹⁵⁰⁷ The UN CAT said that despite the US declaration that thousands of investigations had been conducted, the US government only provided minimal statistics and insufficient information on sentencing and criminal or disciplinary sanctions. It found it could not assess whether the US government was meeting its obligations under the CAT. UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, paras. 12-13.

¹⁵⁰⁸ Senate Study on the CIA RDI Programme, 9 December 2014, Foreword, p. 4, <<http://www.intelligence.senate.gov/sites/default/files/press/foreword.pdf>>; Senate Study on the CIA RDI Programme, Findings and Conclusions, *op. cit.*, note 388, pp. 2-5.

¹⁵⁰⁹ *Ibid.*, Findings and Conclusions, pp. 3, 5 and Executive Summary, pp. 37-38, 47, 204-210, 412.

some folks”.¹⁵¹⁰ In addition to admissions by the US government, the ECtHR determined that Khalid El-Masri, Abu Zubaydah and Al-Nashiri were tortured while they were in the CIA RDI programme.¹⁵¹¹

542. Despite US government admissions, numerous allegations of torture, well-documented cases and international court decisions, the United States has not yet undertaken prompt, independent, impartial, thorough and effective investigations or subsequent prosecutions regarding the conduct undertaken in the CIA RDI programme. US officials informed ODIHR that the then-Attorney General, Eric Holder, took allegations of torture and ill-treatment extremely seriously and that the failure to proceed with prosecutions was based on the conclusion that the available evidence was insufficient to obtain and sustain convictions.¹⁵¹²
543. Although some investigations have taken place regarding alleged acts of torture in relation to the CIA RDI programme, these investigations have been criticized for not being independent and for not covering the full range of acts allegedly committed.¹⁵¹³ Following a two-year preliminary investigation into the CIA RDI programme, the Assistant Attorney of the District of Connecticut, John Durham, was tasked to conduct an investigation into the programme. He determined that a full investigation into the programme was not warranted except in the case of the deaths of two detainees.¹⁵¹⁴ This decision is inexplicable given the admissions by US officials, and international inquiries and court decisions that determined that people were tortured as part of the programme.¹⁵¹⁵ No prosecutions were subsequently conducted regarding the deaths of the two detainees as the Department of Justice concluded that the admissible evidence was insufficient to obtain a conviction beyond a reasonable doubt.¹⁵¹⁶ Although the US government says that 96 witnesses were interviewed during the course of the investigation, some CIA detainees reported that they were not even contacted.¹⁵¹⁷

¹⁵¹⁰ United States President Barack H. Obama, “Press Conference by the President”, The White House website, 1 August 2014, <<http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>>.

¹⁵¹¹ ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, para. 511; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 516; ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, *op. cit.*, note 300, para. 223.

¹⁵¹² ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193; “UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, *op. cit.*, note 77.

¹⁵¹³ “Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama”, Human Rights Watch, November 2008, p. 18, <http://www.hrw.org/sites/default/files/related_material/us1108web.pdf>.

¹⁵¹⁴ United States Attorney General Eric Holder, “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees”, *op. cit.*, note 392.

¹⁵¹⁵ See, for instance, *Globalizing Torture*, *op. cit.*, note 170, pp. 6-8; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, para. 511; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 516.

¹⁵¹⁶ “Mr. Durham’s review concluded that the admissible evidence would not be sufficient to obtain and sustain convictions beyond a reasonable doubt. The Committee shares the concerns (...) over the decision not to prosecute and punish the alleged perpetrators (...) In the event that investigations are reopened, the State party should ensure that any such inquiries are designed to address the alleged shortcomings in the thoroughness of the previous reviews and investigations.” UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 12; UN Special Rapporteur on torture, Interim report to the General Assembly, A/68/295, *op. cit.*, note 304, para. 62: “The State bears the burden of evidentiary proof to rebut the presumption that the State is responsible for violations of the right to life and for inhumane treatment committed against persons in custody”; United States Attorney General Eric Holder, “Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees”, United States Department of Justice website, 30 August 2012, <<http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>>.

¹⁵¹⁷ “[T]he Committee remains concerned about information before it that some former CIA detainees, who had been held in United States custody abroad, were never interviewed during the investigations, which casts doubts as to whether that high

544. Despite having access to the full version of the Senate Study on the CIA RDI Programme, the Department of Justice has announced standing by its decision, following the Durham investigation, not to mount criminal charges.¹⁵¹⁸ ODIHR is particularly troubled by this decision, given that the released executive summary of the Senate Study has in itself already revealed significant new information on the confirmed or presumed abuses inflicted on the detainees held by the CIA, the number of detainees subjected to them and the decisions that have led to these abuses.¹⁵¹⁹ ODIHR urges the US authorities to take necessary steps to conduct prompt, independent, impartial, thorough and effective investigations into the conduct described in the Senate Study and to hold those responsible accountable.
545. Regarding allegations that members of the executive branch destroyed evidence of their crimes, such as CIA interrogation videotapes, the former Attorney General admitted that the investigation into this issue only looked into whether the destruction was illegal rather than whether the content was illegal.¹⁵²⁰ Destroying torture evidence is concealment, which must be criminalized and prosecuted. No one was prosecuted for this offence,¹⁵²¹ and no US official has ever been prosecuted for their involvement in the CIA RDI programme.¹⁵²² Thus, as part of the CIA RDI programme, the US government has admitted to the commission of torture, but failed to conduct effective investigations and subsequent prosecutions of US government officials despite information that provides more than reasonable grounds to do so.¹⁵²³ Thus, ODIHR concludes that the US government has

profile inquiry was properly conducted.” UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 12; “UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, *op. cit.*, note 77; Spencer Ackerman, “Former CIA Detainees Claim US Torture Investigators Never Interviewed Them”, The Guardian website, 11 November 2014, <http://www.theguardian.com/us-news/2014/nov/11/libyan-cia-detainees-torture-inquiry-interview?CMP=tw_t_gu>.

¹⁵¹⁸ Charlie Savage, “U.S. Tells Court That Documents From Torture Investigation Should Remain Secret”, The New York Times website, 10 December 2014, <http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?_r=1>. The United States Department of Justice spokesperson explained that “(...) [t]hose investigators have also reviewed the Senate Committee’s full report and did not find any new information that they had not previously considered in reaching their determination. This inquiry was extraordinarily thorough and we stand by our previously announced decision not to initiate criminal charges”, Carol Rosenberg, “Human rights groups ask attorney general to order new CIA torture probe”, Miami Herald website, 23 June 2015, <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article25313905.html>>.

¹⁵¹⁹ Amnesty International, American Civil Liberties Union, Human Rights Watch, Letter to The Honorable Loretta Lynch, Attorney General, United States Department of Justice, “Request for Appointment of a Special Prosecutor for Torture”, 23 June 2015, <http://www.hrw.org/sites/default/files/related_material/Letter-to-AG-Lynch-Special-Prosecutor-Torture.pdf>; Andy Worthington, “Six months after the CIA Torture Report, We’re Still Waiting for Accountability”, 25 June 2015, andyworthington.co.uk, <<http://www.andyworthington.co.uk/2015/06/25/six-months-after-the-cia-torture-report-were-still-waiting-for-accountability/>>.

¹⁵²⁰ “Letter to United States Attorney General Eric Holder”, American Civil Liberties Union website, *op. cit.*, note 1484, pp. 8-9.

¹⁵²¹ “[The Committee] expresses concern about the absence of criminal prosecutions for the alleged destruction of torture evidence by CIA personnel, including the destruction of the 92 videotapes of interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri that triggered Mr. Durham’s initial mandate.” UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, para. 12; “Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel”, United States Department of Justice website, 9 November 2010, <<http://www.justice.gov/opa/pr/department-justice-statement-investigation-destruction-videotapes-cia-personnel>>.

¹⁵²² “Letter to United States Attorney General Eric Holder”, American Civil Liberties Union website, *op. cit.*, note 1484, p. 9.

¹⁵²³ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, paras. 12, 17, 26; UN Special Rapporteur on torture, “‘If the US tortures, why can’t we do it?’ UN expert says moral high ground must be recovered”, OHCHR website, 11 December 2014,

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15406&LangID=E>>: “It is the Government’s responsibility (...) to ensure accountability and transparency to the fullest extent possible”; UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, “Zeid: Landmark U.S. and Brazil Reports Highlight need to Eradicate Torture on 30th

violated the ICCPR and Articles 5, 7 and 12 of the CAT, as well as failed to meet its OSCE commitments. ODIHR reminds the United States that there is no justification for torture and perpetrators of torture must be held accountable.

546. As addressed in Part 1-II-A of this report, medical personnel have been involved in the torture and ill-treatment of detainees during interrogations in Guantánamo and in the CIA RDI programme. By participating in the interrogation process and by devising the CIA's "enhanced interrogation techniques", medical personnel have thereby participated in and/or acquiesced to the use of techniques that constitute torture and ill-treatment.¹⁵²⁴ By doing so, medical personnel violated both international standards of medical ethics and international law. Yet, no military or intelligence health professional, or civilian medical or psychological contractors, has ever been held accountable for their involvement in acts of torture or ill-treatment regarding the treatment of Guantánamo detainees or detainees in the CIA RDI programme. Instead, state licensing and disciplinary boards dismissed complaints against medical personnel working at Guantánamo and at CIA RDI facilities.¹⁵²⁵ By failing to hold medical staff accountable for their complicity in acts of torture and ill-treatment, the United States has perpetuated and tacitly legitimized the use of torture and ill-treatment which is contrary to its OSCE commitments and in violation of other international standards.

SUPERIOR ORDERS

547. Individuals at the highest levels of the US government devised and authorized practices that amount to torture and ill-treatment, particularly for the CIA's "enhanced interrogation techniques". Former President Bush admitted in his memoirs that he approved the use of waterboarding and other "enhanced interrogation techniques".¹⁵²⁶ Similarly, former Vice President Dick Cheney said he was "aware of the program" and "involved in helping get the process cleared".¹⁵²⁷ Not only did former President Bush and Vice President Cheney support the CIA RDI programme, they reportedly advocated for criminal defences and immunity for CIA personnel involved in the Programme.¹⁵²⁸ Former CIA Director George Tenet oversaw and implemented the CIA RDI programme, thereby rendering it highly likely that he knew, or should have known, that detainees were tortured under the

Anniversary of Convention", OHCHR website, 10 December 2014, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15405&LangID=E>>; IACHR, "IACHR Calls on the United States to Investigate and Punish Acts of Torture Established in the Senate Intelligence Committee Report", Organization of American States website, 12 December 2014, <http://www.oas.org/en/iachr/media_center/PReleases/2014/152.asp>; Harold Koh, "The Torture Report is Only the First Step", Just Security website, 12 December 2014, <<http://justsecurity.org/18372/torture-report-step/>>.

¹⁵²⁴ As mentioned previously, the independent review of the APA determined that "key APA officials" had colluded with the DoD, the CIA and/or other government officials "to support torture" during the Bush administration. For more information, see Part 1-II-A.

¹⁵²⁵ *Ethics Abandoned*, *op. cit.*, note 430, pp. 135-136.

¹⁵²⁶ "Decision Points - Part 3", NBC News website, 8 November 2010, <<http://www.nbcnews.com/video/nbc-news/40073863/#40073863>>; "Bush on Waterboarding: 'Damn Right'", CNN website, 5 November 2010, <<http://edition.cnn.com/2010/POLITICS/11/05/bush.book/>>; Nick Wing, "Bush Directly Authorized Use of Waterboarding, Still Rejects 'Torture' Classification in New Book", The Huffington Post website, 4 November 2010, <http://www.huffingtonpost.com/2010/11/04/bush-waterboarding-torture-book_n_778817.html>.

¹⁵²⁷ "Transcript: Cheney Defends Hard Line Tactics", ABC News website, 16 December 2008, <<http://abcnews.go.com/Politics/story?id=6464697&page=1&singlePage=true>>.

¹⁵²⁸ "Letter to United States Attorney General Eric Holder", American Civil Liberties Union website, *op. cit.*, note 1484, pp. 4-5.

programme.¹⁵²⁹ The legal memoranda justifying the use of torture and ill-treatment were produced by counsel in the White House, the Department of Defense and the Department of Justice.¹⁵³⁰ Although ethics lawyers in the Justice Department concluded that two of these lawyers, Jay Bybee and John Yoo, had demonstrated professional misconduct, the Justice Department later determined that they were only guilty of flawed legal reasoning, not professional misconduct.¹⁵³¹ Furthermore, former Secretary of Defense Donald Rumsfeld authorized the use of 24 of 35 interrogation techniques at Guantánamo, as discussed in more detail in Part 1-II-A, which when taken together, amount to torture or ill-treatment.¹⁵³² The Senate Armed Services Committee's inquiry into detainee treatment while in US custody also found that senior military and civilian officials authorized the interrogation tactics used on Guantánamo detainees.¹⁵³³ By authorizing, ordering or acquiescing to the use of torture, high-level US officials are complicit in the torture of detainees. However, no high-level official has been investigated and/or prosecuted for their role even though some officials have even admitted to authorizing torture.¹⁵³⁴ This complicity and subsequent failure to conduct effective investigations and prosecutions breaches international standards, particularly Articles 5, 7 and 12 of the CAT.

ACCOUNTABILITY OF OTHER PARTICIPATING STATES

548. Other OSCE participating States assisted the United States with the CIA RDI programme and took advantage of the measures used to question detainees.¹⁵³⁵ Albania, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Finland, Georgia, Germany, Greece, Iceland, Ireland, Italy, Lithuania, the former Yugoslav Republic of Macedonia, Poland, Portugal, Romania, Spain, Sweden,

¹⁵²⁹ *Getting Away with Torture*, *op. cit.*, note 401, pp. 18, 25, 28-31, 70, 72-73, 85-90.

¹⁵³⁰ See, for instance, United States Deputy Assistant Attorney General John C. Yoo, "Memorandum for William J. Haynes II, General Counsel, Department of Defense, 'Application of Treaties and Laws to al Qaeda and Taliban Detainees'", 9 January 2002, <<http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.09.pdf>>; United States White House Counsel to the President, Alberto R. Gonzales, "Draft Memorandum for the President, 'Decision re application of the Geneva Convention on prisoners of war to the conflict with Al Qaeda and the Taliban'", 25 January 2002, <<http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.25.pdf>>; George W. Bush, "Memorandum: 'Humane Treatment of Taliban and al Qaeda detainees'", *op. cit.*, note 12; Bybee, "Memorandum: 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340 A'", *op. cit.*, note 353; Lieutenant Colonel Phifer, "Memorandum: 'Request for Approval of Counter-resistance Techniques'", in Haynes II, "Memorandum: 'Counter-resistance Techniques'", *op. cit.*, note 360; Donald H. Rumsfeld, "Memorandum: 'Counter-Resistance Techniques In The War On Terrorism'", *op. cit.*, note 360; Bradbury, "Memorandum: 'Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used In The Interrogation Of A High Value al Qaeda Detainee'", No. 13, *op. cit.*, note 371.

¹⁵³¹ In rejecting the ethics lawyers' conclusion, the Justice Department said that their analysis did not address the national climate of urgency at the time. Another Justice Department lawyer said that the time pressure and the pressure from White House officials made it permissible for Bybee to sign the memorandum. Eric Lichtblau and Scott Shane, "Report Faults 2 Authors of Bush Terror Memos", The New York Times website, 19 February 2010, <<http://www.nytimes.com/2010/02/20/us/politics/20justice.html>>.

¹⁵³² Donald H. Rumsfeld, "Memorandum: 'Counter-Resistance Techniques in the War on Terrorism'", *op. cit.*, note 360; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, p. 146.

¹⁵³³ "Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody", United States Senate Armed Services Committee, *op. cit.*, note 403, pp. xxv, xxvi-xxviii. See, also, Dr. Trudy Bond, Professor Benjamin Davis, Dr. Curtis F. J. Doebbler and the International Human Rights Clinic at Harvard Law School, "Shadow Report to the United Nations Committee against Torture on the Review of the Periodic Report of the United States of America", Advocates for US Torture Prosecutions, 29 September 2014, p. 2, <<http://hrp.law.harvard.edu/wp-content/uploads/2014/10/CAT-Shadow-Report-Advocates-for-US-Torture-Prosecutions.pdf>>.

¹⁵³⁴ *Globalizing Torture*, *op. cit.*, note 170, p. 11; Bond *et al.*, "Shadow Report", *ibid.*, pp. 2, 6-7, and Appendix C.

¹⁵³⁵ Marty, "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", *op. cit.*, note 174, pp. 1, 6-7.

Turkey, the United Kingdom and Uzbekistan have been implicated in having knowledge of or participating in the CIA RDI programme. These states differed in the assistance provided, as their roles reportedly varied from tolerating the programme to active participation by providing information; by approving the use of their airspace; by providing the use of facilities on their territory as secret detention centres; by abducting detainees; by questioning detainees while knowing that they had been subjected to torture and/or ill-treatment; or by detaining, questioning and torturing detainees for the CIA.¹⁵³⁶

549. Despite the involvement of these participating States, prompt, independent, impartial, thorough and effective investigations have consistently not been undertaken to hold to account those responsible.¹⁵³⁷ Many European participating States allowed the CIA to use their airspace or airports. At a minimum, 1,245 CIA-operated flights used European airspace or airports between 2001 and 2005, many of which were used for the CIA RDI programme.¹⁵³⁸ The ECtHR recently determined that Poland was complicit in the programme, as it provided a secret detention facility on its territory that allowed the CIA to torture detainees. Not only did the ECtHR find that Poland had failed to conduct an appropriate investigation, but it also found that Poland had committed a substantive violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits the use of torture and ill-treatment.¹⁵³⁹ Romania and Lithuania are also believed to have allowed the CIA to use facilities on their territories as secret detention sites.¹⁵⁴⁰ These participating States have, however, so far failed to conduct effective investigations and prosecutions.¹⁵⁴¹ In Italy, Italian intelligence officials avoided accountability for the abduction of Abu Omar after the Italian government invoked

¹⁵³⁶ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 52; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, paras. 112, 120, 126, 143, 158-159; CIA - “Extraordinary Rendition” Flights, Torture and Accountability, *op. cit.*, note 180, pp. 10-11; “Accountability for European Complicity in CIA Torture and Enforced Disappearance”, Amnesty International, *op. cit.*, note 490; *Globalizing Torture*, *op. cit.*, note 170, p. 6.

¹⁵³⁷ “Accountability for European Complicity in CIA Torture and Enforced Disappearance”, Amnesty International, *ibid.*, p. 1.

¹⁵³⁸ Resolution P6_TA(2007)0032, “Transportation and illegal detention of prisoners”, European Parliament, *op. cit.*, note 207, para. 42.

¹⁵³⁹ ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, paras. 493, 511-514; ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, paras. 499, 516-519, and holding No. 5: “For these reasons, the court, unanimously, (...) 5. Holds that there has been a violation of Article 3 of the Convention in its substantive aspect, on account of the respondent State’s complicity in the CIA High-Value Detainees Programme in that it enabled the US authorities to subject the applicant to torture and ill-treatment on its territory and to transfer the applicant from its territory despite the existence of a real risk that he would be subjected to treatment contrary to Article 3”. The ECtHR rejected the requests for referral submitted by Poland in both cases. The ECtHR judgments in these cases have become final on 16 February 2015, <<http://hudoc.echr.coe.int/webservices/content/pdf/003-5016676-6159979>>.

¹⁵⁴⁰ Cases against Lithuania and Romania are also pending at the European Court of Human Rights. See, ECtHR, *Abu Zubaydah v. Lithuania*, “Statement of Facts”, *op. cit.*, note 490; ECtHR, *Abd al Rahim Husseyn Muhammad Al Nashiri v. Romania*, “Statement of Facts”, *op. cit.*, note 490. See, also, UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, paras. 112-121; *Globalizing Torture*, *op. cit.*, note 170, p. 16; “Accountability for European Complicity in CIA Torture and Enforced Disappearance”, Amnesty International, *op. cit.*, note 490, p. 5. A number of former high officials in both Lithuania and Romania have admitted that their countries hosted CIA detention facilities, though some of them denied knowing for what use. See, for example, “Breaking the conspiracy of silence, USA’s European “Partners in Crime” must act after Senate Torture Report”, Amnesty International, 20 January 2015,

<<https://www.amnesty.org/en/documents/document/?indexNumber=eur01%2F002%2F2015&language=en>>. In February 2014, the Lithuanian Prosecutor General has opened a pre-trial investigation into the alleged rendition to Lithuania of al Hawsawi.

“Lithuania opens CIA rendition investigation”, Amnesty International, Public Statement, 21 February 2014, <http://www.amnesty.eu/content/assets/Reports/21022014_Lithuania_CIA_rendition_investigation_public_statement.pdf>.

¹⁵⁴¹ Resolution P6_TA(2007)0032, “Transportation and illegal detention of prisoners”, European Parliament, *op. cit.*, note 207, paras. 160-161; UN Special Procedures, “Joint study on global practices in relation to secret detention”, *op. cit.*, note 109, paras. 120-122.

the state secrets doctrine.¹⁵⁴² The United Kingdom is considered by many to have been one of the supporters of the programme. However, it has also failed to conduct an appropriate independent inquiry and to prosecute those responsible.¹⁵⁴³

550. States are responsible where they “knowingly engage in, render aid to or assist in the commission of internationally wrongful acts”, such as torture.¹⁵⁴⁴ Failure to investigate and to prosecute acts of torture when the alleged perpetrator is in any territory under the state’s jurisdiction therefore constitutes a violation of international legal obligations by other OSCE participating States.

551. Although the United States has failed to hold its officials accountable for acts of torture and ill-treatment, complaints against high-level US officials have been submitted in several participating States under the principle of universal jurisdiction, e.g., in Canada, France, Germany, Italy and Spain. In Italy, 26 US citizens were convicted in absentia for the abduction of Abu Omar.¹⁵⁴⁵ Spanish courts have continued to consider complaints by former Guantánamo detainees despite legislative attempts to impose jurisdictional restrictions.¹⁵⁴⁶ A French court has recently issued a subpoena for Major General Geoffrey Miller, Commander of the JTF-GTMO from 2002 to 2004, requesting him to appear in court for questioning over allegations of torture made by three French former detainees.¹⁵⁴⁷ ODIHR welcomes the recognition of universal jurisdiction in participating States’ legal frameworks and urges participating States to seriously investigate – with a view to prosecuting perpetrators where credible information exists – complaints regarding the US treatment of detainees in Guantánamo and at secret detention facilities to ensure accountability for torture and ill-treatment.¹⁵⁴⁸ Participating States have committed themselves to prosecuting perpetrators and to ensuring that the sole criterion for “taking appropriate remedial action” is “preserving and guaranteeing the life and security of any individual subjected to any form of torture” or ill-treatment.¹⁵⁴⁹

¹⁵⁴² After the abduction, Abu Omar was handed over to CIA operatives, rendered to Egypt and tortured. “Accountability for European Complicity in CIA Torture and Enforced Disappearance”, Amnesty International, *op. cit.*, note 490, p. 2.

¹⁵⁴³ *Ibid.*, pp. 6-8.

¹⁵⁴⁴ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 53.

¹⁵⁴⁵ “Accountability for European Complicity in CIA Torture and Enforced Disappearance”, Amnesty International, *op. cit.*, note 490, p. 2.

¹⁵⁴⁶ *Getting Away with Torture*, *op. cit.*, note 401, pp. 98-99; “Spain judge defies pressure to scrap Guantanamo case”, Agence France-Presse website, 15 April 2014, <<http://www.globalpost.com/dispatch/news/afp/140415/spain-judge-defies-pressure-scrap-Guantanamo-case>>.

¹⁵⁴⁷ Charlotte Boitiaux, “‘Symbolic victory’ as French court summons ex-Gitmo chief”, France24 website, 4 April 2015, <<http://www.france24.com/en/20150404-french-court-chief-guantanamo-geoffrey-miller/>>; Vaishali Sharma, “French court taking the road to justice after Guantanamo”, Association for the Prevention of Torture website, 21 April 2015, <http://www.ap.tch/en/blog/french-court-taking-the-road-to-justice-after-guantanamo/#.Vgv3ydRBu_4>.

¹⁵⁴⁸ CIA - “Extraordinary Rendition” *Flights, Torture and Accountability*, *op. cit.*, note 180, pp. 20-24; “Torture in Europe: The Law and Practice: Regional Conference Report”, REDRESS and the European Center for Constitutional and Human Rights, September 2012, p. 17, <<http://www.redress.org/downloads/publications/121012%20Europe%20Report%20FINAL.pdf>>; “Former Guantanamo detainees file torture complaint in French court”, Security Law Brief website, 27 February 2014, <<http://www.securitylawbrief.com/main/2014/02/former-Guantanamo-detainees-file-torture-complaint-in-french-court.html>>; *Getting Away with Torture*, *op. cit.*, note 401, pp. 95-99; *The Report of The Constitution Project's Task Force on Detainee Treatment*, *op. cit.*, note 183, pp. 267-268; “Criminal Complaint against Bush”, European Center for Constitutional and Human Rights website, 6 February 2011, <<http://www.ecchr.de/index.php/bush.html>>; “Bush Torture Indictment”, Center for Constitutional Rights website, <<https://www.ccrjustice.org/ourcases/current.cases/bush-torture-indictment>>.

¹⁵⁴⁹ OSCE Copenhagen Document, *op. cit.*, note 80, para. 16.7; OSCE Budapest Document, *op. cit.*, note 3, para. 20.

d. Recommendations

- To review and amend domestic legislation to ensure full compliance and consistency with the CAT and other relevant international standards and OSCE commitments. In particular, penalties for acts amounting to torture and ill-treatment, as defined under international law, should be amended to ensure that they reflect the gravity of the crime and deter future acts of torture and ill-treatment;
- To review and amend domestic legislation, including Section 1004 of the DTA, in order to remove all grants of immunity for acts of torture or ill-treatment;
- To review and amend domestic legislation in order to remove all statutes of limitation for acts of torture and ill-treatment;
- To ensure that independent, impartial, thorough and effective investigations into all allegations of torture and ill-treatment are promptly carried out;
- To ensure that, wherever possible, perpetrators of torture are prosecuted under the Torture Convention Implementation Act rather than other legislation in which acts of torture or ill-treatment are defined as less grave offences;
- To prosecute superior officials for their approval and authorization of interrogation techniques amounting to torture and ill-treatment. This includes any official who perpetrated, ordered, condoned, tolerated or failed to intervene despite knowing that acts of torture were being committed;
- To reopen investigations, with a view to prosecuting alleged perpetrators, into the CIA RDI programme following the release of the executive summary, findings and conclusions of the Senate Select Committee on Intelligence's Study on the programme;
- To regularly inform the public of the steps taken to investigate and prosecute all cases of abuse in Guantánamo and in the CIA RDI programme;
- To set up a public inquiry into the allegations of abuse at the Guantánamo Bay detention facility for the purpose of investigating, documenting the abuses committed and to issue a public report of the findings of that inquiry;
- Pending the closure of the Guantánamo Bay detention facility, to establish an independent oversight mechanism to receive complaints and review all allegations of torture and ill-treatment at Guantánamo;
- Other OSCE participating States must conduct prompt, independent, impartial, thorough and effective investigations and prosecutions where appropriate of those individuals believed to have facilitated the CIA RDI programme or who were otherwise complicit in the torture or ill-treatment of detainees.

B. RIGHT TO REDRESS

a. International Standards

552. International human rights law, such as Article 14 of the CAT and Articles 2 and 9 of the ICCPR, require states to provide redress for arbitrary detention, torture and ill-treatment.¹⁵⁵⁰ OSCE commitments also include the provision of redress, including Copenhagen 1990 and Moscow 1991.¹⁵⁵¹
553. Redress covers both the provision of an effective remedy and reparations.¹⁵⁵² Providing adequate redress to victims of serious human rights violations incorporates both substantive and procedural measures.¹⁵⁵³ This requires equal and effective access to justice; adequate, effective and prompt reparations; and information on violations and available reparations mechanisms.¹⁵⁵⁴
554. All victims of arbitrary detention, torture and ill-treatment are entitled to redress regardless of whether they are located within the territory of a state, whether the offence was committed by a person acting within his or her official capacity or whether the offence was carried out by or against a national of the state.¹⁵⁵⁵ Victims include those who suffered physical, mental, emotional or economic harm, as well as those who experienced a “substantial impairment of their fundamental rights”.¹⁵⁵⁶ Immediate family members, dependants and those harmed by trying to assist the victim are also included as victims.¹⁵⁵⁷ The failure to provide redress for victims of arbitrary detention, torture and ill-treatment violates international standards.¹⁵⁵⁸ National security concerns are not a legitimate reason to deny redress to victims.¹⁵⁵⁹

¹⁵⁵⁰ CAT, Art. 14: “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation”. General Comment No. 3 specifies that Article 14 applies also to ill-treatment. UN CAT, General Comment No. 3: Implementation of Article 14 by States Parties, CAT/C/GC/3, 19 November 2012, para. 1, <http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf>. ICCPR, Art. 2(3)(a): “To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. ICCPR, Art. 9(5): “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle IX, para. 15; “Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, *op. cit.*, note 280, Art. 11; “Draft articles on responsibility of States for internationally wrongful acts with commentaries”, *op. cit.*, note 1439, Art. 31.

¹⁵⁵¹ OSCE Vienna Document, *op. cit.*, note 90, para. 13.9; OSCE Copenhagen Document, *op. cit.*, note 80, paras. 5.10, 11, 40.5; OSCE Moscow Document, *op. cit.*, note 90, paras. 18.2-18.4, 23.1; OSCE Budapest Document, *op. cit.*, note 3, para. 20; OSCE Istanbul Document, *op. cit.*, note 279, para. 21; OSCE Ljubljana Document, *op. cit.*, note 90; OSCE Helsinki 2008 Document, *op. cit.*, note 767, para. 4; OSCE Athens Document, *op. cit.*, note 80, paras. 1, 6, 9.

¹⁵⁵² UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 2.

¹⁵⁵³ *Ibid.*, para. 5.

¹⁵⁵⁴ CAT, Art. 14; UN CAT, General Comment No. 3, *ibid.*, paras. 20, 23, 27, 29; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principles VII, VIII, X, paras. 11-12, 24.

¹⁵⁵⁵ ICCPR, Art. 2(3)(a); UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 16; UN CAT, General Comment No. 3, *ibid.*, paras. 1, 22.

¹⁵⁵⁶ UN CAT, General Comment No. 3, *ibid.*, para. 3; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle V, para. 8.

¹⁵⁵⁷ *Ibid.*

¹⁵⁵⁸ UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 16.

¹⁵⁵⁹ UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 42.

555. The right to redress encompasses an “enforceable right to fair and adequate compensation”.¹⁵⁶⁰ Monetary compensation alone is generally considered inadequate.¹⁵⁶¹ Instead, international bodies have concluded that redress may consist of compensation, rehabilitation, restitution, satisfaction and guarantees of non-repetition.¹⁵⁶² Compensation is appropriate for economically assessable damages such as legal and medical assistance and physical and mental harm.¹⁵⁶³ Rehabilitation provides victims of gross human rights violations with medical, psychological, legal and social services so as to provide “as full rehabilitation as possible”.¹⁵⁶⁴ Restitution seeks to restore victims to the same position they were in before the act violating human rights was committed, including by clearing the detainee’s name where applicable and returning property, citizenship, employment and place of residence.¹⁵⁶⁵ Satisfaction affords a wide range of measures that promote victim recognition.¹⁵⁶⁶ Relevant measures include providing public apologies that acknowledge facts and accept responsibility, issuing a full public disclosure, ending ongoing violations and articulating official declarations and judicial decisions that restore the rights and dignity of the individual.¹⁵⁶⁷ Finally, guarantees of non-repetition aim to prevent future violations such as by combating impunity, by reviewing and reforming laws and by creating mechanisms for prevention and monitoring.¹⁵⁶⁸
556. Redress should be adequate, effective and prompt.¹⁵⁶⁹ The extent of redress depends on the circumstances of the specific case, as redress should be proportionate to the seriousness of the violation and adapted to the victim’s needs.¹⁵⁷⁰ Ultimately, the aim of redress is to restore the individual’s dignity.¹⁵⁷¹

¹⁵⁶⁰ CAT, Art. 14; Inter-American Court of Human Rights, *Leopoldo García Lucero et al. v. Chile*, Case No. 12.519, 28 August 2013, para. 188, <http://www.corteidh.or.cr/docs/casos/articulos/seriec_267_ing.pdf>.

¹⁵⁶¹ UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 9; UN CAT, *Kepa Urra Guridi v. Spain*, Communication No. 212/2002, 17 May 2005, para. 6.8,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f34%2fD%2f212%2f2002&Lang=en>: the Committee against Torture found a violation of Article 14 of the CAT where the State party paid compensation but did not cover all damages suffered by the victim, including restitution, rehabilitation, and guarantees of non-repetition.

¹⁵⁶² UN CAT, General Comment No. 3, *ibid.*, paras. 2, 5, 6; UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 16; Inter-American Court of Human Rights, *García Lucero et al. v. Chile*, *op. cit.*, note 1560, para. 188.

¹⁵⁶³ UN CAT, General Comment No. 3, *ibid.*, para. 10; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle IX, para. 20.

¹⁵⁶⁴ UN CAT, General Comment No. 3, *ibid.*, paras. 11-12; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *ibid.*, Principle IX, para. 21.

¹⁵⁶⁵ UN CAT, General Comment No. 3, *ibid.*, para. 8; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *ibid.*, Principle IX, para. 19; *Broken Laws, Broken Lives*, *op. cit.*, note 581, p. 110.

¹⁵⁶⁶ *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (New York and Geneva: United Nations, 2008), p. 23, <<http://ictj.org/sites/default/files/UNHCHR-Global-Reparations-Programmes-2008-English.pdf>>.

¹⁵⁶⁷ UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 16; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle IX, para. 22.

¹⁵⁶⁸ UN CAT, General Comment No. 3, *ibid.*, para. 18; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *ibid.*, Principle IX, para. 23.

¹⁵⁶⁹ “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *ibid.*, Principles VII, VIII, IX, paras. 11(b), 14-15.

¹⁵⁷⁰ UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 2, 5-6; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *ibid.*, Principle IX, paras. 15, 18; UN Special Rapporteur on torture, “General Recommendations of the Special Rapporteur on torture”, *op. cit.*, note 313, para. 1.

¹⁵⁷¹ UN CAT, General Comment No. 3, *ibid.*, para. 4.

557. Accessible administrative and judicial mechanisms are also necessary for victims to obtain redress through both formal and informal procedures.¹⁵⁷² Relevant legislation that specifically provides victims with redress and complaints mechanisms and institutions that are capable of issuing enforceable decisions are crucial for ensuring that victims may access remedies.¹⁵⁷³ When victims are unable to submit a complaint due to non-existent or ineffective legislation or mechanisms or without ultimate recourse to judicial mechanisms their right to redress cannot be realized.¹⁵⁷⁴ Even where other mechanisms or remedies exist, victims must always have a judicial remedy available to them.¹⁵⁷⁵ Although states bear the primary responsibility, the Special Rapporteur on torture has stressed that legislation should allow victims of torture to submit claims against individual perpetrators.¹⁵⁷⁶
558. A violation of the CAT and the ICCPR may occur where a state fails to undertake investigations, to conduct criminal prosecutions or to allow civil proceedings promptly following allegations of torture and other serious human rights violations.¹⁵⁷⁷ Immunity and amnesties for torture and ill-treatment are also incompatible with the right to redress.¹⁵⁷⁸ Additionally, statutes of limitation should not apply to gross violations of international human rights law such as torture, ill-treatment and prolonged arbitrary detention.¹⁵⁷⁹
559. According to the traditional understanding of international humanitarian law and state responsibility, international humanitarian law does not provide individuals with a right to reparation for damage suffered during armed conflict.¹⁵⁸⁰ However, it has been argued that

¹⁵⁷² “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, New York, 29 November 1985, para. 5, <<http://www.un.org/documents/ga/res/40/a40r034.htm>>.

¹⁵⁷³ UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 6, 19-20, 24; Inter-American Court of Human Rights, *García Lucero et al. v. Chile*, *op. cit.*, note 1560, paras. 191-192.

¹⁵⁷⁴ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 168.

¹⁵⁷⁵ UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 20, 30; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle VIII, para. 12.

¹⁵⁷⁶ UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, para. 181.

¹⁵⁷⁷ UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 17, 20, 23; UN HRC, General Comment No. 31, *op. cit.*, note 36, paras. 15, 18. See, also, CAT, Arts. 12, 13; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 181: “[i]t follows that the lack of a prompt, impartial and thorough investigation of gross human rights violations, such as torture, (...) constitutes a violation of the right to an effective remedy in Art. 2(3).”; Inter-American Court of Human Rights, *García Lucero et al. v. Chile*, *op. cit.*, note 1560, paras. 183, 191.

¹⁵⁷⁸ UN CAT, General Comment No. 3, *ibid.*, paras. 40-42. See, also, UN HRC, General Comment No. 31, *ibid.*, para. 18; Inter-American Court of Human Rights, *García Lucero et al. v. Chile*, *ibid.*, paras. 204-205.

¹⁵⁷⁹ Statutes of limitation should not apply to gross violations of international human rights law. For more than two decades, there has been a consensus that torture and prolonged arbitrary detention amount to gross human rights violations. In the same vein, statutes of limitations should not be applicable to acts of ill-treatment. “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle IV, para. 6; UN Special Rapporteur on human rights and counter-terrorism, Ben Emmerson, Report to the Human Rights Council, 1 March 2013, A/HRC/22/52, para. 22, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf>; UN CAT, General Comment No. 3, *ibid.*, paras. 1, 40.

¹⁵⁸⁰ “[A]gainst the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted”, ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, 3 February 2012, para. 94, <<http://www.icj-cij.org/docket/files/143/16883.pdf>>. See also, Christian Tomuschat, “State Responsibility and the Individual Right to Compensation Before National Courts”, in Andrew Clapham & Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014), pp. 811-839.

there is an emerging duty of states to provide remedy and reparation to individual victims of violations of international humanitarian law, including in case of serious violations.¹⁵⁸¹ This trend is for example confirmed by the UN General Assembly's adoption, without a dissenting vote, of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,¹⁵⁸² as well as acknowledged in the updated version of the ICRC Study on customary international humanitarian law.¹⁵⁸³ The concept of serious violations of international humanitarian law is meant to encompass severe violations constituting international crimes under the Rome Statute of the ICC – namely genocide, crimes against humanity and war crimes – irrespective of the international or non-international character of the armed conflict in which these violations are committed.¹⁵⁸⁴ Torture and ill-treatment are among those crimes.¹⁵⁸⁵

560. Without prejudice to rights arising from any duty on states to provide reparation for damage suffered during armed conflict, ODIHR considers that the obligation of states to provide redress for gross human rights abuses also governs situations where such abuses have taken place in the context of an armed conflict, irrespective of its nature. Since the prohibition of torture is non-derogable, international human rights law on the right to redress for torture is still applicable in times of armed conflict.¹⁵⁸⁶

b. Domestic Standards

561. The United States submitted an understanding to its ratification of the ICCPR in relation to arbitrary detention. According to the understanding, the US government views the right to compensation for victims of unlawful arrest or detention (Article 9(5) of the ICCPR) or of a miscarriage of justice (Article 14(6) of the ICCPR) as the “provision of effective and enforceable mechanisms” that allow victims of these violations to obtain compensation “subject to the reasonable requirements of domestic law”. The United States also included an understanding in relation to Article 14 of the CAT that stipulates that the Article created a “private right of action for damages only for acts of torture committed in territory under” the United States’ jurisdiction.¹⁵⁸⁷

¹⁵⁸¹ See, for example, Theo van Boven, “Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines”, in Carla Ferstman, Mariana Goetz and Alan Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Leiden: Martinus Nijhoff, 2009), pp. 19-40; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418.

¹⁵⁸² “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *ibid.* The Principles and Guidelines were meant to reflect the state of international law on remedies and reparations at the time. It is worth noting that, already in their draft form, these served as reference for a number of governments, domestic, regional and international courts. Theo van Boven, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law – Introductory Note”, United Nations Audiovisual Library of International Law website, <http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html>.

¹⁵⁸³ See, also, “Customary International Humanitarian Law, Rule 150: Reparation”, ICRC website, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150>.

¹⁵⁸⁴ Van Boven, “Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines”, *op. cit.*, note 1581, pp. 33-34.

¹⁵⁸⁵ Rome Statute, Art. 8.

¹⁵⁸⁶ See, for example, Koh, “Memorandum Opinion on the Geographic Scope of the Convention against Torture and Its Application in Situations of Armed Conflict”, *op. cit.*, note 1447, p. 90.

¹⁵⁸⁷ US reservations to the ICCPR, *op. cit.*, note 327, para. II(2); US reservations to the CAT, *op. cit.*, note 327, para. II(3).

562. The Fifth and Eighth Amendments to the US Constitution, as well as Article 1 Section 9 of the US Constitution, are relevant to redress claims for arbitrary detention, torture and ill-treatment.¹⁵⁸⁸ Only Article 1 Section 9, which prevents a writ of *habeas corpus* from being suspended except when required to maintain public safety during a rebellion or invasion, has been held to apply to Guantánamo detainees.¹⁵⁸⁹ An individual may seek redress for violations of the Constitution by federal officials through what is known as a Bivens claim if no other federal remedy is available.¹⁵⁹⁰ A Bivens claim is the name given to the civil remedy that arises when a federal official violates an individual's constitutional rights.¹⁵⁹¹ The courts have been hesitant to extend Bivens liability, however, especially where special factors exist, such as national security, intelligence or military involvement, even where there is no alternative remedy, and where "Congress has affirmatively declared that injured persons must seek another remedy".¹⁵⁹² Qualified immunity also shields federal officials from Bivens liability when their alleged conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known".¹⁵⁹³
563. In addition to constitutional provisions, several legislative provisions appear to provide redress to victims of arbitrary detention, torture and ill-treatment. The Torture Victim Protection Act (TVPA) creates liability to provide damages in the case of individuals who commit an act of torture "under actual or apparent authority, or color of law, of any foreign nation".¹⁵⁹⁴ Before a court will provide redress, the victim must first exhaust other adequate and available remedies, as well as commence the action within 10 years.¹⁵⁹⁵ Additionally, the Alien Tort Statute (ATS) creates a cause of action for foreign citizens for "a tort only, committed in violation of the law of nations or a treaty of the United States".¹⁵⁹⁶ The presumption against extraterritoriality¹⁵⁹⁷ is applicable to the ATS. In *Al Shimari v. CACI*, however, a federal circuit court found that this presumption was overcome where the acts of torture were carried out by US citizens employed by an American corporation hired by the United States Department of the Interior.¹⁵⁹⁸

¹⁵⁸⁸ US Constitution, Art. 1 § 9, Fifth Amendment and Eighth Amendment.

¹⁵⁸⁹ United States Supreme Court, *Boumediene v. Bush*, *op. cit.*, note 73.

¹⁵⁹⁰ United States Supreme Court, *Webster Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, Case No. 301, 21 June 1971, <<http://www.law.cornell.edu/supremecourt/text/403/388>>.

¹⁵⁹¹ The provision is named after the case it was created by – United States Supreme Court, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, *ibid.*

¹⁵⁹² United States Court of Appeals for the District of Columbia Circuit, *John Doe v. Donald H. Rumsfeld*, Case No. 11-5209, 15 June 2012, <[http://www.cadc.uscourts.gov/internet/opinions.nsf/3DA05C9A3814B28C85257A1E004D6D69/\\$file/11-5209-1378889.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3DA05C9A3814B28C85257A1E004D6D69/$file/11-5209-1378889.pdf)>; United States Supreme Court, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, *ibid.*

¹⁵⁹³ United States Supreme Court, *Harlow v. Fitzgerald*, Case No. 80-945, 24 June 1982, <http://scholar.google.com/scholar_case?case=13486920831186038844&hl=en&as_sdt=6&as_vis=1&oi=scholar>.

¹⁵⁹⁴ TVPA, 28 U.S.C. § 1350 note, Sec. 2(a).

¹⁵⁹⁵ TVPA, 28 U.S.C. § 1350 note, Sec. 2(b), (c).

¹⁵⁹⁶ ATS, 28 U.S.C. § 1350.

¹⁵⁹⁷ The presumption against extraterritoriality means that a statute does not apply extraterritorially. The United States Supreme Court said that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none". United States Supreme Court, *Kiobel v. Royal Dutch Petroleum*, Case No. 10-1491, 17 April 2013, <http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf>.

¹⁵⁹⁸ The court also cited the relevance of the allegations that the contract was issued in the United States, that CACI Premier Technology, Inc. managers in the United States were aware of the misconduct, attempted to cover it up and implicitly encouraged it and that Congress enacted the TVPA and Torture Convention Implementation Act to provide aliens with access to US courts. The court determined that the various factors showed that the "ATS claims 'touch and concern' the territory of the United States with sufficient force to displace the presumption against extraterritorial application". United States Court of Appeals for the Fourth Circuit, *Suhail Najim Abdullah Al Shimari v. CACI Premier Technology*, Case No. 13-1937, 30 June 2014, <<http://www.ca4.uscourts.gov/Opinions/Published/131937.P.pdf>>.

564. The Foreign Claims Act (FCA) and Military Claims Act represent administrative mechanisms for redress. The FCA allows the US government to pay up to USD 100,000 in compensation for property damage and “personal injury to, or death of, any inhabitant of a foreign country” if it occurs outside the United States and is otherwise related to noncombat conduct. If the claimant’s country of citizenship is at war with the United States, then the United States must determine that the claimant is friendly. Moreover, the injury should not result from the action of any enemy or in combat.¹⁵⁹⁹ The Military Claims Act provides similar compensation when military personnel cause injuries when acting within the scope of their employment.¹⁶⁰⁰
565. The Federal Tort Claims Act (FTCA) creates tort liability against the United States for the “negligent or wrongful act or omission” of a US government employee “acting within the scope of his office or employment” for “injury or loss of property or personal injury or death” if a private person would be liable for such act or omission.¹⁶⁰¹ A successful claim under the FTCA will provide the victim with monetary damages.¹⁶⁰² This remedy is “exclusive of any other civil action or proceeding for money damages” against the United States, and a court will only hear cases under other legislative provisions if this remedy has been exhausted.¹⁶⁰³ The statute of limitations for such a tort claim is two years.¹⁶⁰⁴ Claims arising in a foreign country are exempted.¹⁶⁰⁵
566. Section 1005(e) of the DTA limits courts’ jurisdiction to hear claims for redress by Guantánamo detainees. The DTA strips the courts of jurisdiction where (1) the action is against the United States or its agents; (2) the action relates to any aspect of the detention, transfer, treatment, trial or detention conditions of a detainee; (3) the detainee has been determined to be an enemy combatant or is awaiting such a determination; and (4) the action does not relate to a writ of *habeas corpus*.¹⁶⁰⁶ Two exceptions exist to this rule. First, the Court of Appeals for the District of Columbia Circuit may review the CSRTs’ final determination that the detainee is an enemy combatant.¹⁶⁰⁷ Second, military commission convictions may be reviewed by the Court of Appeals for the District of Columbia Circuit.¹⁶⁰⁸
567. United States government personnel are protected under Section 1004 of the DTA in any civil action in certain circumstances. During the detention and interrogation of foreigners who the President has designated as “engaged in or associated with international terrorist

¹⁵⁹⁹ FCA, 10 U.S.C. § 2734.

¹⁶⁰⁰ Military Claims Act, 10 U.S.C. § 2733.

¹⁶⁰¹ FTCA, 28 U.S.C. § 2672.

¹⁶⁰² *Ibid.*

¹⁶⁰³ *Ibid.*, 28 U.S.C. § 2679, as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (also known as the Westfall Act); United States Court of Appeals for the District of Columbia Circuit, *Allaithi v. Rumsfeld*, 10 June 2014, *op. cit.*, note 518; United States Court of Appeals for the District of Columbia Circuit, *Rasul v. Myers*, 11 January 2008, *op. cit.*, note 518.

¹⁶⁰⁴ FTCA, 28 U.S.C. § 2401(b).

¹⁶⁰⁵ *Ibid.*, 28 U.S.C. § 2680(k).

¹⁶⁰⁶ DTA, § 1005(e); 28 U.S.C. § 2241(e); United States Court of Appeals for the Ninth Circuit, *Adel Hassan Hamad v. Robert M. Gates*, Cases No. 12-35385 and 12-35489, 7 October 2013,

<http://scholar.google.com/scholar_case?case=2102963433949219965&hl=en&as_sdt=6&as_vis=1&oi=scholar>.

¹⁶⁰⁷ DTA, § 1005(e)(2); United States Court of Appeals for the Ninth Circuit, *Hamad v. Gates*, *ibid.*

¹⁶⁰⁸ DTA, § 1005(e)(3); United States Court of Appeals for the Ninth Circuit, *Hamad v. Gates*, *ibid.*

activity that poses a serious continuing threat to the United States, its interests, or its allies”, government personnel are protected when the conduct is “officially authorized and determined to be lawful” when conducted. To utilize this defence, the individuals must not be aware that their conduct was unlawful, and the conduct must be such that “a person of ordinary sense and understanding would not know the practices were unlawful”.¹⁶⁰⁹

568. The state secrets doctrine dictates that in exceptional circumstances the disclosure of state secrets must be prevented in the interests of national security.¹⁶¹⁰ The doctrine prevents the disclosure of information when reasonable danger exists that the disclosure of this information “will expose military matters which, in the interests of national security, should not be divulged”.¹⁶¹¹ This doctrine enables the executive branch to keep secret information pertaining to military and foreign affairs. The privileged information is completely protected from disclosure during a trial, even from the judge, once the doctrine has been successfully invoked. A case is dismissed where the privileged information is so central to the litigation that there is a risk that the information will be disclosed if the case proceeds.¹⁶¹² In 2009, the Attorney General’s memorandum instituting new policies and procedures relating to the state secrets privilege included that the privilege would not be invoked to avoid embarrassment or conceal government wrongdoing.¹⁶¹³

c. Findings and Analysis

569. The United States made reservations, declarations and understandings to the CAT and the ICCPR. Both the Human Rights Committee and the Committee against Torture have expressed concerns about these reservations and requested their withdrawal.¹⁶¹⁴ In particular, the Committee against Torture contends that reservations limiting Article 14 are incompatible with the object and purpose of CAT and, by implication, impermissible under Article 19 of the Vienna Convention on the Law of Treaties.¹⁶¹⁵

570. The United States is of the view that Article 14 of the CAT does not apply to detainees held at Guantánamo. Rather, it maintains that claims for violations of the laws of war are to be resolved on a state-by-state basis and that it would be anomalous under the law of war

¹⁶⁰⁹ DTA, §1004.

¹⁶¹⁰ United States Supreme Court, *Totten v. United States*, 1875,

<<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=92&invol=105>>; United States Court of Appeals for the Ninth Circuit, *Binyam Mohamed v. Jeppesen Dataplan, Inc.*, Case No. 08-15693, 8 September 2010,

<http://scholar.google.pl/scholar_case?case=1060445994998403010&hl=en&as_sdt=6&as_vis=1&oi=scholar&sa=X&ei=c88fVKKiH6mCzAPB0IDgBw&ved=0CCEQgAMoADAA>.

¹⁶¹¹ United States Supreme Court, *United States v. Reynolds*, Case No. 21, 9 March 1953,

<http://scholar.google.com/scholar_case?case=14956670779421951435&hl=en&as_sdt=6&as_vis=1&oi=scholar>.

¹⁶¹² United States Court of Appeals for the Fourth Circuit, *Khaled El-Masri v. United States of America*, Case No. 06-1667, 2 March 2007, <http://www.nytimes.com/packages/pdf/world/20070303_MASRI.pdf>.

¹⁶¹³ “Attorney General Establishes New State Secret Policies and Procedures”, United States Department of Justice website, 23 September 2009, <<http://www.justice.gov/opa/pr/attorney-general-establishes-new-state-secrets-policies-and-procedures>>.

¹⁶¹⁴ UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 43; UN HRC, Concluding observations, United States of America, CCPR/C/79/Add.50, *op. cit.*, note 328, paras. 278-279, 292.

¹⁶¹⁵ UN CAT, General Comment No. 3, *ibid.*, para. 43; Vienna Convention on the Law of Treaties, Art. 19. It is generally accepted that the Vienna Convention is a codification of existing international customary law.

to provide enemy belligerents with an enforceable individual right to a claim for monetary compensation against the Detaining Power for alleged unlawful conduct.¹⁶¹⁶

571. ODIHR considers that, in line with the conclusions of the Committee against Torture, the United States should provide effective remedies and redress, “including fair and adequate compensation, and as full rehabilitation as possible”, to victims of torture or ill-treatment in CIA detention facilities overseas and at Guantánamo, in accordance with Article 14 of the CAT and the General Comment on its implementation.¹⁶¹⁷
572. Under the CAT, State parties are able to decide what measures are to be used to provide redress as long as such measures “are effective and consistent with the object and purpose of the Convention.”¹⁶¹⁸ Victims must also always have a judicial remedy available to them even when other mechanisms or remedies exist.¹⁶¹⁹ As discussed in the introduction of this report, international human rights law is also fully applicable to detainees that were not captured in the context of any armed conflict.
573. ODIHR welcomes the decision in *Boumediene v. Bush*, which determined that Guantánamo detainees have a right to *habeas corpus*.¹⁶²⁰ Since the Boumediene case, some detainees have successfully challenged their detention in district court and have been transferred from Guantánamo. More recently, however, federal court rulings appear to be weighed in favour of the executive branch.¹⁶²¹ Government appeals have resulted in a reversal of a number of *habeas corpus* challenges, thereby raising concern over whether this remedy is actually available to detainees.¹⁶²² Even when a detainee’s *habeas corpus* petition is successful, federal courts have not provided detainees with prompt release.¹⁶²³ Thus, the federal government is still able to hold a detainee after a court determines that this detention is not valid.¹⁶²⁴ In 32 successful *habeas corpus* challenges in 2008 to 2013,¹⁶²⁵ 11 detainees were released within six months, while 21 detainees remained in

¹⁶¹⁶ “UN Treaty Body Webcast, CAT 53rd session – United States of America, 3”, *op. cit.*, note 77; US comments to the draft report.

¹⁶¹⁷ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, paras. 12-14.

¹⁶¹⁸ UN CAT, General Comment No. 2, *op. cit.*, note 76, para. 6.

¹⁶¹⁹ UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 20, 30; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principle VIII, para. 12.

¹⁶²⁰ United States Supreme Court, *Boumediene v. Bush*, *op. cit.*, note 73.

¹⁶²¹ Hafetz, “Calling the Government to Account”, *op. cit.*, note 159, p. 27.

¹⁶²² Please refer to Part I-I of this report for additional information. This may be due to the broadly defined detention standard under the AUMF and procedural and evidentiary hurdles imposed against the detainees. ODIHR interview with Matthew O’Hara, *op. cit.*, note 255: O’Hara explained that given the Court of Appeals for the District of Columbia Circuit’s case law, *habeas corpus* claims cannot be won; ODIHR interview with Brent Rushforth, *op. cit.*, note 207: Rushforth explained that the Court of Appeals for the District of Columbia Circuit has reversed all of trial court decisions granting *habeas corpus* claims and they set the bar of standard of evidence so low for the government that it is very hard to see the Court of Appeals upholding any successful petition. ODIHR interview with David Remes, *op. cit.*, note 255: Remes explained that not one victorious case before the District Court for the District of Columbia has survived the Court of Appeals for the District of Columbia Circuit, mainly because the Court of Appeals considers having no role in looking at law-of-war detention. Therefore, the judiciary is no longer a meaningful resort.

¹⁶²³ See, for example, United States Court of Appeals for the District of Columbia Circuit, *Kiyemba v. Obama*, 7 April 2009, *op. cit.*, note 1362; United States Court of Appeals for the District of Columbia Circuit, *Kiyemba v. Obama*, 18 February 2009, *op. cit.*, note 157.

¹⁶²⁴ Hafetz, “Calling the Government to Account”, *op. cit.*, note 159, pp. 33-36; United States Court of Appeals District of Columbia Circuit, *Kiyemba v. Obama*, 7 April 2009, *ibid.*; United States Court of Appeals District of Columbia Circuit, *Kiyemba v. Obama*, 18 February 2009, *ibid.*

¹⁶²⁵ This number does not include any cases where the appeals court overturned or vacated successful petitions.

detention in Guantánamo for over six months. For instance, three Uighur detainees, Yusef Abbas, Saidullah Khalik and Hajiakbar Abdulghupur, had their *habeas corpus* petitions granted in 2008, but they were not released until 2013.¹⁶²⁶ While the complexities of resettling Guantánamo detainees may cause some delay in their transfers, the remedy of *habeas corpus* becomes illusory when the federal government continues to detain individuals for years despite a court determination that their detention is not valid.¹⁶²⁷

574. Despite a number of legislative provisions that appear to provide detainees with access to redress, detainees are not receiving remedies in relation to arbitrary detention, torture and ill-treatment. The TVPA, for instance, does not apply to detainees because the defendant must be acting under the authority of, or colour of law of, a *foreign nation*. Accordingly, Congress does not appear to have intended that defendants might include US officials or private persons acting pursuant to US authority or law.¹⁶²⁸ The US government has said that the FCA and the Military Claims Act could potentially be used to provide compensation, but only for damage, loss or destruction of personal property.¹⁶²⁹ Such a remedy does not account for years of arbitrary detention, torture and ill-treatment. Additionally, the FCA requires the US government to determine that a claimant is friendly.¹⁶³⁰ The right to redress, however, mandates redress for *all* victims of human rights violations. For claims under other provisions, federal courts have dismissed detainees' redress claims on jurisdictional, immunity and state secrets grounds.¹⁶³¹
575. The DTA effectively prevents the majority of detainees from accessing redress through the courts even though international standards mandate equal and effective access to justice for violations of human rights and fundamental freedoms.¹⁶³² Adel Hassan Hamad, a Sudanese citizen detained by the United States in Bagram and Guantánamo from 2002 to 2007, submitted a claim in federal court alleging that he was subjected to prolonged arbitrary detention, torture and ill-treatment, among other things, during his detention. His claim was dismissed because the CSRTs previously determined that he was an enemy combatant and that he otherwise fell within the requirements of the DTA. Therefore, his claim for redress was dismissed because the court lacked jurisdiction to assess the merits of the case. As a result, his claims for redress for arbitrary detention, torture and ill-treatment were not assessed, and he was effectively denied effective access to justice for the treatment he was allegedly subjected to during his detention.¹⁶³³

¹⁶²⁶ Worthington, "Guantánamo Habeas Results: the Definitive List", *op. cit.*, note 252; Denbeaux, Hafetz *et al.*, "No Hearing Habeas", *op. cit.*, note 252, p. 5; "The Guantánamo Docket", The New York Times website, *op. cit.*, note 88.

¹⁶²⁷ UN HRC, *Chambala v. Zambia*, *op. cit.*, note 114, para. 7.3; UN HRC, General Comment No. 35, *op. cit.*, note 92, para. 41. See, also, "Current Challenges Regarding Respect of Human Rights in the Fight Against Terrorism", European Parliament, Directorate-General for External Policies, April 2010, p. 22.

<[http://www.europarl.europa.eu/RegData/etudes/note/join/2010/410208/EXPO-DROI_NT\(2010\)410208_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2010/410208/EXPO-DROI_NT(2010)410208_EN.pdf)>.

¹⁶²⁸ United States Court of Appeals for the Second Circuit, *Mahar Arar v. John Ashcroft*, Case No. 06-4216-cv, 2 November 2009, <http://scholar.google.com/scholar_case?case=13093177374759375473&hl=en&as_sdt=6&as_vis=1&oi=scholar>.

United States Court of Appeals for the District of Columbia Circuit, *Doe v. Rumsfeld*, *op. cit.*, note 1592.

¹⁶²⁹ UN HRC, Fourth periodic report of the United States of America, *op. cit.*, note 39, para. 527.

¹⁶³⁰ FCA, 10 U.S.C. § 2734(b).

¹⁶³¹ ODIHR interview with the American Civil Liberties Union, 28 February 2014, *op. cit.*, note 255; ODIHR interview with the Center for Victims of Torture, *op. cit.*, note 229.

¹⁶³² DTA, § 1005(e); 28 U.S.C. § 2241(e); UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 30; "Basic Principles and Guidelines on the Right to a Remedy and Reparation", *op. cit.*, note 1418, Principle VII, para. 11(a); OSCE Vienna Document, *op. cit.*, note 90, para. 13.9

¹⁶³³ United States Court of Appeals for the Ninth Circuit, *Hamad v. Gates*, *op. cit.*, note 1606.

576. The DTA appears to strip US courts' jurisdiction even for those detainees who have successfully challenged their detention through *habeas corpus*. In other words, detainees cannot access the courts for redress even when a court previously determined that the detainee's detention was not valid. Hajj Boudella, Lakhdar Boumediene, Mustafa Ait Idir, Sabir Mahfouz Lahmar and Mohammed Nechle were detained for over six years despite a decision by the Supreme Court of the Federation of Bosnia and Herzegovina that dismissed charges relating to an alleged plot to attack the US Embassy in Sarajevo.¹⁶³⁴ In addition to being arbitrarily arrested and detained, they were allegedly subjected to various forms of torture and ill-treatment during their detention.¹⁶³⁵ The CSRTs determined that they were all enemy combatants. Eventually, a federal court granted their *habeas corpus* petitions and ordered their release after it determined that the available evidence did not show that the detainees were enemy combatants.¹⁶³⁶ Similarly, Abdul Rahim Abdul Razak al Janko was released as a result of a successful *habeas corpus* petition. His subsequent challenge for redress for the alleged torture, physical and psychological degradation and other mistreatment he was subjected to during his detention was rejected because the CSRTs previously determined that he was an enemy combatant. Thus, the DTA prevented him from accessing a court for redress as the merits of his case were not even assessed.¹⁶³⁷ Even after a successful *habeas corpus* claim, judicial access for detainees previously deemed enemy combatants is thus unavailable.

577. Between July 2004 and February 2009, the CSRTs convened 581 tribunals, during which they determined that 539 detainees were enemy combatants.¹⁶³⁸ Based on the jurisdictional stripping function of the DTA, these 539 detainees, minus any detainees who successfully challenged their CSRT determination in federal court, do not have access to the courts, except through a *habeas corpus* petition, in relation to any aspect of their detention, transfer, treatment, trial or detention conditions due to their CSRT determination. These

¹⁶³⁴ Human Rights Chamber of Bosnia and Herzegovina, *Hadz Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lahmar v. Bosnia and Herzegovina and The Federation of Bosnia and Herzegovina*, Cases No. CH/02/8679, CH/02/8689, CH/02/8690, CH/02/8691, 3 September 2002, para. 53, <[http://www.therenditionproject.org.uk/pdf/PDF%20424%20\[Boudella%20et%20al%20v%20BiH,%20Human%20Rights%20Chamber,%20Decision%20on%20Admissibility%20\(11%20Oct%202002\)\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%20424%20[Boudella%20et%20al%20v%20BiH,%20Human%20Rights%20Chamber,%20Decision%20on%20Admissibility%20(11%20Oct%202002)].pdf)>.

¹⁶³⁵ ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217, during which Idir said: "Half of my body was paralyzed as a result of punishment; you can see how broken my fingers are (...) They put a hose with strong water pressure straight into my mouth. Then they grabbed my head and punched me against the metal (...) we were psychologically tortured. (...) They put plastic handcuffs behind my back and legs, and tied them together. Then they threw me outside on pebbles and hit me. I nearly lost consciousness as a result of the spray. They started hitting me and broke my pinkie finger. They put my head on the stones and one of the soldiers jumped with his knee on this part of my head. (...) Everything, my mouth, nose were paralyzed." ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216: "I need to stress that torture, the ways of torture, the tools of torture, they are different between hunger strikers and non-hunger strikers. (...) For example, in my nose I have a broken bone and you can see it. They knew that it was broken and it was stuck and they were trying to put the tube into my sinus, but they knew it was broken and they would keep on trying and trying and they knew it was hurting me. Even if they wanted the right sinus, the right channel if you want, instead of inserting one they would insert five or six and I would throw up. (...) You can choose, you can say its physical torture or psychological torture. And they would take you regardless of how many bones would be fractured. They would just grab you and throw you on a chair. The belt around my stomach, they would tighten the belts so much on my stomach so I could not put anything. (...) Some would beat me in the head, some would punch me in the back."

¹⁶³⁶ United States District Court for the District of Columbia, *Boumediene v. Bush*, 20 November 2008, *op. cit.*, note 203, pp. 7, 11.

¹⁶³⁷ United States Court of Appeals for the District of Columbia Circuit, *Abdul Rahim Abdul Razak al Janko v. Robert M. Gates*, Case No. 12-5017, 17 January 2014, <[http://www.cadc.uscourts.gov/internet/opinions.nsf/FB286400C4764F5D85257C630054C671/\\$file/12-5017-1475659.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/FB286400C4764F5D85257C630054C671/$file/12-5017-1475659.pdf)>.

¹⁶³⁸ "Combatant Status Review Tribunal Summary", United States Department of Defense website, 10 February 2009, *op. cit.*, note 237. Thirty-nine detainees were found to no longer be classified as enemy combatants, and three tribunals were suspended.

restrictions cover redress claims relating to arbitrary detention, torture and ill-treatment. The fairness of the procedures by which the CSRTs made their determinations raises further concerns, as the Supreme Court found that CSRTs denied detainees counsel, made extensive use of classified information that was not available to the detainee, allowed hearsay and created a “considerable risk of error in [their] finding of fact”.¹⁶³⁹ Given that the US government has not provided Guantánamo detainees with redress,¹⁶⁴⁰ ODIHR is concerned that these detainees will be unable to obtain any redress for their treatment. Preventing detainees from accessing the courts and thereby redress for gross violations of human rights, particularly when based on a determination that creates a “considerable risk of error”, does not comply with OSCE commitments or other international standards.¹⁶⁴¹

578. Detainees who were not determined to be enemy combatants by the CSRTs or who were subsequently cleared are not subject to the jurisdictional stripping provision of the DTA. Therefore, they should be able to access the courts to seek redress. However, claims for redress under the ATS and the Constitution via Bivens claims have been unsuccessful.

579. Several detainees filed claims for redress under the ATS and via Bivens claims.¹⁶⁴² The courts dismissed the ATS claims because of a lack of jurisdiction since the officials responsible for the detainees’ treatment acted within the scope of their employment, and their conduct during detention and interrogations was foreseeable.¹⁶⁴³ Since the officials’ conduct was within the scope of their employment, claims for their offences had to be filed against the United States under the FTCA, and administrative remedies under this Act must be exhausted before a case can be brought in court.¹⁶⁴⁴ Victims of torture and ill-treatment, however, are entitled to redress regardless of whether an official is acting within their official capacity. Accordingly, they should be able to sue the perpetrators in their individual capacity.¹⁶⁴⁵ The FTCA, as the exclusive remedy for monetary damages against the United States, also has a two-year statute of limitations for tort claims. Statutes of limitations for torture and ill-treatment are incompatible with the right to redress.¹⁶⁴⁶ Finally, the FTCA does not appear to apply to Guantánamo detainees’ claims because these claims arise in a foreign country. The FTCA’s exception to claims arising in a

¹⁶³⁹ United States Supreme Court, *Boumediene v. Bush*, *op. cit.*, note 73; Hafetz, “Calling the Government to Account”, *op. cit.*, note 159, pp. 13, 15.

¹⁶⁴⁰ ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193.

¹⁶⁴¹ CAT, Art. 14; UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 20, 23, 27, 29; “Basic Principles and Guidelines on the Right to a Remedy and Reparation”, *op. cit.*, note 1418, Principles VII, VIII, X, paras. 11-12, 24; OSCE Vienna Document, *op. cit.*, note 90, para. 13.9; OSCE Copenhagen Document, *op. cit.*, note 80, paras. 5.10, 11, 40.5; OSCE Moscow Document *op. cit.*, note 90, paras. 18.2-18.3, 23.1(xi); OSCE Istanbul Document, *op. cit.*, note 279, para. 21; OSCE Helsinki 2008 Document, *op. cit.*, note 767, para. 4; OSCE Athens Document, *op. cit.*, note 80, paras. 1, 6, 9.

¹⁶⁴² For instance: four British citizens detained from 2002 to 2004, Shafiq Rasul, Asif Iqbal, Ruhel Ahmed and Jamal Al-Harith, said they were systematically and repeatedly tortured during their detention. They alleged that they had been “beaten, shackled in painful positions, threatened by dogs, subjected to extreme temperatures and deprived of adequate sleep, food, sanitation, medical care and communication”. United States Court of Appeals for the District of Columbia Circuit, *Rasul v. Myers*, 11 January 2008, *op. cit.*, note 518; United States Court of Appeals for the District of Columbia Circuit, *Allaithi v. Rumsfeld*, 10 June 2014, *op. cit.*, note 518; Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam, Abu Muhammad and Sami Abdulaziz Allaithi claimed that they had been subjected to prolonged detention, torture and ill-treatment.

¹⁶⁴³ United States Court of Appeals for the District of Columbia Circuit, *Rasul v. Myers*, 11 January 2008, *ibid.*; United States Court of Appeals for the District of Columbia Circuit, *Allaithi v. Rumsfeld*, 10 June 2014, *ibid.*

¹⁶⁴⁴ *Ibid.*

¹⁶⁴⁵ UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 1, 22; UN Special Rapporteur on torture, “Study on the phenomena of torture”, *op. cit.*, note 283, paras. 167, 181.

¹⁶⁴⁶ UN CAT, General Comment No. 3, *ibid.*, para. 40.

foreign country allows the United States to avoid such claims by invoking sovereign immunity.¹⁶⁴⁷ Accordingly, ODIHR is of the opinion that the United States has violated international standards by failing to hold officials liable when acting within their official capacity and by leaving to submit claims for redress under the FTCA, whereby their claims will likely be barred by sovereign immunity or the statute of limitations.¹⁶⁴⁸

580. In addition to the ATS claim, the detainees' complaints also alleged causes of action under the Constitution via Bivens claims. While the courts did not determine that the Constitution applied to these detainees, the claims were dismissed because the officials had qualified immunity.¹⁶⁴⁹ Immunity, however, is incompatible with the right to redress for gross human rights violations.¹⁶⁵⁰
581. While the state secrets doctrine originally only barred sensitive information from being admitted in court, the privilege has been used to dismiss entire cases relating to detainees' claims for redress.¹⁶⁵¹ Khaled El-Masri was detained in a CIA facility in Kabul, Afghanistan, for several months. He alleged that he had been beaten, drugged, confined in a small, unsanitary cell, interrogated and prevented from contacting anyone. The ECtHR determined that El-Masri had been tortured.¹⁶⁵² Even though many of the facts of his treatment and detention had already been made public, his case for redress was dismissed under the state secrets doctrine because continuing the proceedings was treated as risking exposure of sensitive CIA intelligence operations and other privileged information.¹⁶⁵³ This dismissal effectively denied El-Masri access to the judiciary and redress for his arbitrary detention and torture. While states may protect their national security by withholding information from the public, the state secrets privilege should not be used to avoid embarrassment or conceal government wrongdoing.¹⁶⁵⁴ Moreover, such provisions should not be used to protect systematic policies and practices such as the CIA RDI programme, as the privilege undermines the separation of powers and Article 2 of the ICCPR.¹⁶⁵⁵

¹⁶⁴⁷ United States District Court for the District of Columbia, *Talal Al-Zahrani v. Donald Rumsfeld*, Case No. 1:09-cv-00028, 16 February 2010, <<http://www.ecases.us/case/dcd/2666477/al-zahrani-v-donald-rumsfeld>>. In this case, the court determined that the foreign-country exception to the FTCA applied. For the purposes of the act, Guantánamo was in a foreign country. Therefore, since the United States had not waived sovereign immunity, the court lacked jurisdiction.

¹⁶⁴⁸ UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 40-42.

¹⁶⁴⁹ United States Court of Appeals for the District of Columbia Circuit, *Rasul v. Myers*, 11 January 2008, *op. cit.*, note 518; United States Court of Appeals for the District of Columbia Circuit, *Allaithi v. Rumsfeld*, 10 June 2014, *op. cit.*, note 518; United States Court of Appeals for the District of Columbia Circuit, *Rasul v. Myers*, 24 April 2009, *op. cit.*, note 518: "No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights. At the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil detained beyond sovereign U.S. territory had any constitutional rights".

¹⁶⁵⁰ UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 42; UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 18.

¹⁶⁵¹ *Getting Away with Torture*, *op. cit.*, note 401, pp. 68-69.

¹⁶⁵² ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, *op. cit.*, note 300, paras. 4, 21, 24-25, 167, 203-205, 211; *Globalizing Torture*, *op. cit.*, note 170, pp. 8, 47-48.

¹⁶⁵³ United States Court of Appeals for the Fourth Circuit, *El-Masri v. United States of America*, *op. cit.*, note 1612.

¹⁶⁵⁴ UN Special Procedures, "Joint study on global practices in relation to secret detention", *op. cit.*, note 109, paras. 160, 287; UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *op. cit.*, note 131, para. 60.

¹⁶⁵⁵ UN Special Rapporteur on human rights and counter-terrorism, Report to the Human Rights Council, A/HRC/10/3, *ibid*: "The blanket invocation of State secrets privilege with reference to complete policies, such as the United States secret detention, interrogation and rendition programme or third-party intelligence (...) prevents effective investigation and renders the right to a remedy illusory."

ODIHR reminds the United States that national security is not a legitimate reason to deny victims redress.¹⁶⁵⁶ The US government is obliged by international law to provide El-Masri, and any other individuals in similar circumstances, with redress that is proportionate to the gravity of the acts committed and the resulting harm.¹⁶⁵⁷

582. The US legal system appears to contain numerous exceptions that allow the US government to either avoid providing redress altogether or to provide only inadequate redress. The DTA strips federal courts of jurisdiction for claims by detainees that have been determined to be enemy combatants; the FTCA exempts claims arising in foreign countries and protects officials acting within the scope of their employment; qualified immunity provides additional protection from liability,¹⁶⁵⁸ and the state secrets doctrine allows for the dismissal of entire cases. In addition, US government personnel detaining and interrogating aliens are protected for their “authorized and (...) lawful” conduct when the officials are not aware their conduct was unlawful and a reasonable person would not know the practices were unlawful.¹⁶⁵⁹ Moreover, in *Arar v. Ashcroft* the United States Court of Appeals for the Second Circuit said that Congress would need to create a civil remedy for the injuries caused as a result of the extraordinary rendition programme for damages to even be awarded.¹⁶⁶⁰ No such remedy has been created.

583. Rehabilitation, in particular, is a critical area of redress for detainees. Many detainees allegedly suffer from injuries, both physical and mental, due to their prolonged detention, torture and ill-treatment. Detainees interviewed by ODIHR allegedly suffered various physical injuries as a result of their treatment, including back and kidney problems, facial paralysis, lumps, broken bones and rheumatism.¹⁶⁶¹ Ongoing psychological issues, particularly for those also subjected to the CIA RDI programme, also require rehabilitation.¹⁶⁶² Shaker Aamer, who is still detained in Guantánamo, reportedly suffers from “chronic and severe mental and physical disease”, including post-traumatic stress disorder, severe oedema, ringing in his ears, asthma, debilitating headaches, digestive problems, paranoia and trouble concentrating.¹⁶⁶³ Released detainees reportedly continue to experience medical problems, particularly psychological issues, due to the conditions and

¹⁶⁵⁶ UN CAT, General Comment No. 3, *op. cit.*, note 1550, para. 42.

¹⁶⁵⁷ In addition to El-Masri, a federal circuit court dismissed a lawsuit seeking redress for five men kidnapped by the CIA and held in secret detention facilities on state-secret grounds. Court of Appeals Ninth Circuit, *Binyam Mohamed v. Jeppesen Dataplan, Inc.*, *op. cit.*, note 1610.

¹⁶⁵⁸ As discussed in the Domestic Standards section above, qualified immunity also shields federal officials from Bivens liability when their alleged conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”. United States Supreme Court, *Harlow v. Fitzgerald*, *op. cit.*, note 1593.

¹⁶⁵⁹ DTA, § 1004(a).

¹⁶⁶⁰ United States Court of Appeals for the Second Circuit, *Arar v. Ashcroft*, *op. cit.*, note 1628. Other Bivens special-factors cases essentially declare this as well. See, for instance, United States Court of Appeals for the District of Columbia Circuit, *Doe v. Rumsfeld*, *op. cit.*, note 1592.

¹⁶⁶¹ ODIHR interview with David Hicks, *op. cit.*, note 228; ODIHR interview with Mustafa Ait Idir and Hajj Boudella, *op. cit.*, note 217; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216.

¹⁶⁶² For instance, al Shibh’s mental competence has been raised as a concern. David Hicks reported that he, Hicks, has ongoing psychological issues, and Matthew O’Hara reported that his client needed ongoing psychiatric care. ODIHR interview with David Hicks, *ibid.*; ODIHR interview with Matthew O’Hara, *op. cit.*, note 255; Carol Rosenberg, “9/11 competency hearing puts focus on Guantanamo’s secret prison”, Miami Herald website, 13 April 2014, <<http://www.miamiherald.com/news/nation-world/world/americas/article1962826.html>>; United States Military Commission, *United States v. Mohammad et al.*, “Unofficial/unauthenticated transcript of the hearing dated 17/12/2013 from 9:04 AM to 11:50 AM”, pp. 7279, 7286-7288.

¹⁶⁶³ United States District Court for the District of Columbia, *Shaker Aamer v. Barack H. Obama*, “Petitioner’s motion for judgment on his petition for writ of habeas corpus”, *op. cit.*, note 605.

their treatment in detention. Former detainees face an additional hurdle with subsequent medical treatment, as the United States withholds their medical records upon their release. Interviews conducted by ODIHR have implied that the US government may not have provided any support, financial or otherwise, to former detainees in the form of rehabilitation.¹⁶⁶⁴

584. For detainees who have been transferred, restitution is also problematic. The United States has reportedly withheld passports and kept other property. For instance, Lakhdar Boumediene reported that US authorities destroyed his diplomas, his passports and his certificates.¹⁶⁶⁵ Djamel Ameziane said the US government also retains detainees' money.¹⁶⁶⁶
585. Gaining employment following release is another common problem for detainees. Not only do many suffer from physical and mental ailments, but the stigma attached to prolonged detention in Guantánamo means that there are few job opportunities.¹⁶⁶⁷ As the majority of detainees have not been charged or convicted of any offence, the provision of adequate redress means that the US government must take steps to establish the truth about the situation in Guantánamo and clear the names of detainees who have not been convicted of offences by a court that complies with all fair-trial standards.¹⁶⁶⁸ The US courts, however, have dismissed cases where detainees have sought to clear their names.¹⁶⁶⁹
586. ODIHR notes that the United States has undertaken steps to provide redress in the form of satisfaction. First, the Senate Study on the CIA RDI Programme is a positive step in publically disclosing the gross violations of human rights committed by the US government as part of this programme. The Study provides some examples of the techniques used and the effects of these techniques on some of the detainees. The Study does contain redactions and code names for the CIA detention sites abroad and personnel involved in the interrogations. Additionally, only the executive summary, findings and conclusions have been made available and not the full Study.¹⁶⁷⁰ However, it does not

¹⁶⁶⁴ ODIHR interview with Brent Rushforth, *op. cit.*, note 207. See, also, ODIHR interview with David Hicks, *op. cit.*, note 228; ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216; ODIHR interview with Hajj Boudella and Mustafa Ait Idir, *op. cit.*, note 217; ODIHR interview with Matthew O'Hara, *op. cit.*, note 255.

¹⁶⁶⁵ ODIHR interview with Lakhdar Boumediene, *ibid.*

¹⁶⁶⁶ United States District Court for the District of Columbia, *Djamel Ameziane v. Barack Obama*, Case No. 05-392, 21 July 2014, <<https://ccrjustice.org/files/Memorandum%20Opinion%20Dismissing%20Habeas%20Case%20as%20Moot.pdf>>. Similar information was provided to ODIHR during an interview with the Center for Constitutional Rights, *op. cit.*, note 255.

¹⁶⁶⁷ ODIHR interview with Lakhdar Boumediene, *op. cit.*, note 216; ODIHR interview with Brent Rushforth, *op. cit.*, note 207: Rushforth said his client has tried to get several jobs, but every time he is asked what he has been doing in the past and he mentions Guantánamo, his interview ends.

¹⁶⁶⁸ ODIHR interview with David Hicks, *op. cit.*, note 228. In relation to the stigma associated with Guantánamo, Hicks said: "From my understanding, in Europe for example, I am described as a victim, but in Australia I am a convicted terrorist. There are still stories that come out, so that has an impact"; Laurel E. Fletcher, Eric Stover *et al.*, "Guantanamo and Its Aftermath, U.S. Detention and Interrogation Practices and Their Impact on Former Detainees", Human Rights Center and International Human Rights Law Clinic, University of California, Berkeley, November 2008, p. 64, <https://ccrjustice.org/files/Report_GTMO_And_Its_Aftermath.pdf>. A former detainee noted: "It doesn't matter I was found innocent (...). We still have this big hat on our heads that we were terrorists".

¹⁶⁶⁹ United States Court of Appeals for the District of Columbia Circuit, *Nazul Gul v. Barack Obama*, Case Nos. 10-5117 and 10-5118, 22 July 2011,

<http://scholar.google.com/scholar_case?case=2533885896292588737&hl=en&as_sdt=6&as_vis=1&oi=scholar>.

¹⁶⁷⁰ Senate Study on the CIA RDI Programme, Findings and Conclusions, *op. cit.*, note 388; Senate Study on the CIA RDI Programme, Executive Summary, *op. cit.*, note 171.

cover the actions of government officials at Guantánamo. While ODIHR welcomes President Obama's acknowledgement that detainees have been tortured in the framework of the CIA RDI programme,¹⁶⁷¹ it notes with concern that the President deemed it necessary to stress the amount of pressure the CIA was under to obtain intelligence following the 9/11 attacks. While the attacks constituted grave crimes, ODIHR reiterates that no circumstances whatsoever can justify the use of torture and ill-treatment, including the threat of terrorist acts. ODIHR further stresses that the acknowledgement of acts of torture and ill-treatment must be accompanied by investigations and criminal prosecutions.

587. Overall, ODIHR is concerned that the current legislative provisions do not, in practice, provide an avenue for individual detainees to seek and obtain redress. Despite numerous allegations of arbitrary detention, torture and ill-treatment, no detainee held at Guantánamo has received redress,¹⁶⁷² and no court has ever considered a lawsuit seeking redress on the merits. This denial of redress for torture, ill-treatment and arbitrary detention is a violation of the CAT and of the ICCPR.¹⁶⁷³

OTHER OSCE PARTICIPATING STATES

588. Other OSCE participating States have been implicated in the CIA rendition programme and at Guantánamo. As a result, some participating States have paid compensation to detainees, including Canada, Sweden and the United Kingdom. The government of the United Kingdom paid former detainees an undisclosed amount in an out-of-court settlement.¹⁶⁷⁴ Canada issued an apology and paid CAD 10.5 million to Maher Arar after the Canadian government gave the United States false information resulting in his rendition to, and torture in, Syria.¹⁶⁷⁵ However, the Canadian government has thus far

¹⁶⁷¹ Barack H. Obama, "Press Conference by the President", *op. cit.*, note 1510.

¹⁶⁷² ODIHR meeting with Attorneys from the Departments of State, Justice and Defense, *op. cit.*, note 193. During the meeting, a representative said there have been multiple investigations by the Department of Defense and Senate Committee reports as well as independent investigations. Compensation has not been paid to any Guantánamo detainee. ODIHR interview with the American Civil Liberties Union, 28 February 2014, *op. cit.*, note 255: representatives explained that the United States has not provided any remedy to victims through the courts, and that every case that has challenged the use of torture has been thrown out on threshold, jurisdiction or immunity grounds. No case has gone forward on the merits. Judicial avenues for redress are rapidly closing and international bodies may be the only judicial avenue available anymore. ODIHR interview with the Center for Victims of Torture, *op. cit.*, note 229: it was explained that the only right to redress for individual victims in the United States is to bring civil suit for damages before a civilian court. However, every suit brought before the US courts has been dismissed primarily on immunity and state secret grounds. There has been no movement to provide any kind of redress to prisoners at Guantánamo. ODIHR interview with Robert Kirsch and Robert McKeehan, 25 February 2014: they indicated that Congress legislated to prevent US courts from having jurisdiction to look at remedy claims for Guantánamo detainees; ODIHR interview with the Center for Constitutional Rights, *op. cit.*, note 255: representatives also stated that the United States has not paid reparations or apologized to any Guantánamo detainee. Pannelle, "The Guantanamo Gap", *op. cit.*, note 182, pp. 306-307, 349-351. UN CAT, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, *op. cit.*, note 107, para. 28.

¹⁶⁷³ UN CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, *op. cit.*, note 107, paras. 12, 14-15, 29. See, also, ICCPR, Art. 2(3); UN HRC, General Comment No. 31, *op. cit.*, note 36, para. 18; UN CAT, General Comment No. 3, *op. cit.*, note 1550, paras. 17, 23. See, also, CAT, Arts. 12, 13; Nowak, *CCPR Commentary*, *op. cit.*, note 93, p. 181: "It follows that the lack of a prompt, impartial and thorough investigation of gross human rights violations, such as torture, (...) constitutes a violation of the right to an effective remedy in Art. 2(3)."

¹⁶⁷⁴ Patrick Wintour, "Guantánamo Bay detainees to be paid compensation by UK government", The Guardian website, 16 November 2010, <<http://www.theguardian.com/world/2010/nov/16/guantanamo-bay-compensation-claim>>.

¹⁶⁷⁵ "Prime Minister Releases Letter of Apology to Maher Arar and his Family and Announces Completion of Mediation Process", Prime Minister of Canada Stephen Harper's website, 26 January 2007, <<http://pm.gc.ca/eng/news/2007/01/26/prime-minister-releases-letter-apology-maher-arar-and-his-family-and-announces>>.

failed to compensate Omar Khadr even though the Canadian Supreme Court found that the government “actively participated in a process contrary to its international human rights obligations” and contributed to his continued detention.¹⁶⁷⁶ Additionally, the former Yugoslav Republic of Macedonia was ordered to pay El-Masri EUR 60,000 by the ECtHR in relation to El-Masri’s incommunicado detention, ill-treatment and transfer to US authorities.¹⁶⁷⁷ Poland has reportedly complied with the ECtHR ruling to pay EUR 100,000 to Al-Nashiri and EUR 130,000 to Zubaydah in relation to CIA detention site that was located in Poland.¹⁶⁷⁸

589. While ODIHR commends those participating States that have provided redress, it urges all participating States complicit in arbitrary detention, torture and ill-treatment to ensure that adequate, effective and prompt redress is provided to Guantánamo detainees, or other persons detained in the CIA RDI programme who have not yet been compensated, who have been subjected to gross violations of international law.

d. Recommendations

- To ensure that former and current detainees, including those previously detained in secret detention, have access to full redress, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for violations of the freedom from arbitrary detention and the prohibition of torture and ill-treatment;
- To amend domestic legislation so as to repeal or amend Section 2241(e)(2) so that detainees can access US courts to seek redress; to repeal or amend Section 2000dd-1 of Title 42 so that there can be no justification for acts of torture; to repeal or amend legislative provisions imposing statutes of limitations and immunity for gross human rights violations; and to enact legislation to expressly provide detainees with an opportunity to seek redress in federal courts or through other mechanisms for violations of human rights and fundamental freedoms;
- To promptly release from detention those detainees whose *habeas corpus* petitions have been successful;
- To refrain from invoking the state secrets privilege and thereby preventing detainees from seeking redress. The privilege should never be invoked to avoid embarrassment, to conceal violations of law or to avoid liability;
- To provide full information on available remedies to former and current Guantánamo detainees or other persons subject to the CIA RDI programme;
- To establish an independent and effective mechanism to review claims and provide compensation for any abuses committed in the CIA RDI programme and at Guantánamo;

¹⁶⁷⁶ Canadian Supreme Court, *Prime Minister of Canada v. Khadr*, *op. cit.*, note 1229. In May 2015, Khadr has been released on bail. Under the terms of his bail, he reportedly lives with his attorney and is subject to extensive monitoring (including wearing an electronic bracelet and the remote surveillance of his Internet usage) and a curfew. He is also prohibited from having a laptop, cell phone or any other mobile device, Spencer Ackerman, “Canada frees Omar Khadr, once Guantánamo Bay’s youngest inmate”, The Guardian website, 7 May 2015, <<http://www.theguardian.com/world/2015/may/07/canada-free-bail-omar-khadr-guantanamo-bay-youngest>>.

¹⁶⁷⁷ ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, *op. cit.*, note 300, para. 270.

¹⁶⁷⁸ ECtHR, *Al Nashiri v. Poland*, *op. cit.*, note 172, para. 595; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, *op. cit.*, note 172, paras. 567, 571. Associated Press in Warsaw, “Poland pays \$250,000 to victims of CIA rendition and torture”, The Guardian website, 15 May 2015, <<http://www.theguardian.com/world/2015/may/15/poland-pays-250000-alleged-victims-cia-rendition-torture>>.

- To issue an official apology and commit to full disclosure of the truth regarding the CIA RDI programme and the situation at Guantánamo;
- To publicly and promptly release the full Senate Select Intelligence Committee's Study on the CIA RDI Programme;
- Other OSCE participating States must provide redress to former and current Guantánamo detainees where they have been complicit in their arbitrary detention, torture and ill-treatment.

ANNEX 1 – KEY RELEVANT OSCE HUMAN DIMENSION COMMITMENTS

HELSINKI 1975 (Questions Relating to Security in Europe: 1.(a) Declaration on Principles Guiding Relations between Participating States – Principle VII)

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

(...)

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law (...).

VIENNA 1989 (Questions Relating to Security in Europe: Principles)

(11) [The participating States] confirm that they will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They also confirm the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and security necessary to ensure the development of friendly relations and cooperation among themselves, as among all States.

(...)

(13) In this context they will

(...)

(13.7) - ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

(...)

(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia*, effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies. (...)

(16) In order to ensure the freedom of the individual to profess and practise religion or belief, the participating States will, *inter alia*,

(16.1) - take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life (...);

(...)

(16.4) - respect the right of these religious communities to

- establish and maintain freely accessible places of worship or assembly (...);

(...)

(16.5) - engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;

(16.6) - respect the right of everyone to give and receive religious education in the language of his choice, whether individually or in association with others;

(...)

(16.9) - respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief,

(...)

(17) The participating States recognize that the exercise of the above-mentioned rights relating to the freedom of religion or belief may be subject only to such limitations as are provided by law and consistent with their obligations under international law and with their international commitments. They will ensure in their laws and regulations and in their application the full and effective exercise of the freedom of thought, conscience, religion or belief.

(...)

(23) The participating States will

(23.1) - ensure that no one will be subjected to arbitrary arrest, detention or exile;

(23.2) - ensure that all individuals in detention or incarceration will be treated with humanity and with respect for the inherent dignity of the human person;

(23.3) - observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the United Nations Code of Conduct for Law Enforcement Officials;

(23.4) - prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices;

(...)

(23.6) - protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and take effective measures to prevent and punish such practices.

(24) With regard to the question of capital punishment, the participating States note that capital punishment has been abolished in a number of them. In participating States where capital punishment has not been abolished, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the

crime and not contrary to their international commitments. This question will be kept under consideration. In this context, the participating States will co-operate within relevant international organizations.

COPENHAGEN 1990

(5) [The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(...)

(5.9) - all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;

(5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) - the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(...)

(5.15) - any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) - any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) - no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) - everyone will be presumed innocent until proved guilty according to law;

(...)

(9) The participating States reaffirm that

(9.1) - everyone will have the right to freedom of expression (...). This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.

(...)

(9.4) - everyone will have the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom to manifest one's religion or belief, either alone or in community with others, in public or in private, through worship,

teaching, practice and observance. The exercise of these rights may be subject only to such restrictions as are prescribed by law and are consistent with international standards;
(...)

(10.1) - respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms, including the rights to disseminate (...) such views and information;
(...)

(11) The participating States further affirm that, where violations of human rights and fundamental freedoms are alleged to have occurred, the effective remedies available include
(11.1) - the right of the individual to seek and receive adequate legal assistance;
(11.2) - the right of the individual to seek and receive assistance from others in defending human rights and fundamental freedoms, and to assist others in defending human rights and fundamental freedoms;
(11.3) - the right of individuals or groups acting on their behalf to communicate with international bodies with competence to receive and consider information concerning allegations of human rights abuses.
(...)

(16) The participating States

(16.1) - reaffirm their commitment to prohibit torture and other cruel, inhuman or degrading treatment or punishment, to take effective legislative, administrative, judicial and other measures to prevent and punish such practices, to protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and to take effective measures to prevent and punish such practices;
(...)

(16.3) - stress that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;
(...)

(16.5) - will keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under their jurisdiction, with a view to preventing any cases of torture;

(16.6) - will take up with priority for consideration and for appropriate action, in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE, any cases of torture and other inhuman or degrading treatment or punishment made known to them through official channels or coming from any other reliable source of information;

(16.7) - will act upon the understanding that preserving and guaranteeing the life and security of any individual subjected to any form of torture and other inhuman or degrading treatment or punishment will be the sole criterion in determining the urgency and priorities to be accorded in taking appropriate remedial action; and, therefore, the consideration of any cases of torture and other inhuman or degrading treatment or punishment within the framework of any other international body or mechanism may not be invoked as a reason for refraining from

consideration and appropriate action in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE.

(...)

(25) The participating States confirm that any derogations from obligations relating to human rights and fundamental freedoms during a state of public emergency must remain strictly within the limits provided for by international law, in particular the relevant international instruments by which they are bound, especially with respect to rights from which there can be no derogation. They also reaffirm that

(...)

(25.3) - measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation;

(25.4) - such measures will not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or belonging to a minority;

(...)

(40.5) - recognize the right of the individual to effective remedies and endeavour to recognize, in conformity with national legislation, the right of interested persons and groups to initiate and support complaints against acts of discrimination, including racist and xenophobic acts;

MOSCOW 1991

(18.2) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.

(18.3) To the same end, there will be effective means of redress against administrative regulations for individuals affected thereby.

(18.4) The participating States will endeavour to provide for judicial review of such regulations and decisions.

(19) The participating States:

(19.1) - will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, *inter alia*, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;

(19.2) - will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary, which, *inter alia*, provide for

- (i). prohibiting improper influence on judges;
- (ii). preventing revision of judicial decisions by administrative authorities, except for the rights of the competent authorities to mitigate or commute sentences imposed by judges, in conformity with the law;
- (iii). protecting the judiciary's freedom of expression and association, subject only to such restrictions as are consistent with its functions;

- (iv). ensuring that judges are properly qualified, trained and selected on a non-discriminatory basis;
 - (v). guaranteeing tenure and appropriate conditions of service, including on the matter of promotion of judges, where applicable;
 - (vi). respecting conditions of immunity;
 - (vii). ensuring that the disciplining, suspension and removal of judges are determined according to law.
- (...)

(23.1) The participating States will ensure that

- (i). no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;
- (ii). anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;
- (iii). any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;
- (iv). any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful;
- (v). anyone charged with a criminal offence will have the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (vi). any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards;
- (vii). effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;
- (viii). the duration of any interrogation and the intervals between them will be recorded and certified, consistent with domestic law;
- (ix). a detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;
- (x). such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;

- (xi). anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.

HELSINKI 1992 (Decisions: VI. The Human Dimension)

Enhanced role of the ODIHR

(...)

(5) (...) [T]he ODIHR will, as the main institution of the Human Dimension:

(5a) assist the monitoring of implementation of commitments in the Human Dimension (...).

BUDAPEST 1994 (Decisions: VIII. The Human Dimension)

8. The ODIHR, as the main institution of the human dimension, in consultation with the Chairman-in-Office, will, acting in an advisory capacity, participate in discussions of the Senior Council and the Permanent Council, by reporting at regular intervals on its activities and providing information on implementation issues. It will provide supporting material for the annual review of implementation and, where necessary, clarify or supplement information received. Acting in close consultation with the Chairman-in-Office, the Director of the ODIHR may propose further action.

(...)

20. The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination. They recognize the importance in this respect of international norms as laid down in international treaties on human rights, in particular the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. They also recognize the importance of national legislation aimed at eradicating torture. They commit themselves to inquire into all alleged cases of torture and to prosecute offenders. They also commit themselves to include in their educational and training programmes for law enforcement and police forces specific provisions with a view to eradicating torture. They consider that an exchange of information on this problem is an essential prerequisite. The participating States should have the possibility to obtain such information. The CSCE should in this context also draw on the experience of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment established by the Commission on Human Rights of the United Nations and make use of information provided by NGOs.

(...)

36. The participating States reaffirm that freedom of expression is a fundamental human right and a basic component of a democratic society.

(...)

43. They agreed that the ability of the ODIHR to provide in-depth expertise on human dimension issues under the Programme of Co-ordinated Support should be further developed. In order to respond to requests for advice by newly independent States concerned on all

aspects of democratization, they decided that using experts-at-large within the framework of the Programme of Co-ordinated Support would be a useful enhancement of the ODIHR's role.

ISTANBUL 1999 (Charter for European Security: III. Our Common Response)

21. We are committed to eradicating torture and cruel, inhumane or degrading treatment or punishment throughout the OSCE area. To this end, we will promote legislation to provide procedural and substantive safeguards and remedies to combat these practices. We will assist victims and co-operate with relevant international organizations and non-governmental organizations, as appropriate.

(...)

26. We reaffirm the importance of (...) the free flow of information as well as the public's access to information.

BUCHAREST 2001 (Annex to Decision 1 on Combating Terrorism; The Bucharest Plan of Action for Combating Terrorism)

18. ODIHR: Will, on request by interested participating States and where appropriate, offer technical assistance/advice on the implementation of international anti-terrorism conventions and protocols as well as on the compliance of this legislation with international standards, in accordance with Permanent Council decisions (...).

PORTO 2002 (Charter on Preventing and Combating Terrorism)

The OSCE participating States, firmly committed to the joint fight against terrorism,
(...)

2. Firmly reject identification of terrorism with any nationality or religion and reaffirm that action against terrorism is not aimed against any religion, nation or people;
(...)

6. Reaffirm their commitment to take the measures needed to protect human rights and fundamental freedoms, especially the right to life, of everyone within their jurisdiction against terrorist acts;

7. Undertake to implement effective and resolute measures against terrorism and to conduct all counter-terrorism measures and co-operation in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights and, where applicable, international humanitarian law; (...).

MAASTRICHT 2003 (OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century)

20. The OSCE will continue to be an active player across its region, using its institutions — the Office for Democratic Institutions and Human Rights (ODIHR), the High Commissioner

on National Minorities (HCNM), and the Representative on Freedom of the Media (RFM) — its field operations and its Secretariat to the full. They are important instruments in assisting all participating States to implement their commitments, including respect for human rights, democracy and the rule of law. (...)

LJUBLJANA 2005 (Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems)

The Ministerial Council,
(...)

Recognizing that rule of law must be based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention,

Recognizing that an impartial and independent judiciary plays a vital role in ensuring due process and protecting human rights before, during and after trials,
(...)

Underlining the need to speak out publicly against torture, and recalling that all forms of torture and other cruel, inhuman or degrading treatment or punishment are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and stressing the need to strengthen procedural safeguards to prevent torture as well as to prosecute its perpetrators, thereby preventing impunity for acts of torture, and calling upon participating States to give early consideration to signing and ratifying the Optional Protocol to the Convention against Torture, (...).

BRUSSELS 2006 (Brussels Declaration on Criminal Justice Systems)

We recall the commitment of the participating States to ensure the independence of the judiciary.
(...)

We consider that:

- Judicial independence is a prerequisite to the rule of law and acts as a fundamental guarantee of a fair trial;
- Impartiality is essential to the proper discharge of the judicial office;
- Integrity is essential to the proper discharge of the judicial office;
- Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge;
- A guarantee of equality of treatment to all before the courts is essential to the due performance of the judicial office;
- Competence and diligence are prerequisites to the due performance of the judicial office.

We consider that:

- Prosecutors should be individuals of integrity and ability, with appropriate training and qualifications;
- Prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law;
- The office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges;
- Prosecutors should, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

We consider that:

(...)

- Law enforcement officials, as members of the broader group of public officials or other persons acting in an official capacity, should not inflict, instigate, encourage or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment;
- No law enforcement official should be punished for not obeying orders to commit or conceal acts amounting to torture or other cruel, inhuman or degrading treatment or punishment;
- Law enforcement officials should be cognizant and attentive to the health of persons in their custody and, in particular, should take immediate action to secure medical attention whenever required.

We consider that:

- All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer, without discrimination and without improper interference from the authorities or the public;

(...)

- Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards;
- Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards;
- All reasonable and necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law;
- Lawyers (...) should have access to all relevant evidence and records when defending the rights and interests of their clients in accordance with their professional standards.

HELSINKI 2008 (Ministerial Declaration on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights)

We stress that everyone has the right to life, liberty and security of person; no one shall be held in slavery, and no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

HELSINKI 2008 (Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area)

4. Encourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law, *inter alia* in the following areas:

- Independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention;
(...)
- Respect for the rule of law and human rights in the fight against terrorism according to their obligations under international law and OSCE commitments;
- Prevention of torture and other cruel, inhuman or degrading treatment or punishment,
(...)
- The provision of effective legal remedies, where appropriate, and the access thereto;

ATHENS 2009 (Ministerial Declaration on the Occasion of the 25th Anniversary of the Adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

1. We, the members of the Ministerial Council of the OSCE, reaffirm our strong commitment to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984, to which all OSCE participating States have become parties.

2. On the occasion of the 25th anniversary of the adoption of this Convention we reaffirm that, as also set forth in the Universal Declaration of Human Rights, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

3. We recognize that torture is a most serious crime and affirm that freedom from torture and other forms of cruel, inhuman or degrading treatment or punishment is a non-derogable right, which protects the inherent dignity and integrity of the human person.

4. We strongly condemn all forms of torture and other cruel, inhuman or degrading treatment or punishment, which are and shall remain prohibited at any time and in any place whatsoever and can never be justified.

5. We are seriously concerned that torture and other cruel, inhuman or degrading treatment or punishment still take place in many parts of the world, including in OSCE participating States.

6. We therefore pledge to uphold the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment as set forth in the Convention, to implement fully and in good faith its provisions, and to act in full conformity with all its principles.

8. We also reaffirm our determination to implement fully our common OSCE commitments to eradicate torture and other cruel, inhuman or degrading treatment or punishment

9. We shall intensify our efforts to take persistent, determined and effective measures to prevent and combat torture and other cruel, inhuman or degrading treatment or punishment and to ensure full rehabilitation of torture victims.

DUBLIN 2012 (Decision No. 1063 on the OSCE Consolidated Framework for the Fight against Terrorism)

23. The Office for Democratic Institutions and Human Rights (ODIHR) will continue to address those issues within its mandate that relate to terrorism and to co-operate and co-ordinate with all the relevant OSCE executive structures to advance the OSCE human dimension commitments on the prevention of terrorism, within the OSCE's comprehensive concept of security.

ANNEX 2 – LIST OF INTERLOCUTORS

UNITED STATES GOVERNMENT

- **U.S. DEPARTMENT OF STATE**

- Office of the Special Envoy for Guantánamo Closure
- Office of the Legal Adviser
- Office of European Security and Political Affairs
- United States Mission to the OSCE

- **NATIONAL SECURITY COUNCIL**

- **U.S. DEPARTMENT OF JUSTICE**

- National Security Division

- **U.S. DEPARTMENT OF DEFENSE**

- Office of the Special Envoy for Guantánamo Closure
- Office of the Under Secretary of Defense for Policy, Office of Detainee Policy
- Office of the Chief Prosecutor
- Office of the Convening Authority
- Office of the General Counsel
- Joint Staff, J3-Operations

- **COMMISSION ON SECURITY AND COOPERATION IN EUROPE (THE HELSINKI COMMISSION)**

- David Kostelancik, Senior State Department Advisor
- Janice Helwig, Policy Advisor
- Erika Schlager, Counsel for International Law

MILITARY COMMISSION AND HABEAS CORPUS COUNSEL FOR GUANTÁNAMO DETAINEES

- Navy Lieutenant Commander Kevin B. Bogucki, Judge Advocate General's Corps, Detailed defense counsel, Office of Chief Defense Counsel
- Cheryl T. Bormann, Learned counsel, Law Office of Cheryl T. Bormann
- James G. Connell III, Learned counsel, Office of the Chief Defense Counsel
- Air Force Reserves Lieutenant Colonel David Frakt, Visiting Professor, University of Pittsburgh School of Law
- Navy Reserves Lieutenant Commander James Hatcher, Detailed defense counsel, Office of the Chief Defense Counsel
- Nancy Hollander, Freedman Boyd Hollander Goldberg Urias & Ward PA
- Richard Kammen, Learned counsel, Office of the Chief Defense Counsel
- Ramzi Kassem, Civilian defense counsel, Associate Professor of Law, The City University of New York, CUNY School of Law

- Robert Kirsch, WilmerHale
- Colonel Karen Mayberry, Chief Defense Counsel, Office of the Chief Defense Counsel
- Navy Commander Katharine McCormick, Judge Advocate General's Corps, Defense Counsel, Office of Chief Defense Counsel
- Robert McKeehan, WilmerHale
- Navy Commander Brian Mizer, Assistant detailed defense counsel, Office of Chief Defense Counsel
- Michael E. Mone, Jr., Habeas counsel, Esdaile, Barrett, Jacobs and Mone
- Matthew O'Hara, Partner, Hinshaw & Culbertson LLP
- Michel Paradis, Counsel, Office of the Chief Defense Counsel
- Marine Corps Major Derek Poteet, Detailed defense counsel, Office of the Chief Defense Counsel
- David Remes, Appeal for Justice
- Brent Rushforth, Partner, McKool Smith
- Heather Schafroth, WilmerHale
- Air Force Captain Michael Schwartz, Detailed defense counsel, Office of the Chief Defense Counsel
- Tim Jon Semmerling, Mitigation Specialist, The Mercury Endeavor, LLC
- Air Force Lieutenant Colonel Sterling Thomas, Detailed defense counsel, Office of the Chief Defense Counsel
- Adam Thurschwell, General Counsel, Office of the Chief Defense Counsel
- Army Major Jason Wright, Detailed defense counsel, Office of the Chief Defense Counsel

FORMER GUANTÁNAMO DETAINEES

- Mustafa Ait Idir
- Hajj Boudella
- Lakhdar Boumediene
- David Hicks
- Murat Kurnaz

INTERNATIONAL ORGANIZATIONS

- Inter-American Commission on Human Rights
- International Committee of the Red Cross

ACADEMICS AND OTHER EXPERTS

- Scott Allen, Clinical Professor and Associate Dean of Academic Affairs, UC Riverside School of Medicine
- Alex Conte, Reader in Public International Law and Human Rights, Sussex Law School, University of Sussex
- Jonathan Hafetz, Associate Professor of Law, Seton Hall Law
- Thomas Parker
- Stephen Vladeck, Professor of Law, American University, Washington College of Law

- Brigadier General Stephen Xenakis, Center for Translational Medicine

NGO REPRESENTATIVES

- Christopher Anders, Senior Legislative Counsel, American Civil Liberties Union
- Mason Clutter, National Security and Privacy Counsel, National Association of Criminal Defense Lawyers
- Jamil Dakwar, Director, Human Rights Program, American Civil Liberties Union
- Wells Dixon, Senior Staff Attorney, Center for Constitutional Rights
- Andrea Gittleman, Senior Legislative Counsel, Physicians for Human Rights
- Jonathan Horowitz, Associate Legal Officer, National Security and Counterterrorism, Open Society Justice Initiative
- Zeke Johnson, Director, Security with Human Rights Campaign, Amnesty International USA
- Pardiss Kebriaei, Senior Staff Attorney, Center for Constitutional Rights
- Melina Milazzo, Senior Policy Counsel, The Center for Victims of Torture
- Andrea Prasow, Senior National Security Counsel and Advocate, Human Rights Watch
- Hina Shamsi, Director, National Security Project, American Civil Liberties Union
- Scott Roehm, Senior Counsel, The Constitution Project
- Amrit Singh, Senior Legal Officer, National Security and Counterterrorism, Open Society Justice Initiative
- Raha Wala, Senior Counsel, Defense and Intelligence, Human Rights First

ANNEX 3 – RESPONSE FROM CURRENT DETAINEE TO QUESTIONS SUBMITTED BY ODIHR

1435/11/10
2014/9/5

From: Waleed Mohammad Bin 'Attash

To: Office for Democratic Institutions and Human Rights, Organization for Security and Cooperation in Europe

[REDACTED]

