



United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D.C. 20520

December 23, 2016

Mr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Djamel Ameziane, Case No. 12.865
Further Response of the United States**

Dear Mr. Abrão:

We appreciate the opportunity to provide further observations on the various communications forwarded to the United States in the above-referenced matter, including the Merits Brief on behalf of Djamel Ameziane dated September 30, 2015, which was transmitted to the United States via a letter dated November 15, 2016. As a courtesy, we append to this letter our submission on the detention program at the Guantanamo Bay Naval Station dated March 30, 2015 and here provide some general information regarding the competence of the Commission, precautionary measures, and U.S. law, policy, and practice regarding detention authorities, safeguards against torture and ill-treatment in U.S. custody, and U.S. humane transfer policies, including, where relevant, information specific to Mr. Ameziane. We refer you to our prior submissions on this matter for further information.¹

¹ See, e.g., Ameziane v. United States, Case No. 12.865, Response of the United States, Oct. 29, 2010; 254 Detainees in the Guantanamo Bay Military Base v. United States, PM No. 259-02, Supplementary Response of the United States, March 30, 2011; 254 Detainees in the Guantanamo Bay Military Base v. United States & Ameziane v. United States, PM No. 259-02 & PM No. MC-211-08, Supplementary Response of the United States, Aug. 26, 2011; Ameziane v. United States, Case No. 12.865, Friendly Settlement Response of the United States, July 24, 2012; Ameziane v. United States, Case No. 12.865, Response of the United States Regarding Working Meeting, Dec. 14, 2012; Ameziane v. United States, Case No. 12.865, Response of the United States to Questions from the March 13, 2013 Working Meeting, May 1, 2013; Ameziane v. United States, PM No. 211-08, Response of the United States, July 11, 2013.

Lack of competence

Mr. Ameziane alleges that the United States has “violated”² certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration”) through his detention at the Guantanamo Bay Detention Facility (“Guantanamo”). As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).³ Article 20 of the Statute of the Commission sets forth the Commission’s powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The Commission lacks competence to issue a binding decision vis-à-vis the United States on matters arising under other international human rights treaties, whether or not the United States is a party, or under customary international law.

Even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to certain of Mr. Ameziane’s claims

² As the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, *see infra* note 3, the United States understands that a “violation” in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration.

³ The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the OAS. U.S. courts of appeal have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See, e.g.,* *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.,* *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493–94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission’s decisions before the American Convention goes into effect. To the contrary, the OAS Charter’s reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission’s statute similarly shows that the Commission does not have the power to bind member states.” *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

because during situations of armed conflict, the law of war is the *lex specialis*. As such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.⁴ The Commission has no competence under its Statute and Rules to consider matters arising under the law of war and may not incorporate the law of war into the principles of the American Declaration. The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. Moreover, a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations; international human rights treaties, according to their terms, may also be applicable in armed conflict. However, treaties and customary international law may not be applied by the Commission through the nonbinding American Declaration.

Precautionary measures

The Commission requested precautionary measures in this matter on August 20, 2008. The United States respectfully reiterates that the Commission does not have the authority to request that States not party to the American Convention adopt precautionary measures. As the reasons for the U.S. position on precautionary measures have been stated in detail in past submissions, we will not restate them here but instead append one such submission and invite the Commission to share it with Mr. Ameziane.⁵ As such, the United States has construed the Commission's request for precautionary measures as a nonbinding recommendation.

Detention authority, procedural protections during habeas proceedings in federal court, and Executive Order 13492

Mr. Ameziane was detained under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the law of war, in the

⁴ See Submission of the Government of the United States to the Inter-American Commission on Human Rights with Respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V/II. Doc., Mar. 30, 2015 (attached as Annex 1).

⁵ Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D. We have appended the *Kadamovas* filing as Annex 2. We have no objection to the Commission sharing this letter with Mr. Ameziane, and that letter contains no privacy protected information or other information about the *Kadamovas* petitioners that, in our view, would preclude sharing it with Mr. Ameziane.

ongoing conflict with al-Qaida, the Taliban, and associated forces. This law authorizes the President of the United States to “use all necessary and appropriate force against those ... organizations[] or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” including the authority to detain persons who are part of al-Qaida, the Taliban, or associated forces.

All Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of *habeas corpus*. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. Except in rare circumstances required by compelling security interests, all of the evidence relied upon by the government in *habeas* proceedings to justify detention is disclosed to detainees’ counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link.

The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose *habeas* petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings. Mr. Ameziane took advantage of the availability of this remedy and filed a *habeas corpus* petition on February 24, 2005, challenging the lawfulness of his detention. The case was stayed in May 2009 pending efforts to transfer Mr. Ameziane and ultimately dismissed as moot following his transfer to Algeria.⁶ Mr. Ameziane had access to counsel in connection with his *habeas* proceeding throughout his time in detention. Further, prior to the May 2009 stay, the United States submitted to the *habeas* court and Mr. Ameziane’s counsel filings detailing the factual bases for Mr. Ameziane’s detention, and the court held multiple hearings related to the bases for detention.

Additionally, in his first week in office, President Obama issued Executive Order 13492 regarding the review and disposition of individuals detained at Guantanamo Bay and the closure of the detention facility.⁷ Executive Order 13492

⁶ Ameziane v. Obama, 58 F.Supp.3d 99 (D.D.C. 2014).

⁷ Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Close of Detention Facilities*, 74 FR 4897, Jan. 22, 2009, available at <https://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf>.

required a comprehensive review of the status of Guantanamo detainees to determine their appropriate disposition by way of release, transfer, prosecution, or continued detention pursuant to the law of armed conflict. That review was completed on January 22, 2010. Mr. Ameziane was designated for transfer through this review process.

President Obama has repeatedly reaffirmed that closing the Guantanamo Bay detention facility is a national security imperative. The Administration is taking all possible steps to reduce the detainee population at Guantanamo and to close the detention facility in a responsible manner that protects our national security. However, restrictions that Congress has placed on transfers of Guantanamo detainees since 2011 have served as significant impediments to closing the facility. As of December 23, 2016, there are 59 detainees at Guantanamo, compared to 242 detainees on January 20, 2009, when the President took office.

Treatment in detention

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws. The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo. On one of his first days in office, January 22, 2009, President Obama issued Executive Order 13491, *Ensuring Lawful Interrogations*.⁸ The Executive Order directed that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. policy, and shall not be subjected to violence to life and person (including cruel treatment and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States. It

⁸ Executive Order 13491, *Ensuring Lawful Interrogations*, 74 FR 4893, Jan. 22, 2009, available at <https://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf>.

further ordered that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized and listed in the Army Field Manual 2-22.3.⁹ The Field Manual explicitly prohibits threats, coercion, and physical abuse.¹⁰ The National Defense Authorization Act for Fiscal Year 2016 (“2016 NDAA”)¹¹ codified many of the key interrogation-related reforms required by the Executive Order. It also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

In addition to the Army Field Manual, the U.S. Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09¹² requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

Additionally, Department of Defense Directive 2310.01E¹³ requires that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command,” including “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information.” All reportable incidents must be investigated and, where appropriate, remedied by corrective action.

⁹ See <http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchDownloadPage.aspx?docID=0902c85180012142>.

¹⁰ The requirements of Army Field Manual 2.22-3 are binding on the U.S. military, as well as on all federal government departments and agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of federal law enforcement agencies.

¹¹ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 1223–24, 129 Stat. 726, 1049 (2015).

¹² Department of Defense Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, Nov. 15, 2013, available at www.dtic.mil/whs/directives/corres/pdf/311509p.pdf.

¹³ Department of Defense Directive 2310.01E, DoD Detainee Program, Aug. 19, 2014 (“DoD Directive 2310.01E”), available at www.jag.navy.mil/distrib/instructions/DoDD2310.01E_Detainee_Program.pdf.

International Committee of the Red Cross (ICRC) access

The 2016 NDAA requires that any U.S. government department or agency provide the ICRC with notification of, and prompt access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with existing Department of Defense regulations and policies. This statute codified the identical legal requirement contained in Executive Order 13491, issued by the President in January 2009. The Department of Defense has worked closely with the ICRC to facilitate increased opportunities for Guantanamo detainees to communicate with their families. The addition of near real-time communication is another step in the Department of Defense's efforts to assess continually and, where practicable and consistent with security requirements, improve conditions of detention for detainees in its custody. Detainees are given the opportunity to send and receive letters, facilitated by the ICRC, and are able to talk to their families periodically via phone or video teleconference.

Medical care at Guantanamo

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detainees. JMG providers take seriously their duty to protect the physical and mental health of the detainees and approach their interactions with detainees in a manner that encourages provider-patient trust and rapport and that is aimed at encouraging detainee participation in medical treatment and prevention.¹⁴ The healthcare provided to the detainees at Guantanamo is comparable to that which U.S. service personnel receive while serving at Joint Task Force–Guantanamo.¹⁵

¹⁴ Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians. For example, detainees may make a request to guard personnel in the cell blocks or to the medical personnel who make daily rounds on each cell block at any time in order to initiate medical care. In addition to responding to such detainee requests, the medical staff will investigate any medical issues observed by staff. The availability of care through ongoing monitoring and response to detainee-initiated requests has resulted in thousands of outpatient contacts between detainees at Guantanamo and the medical staff, followed by inpatient care as needed. *See* DoD Instruction 2310.08E, *supra* note 13.

¹⁵ DoD Instruction 2310.08E, *supra* note 13, states: "Health care personnel charged with the medical care of detainees have a duty to protect detainees' physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces." The JMG staff includes licensed, board-certified physicians and staff of different specialties, including an internist/oncologist, a dentist, a physician's assistant, licensed medical/surgical nurses, corpsmen (formally trained Navy medical personnel akin to a "medic" in the Army), various technicians (lab, radiology, pharmacy, operating room, respiratory

Department of Defense physicians and healthcare personnel charged with providing care to detainees take their responsibility for the health of detainees very seriously. Military physicians and other healthcare personnel are held to the highest standards of ethical care and at no time have been released from their ethical obligations. Medical care is not provided or withheld based on a detainee's compliance or noncompliance with detention camp rules.

Religious practice at Guantanamo

The Joint Task Force also makes every effort to accommodate the religious and cultural practices of detainees. Detainees at Guantanamo have the opportunity to pray five times each day. Prayer times are posted for the detainees, and arrows are painted in the living areas—in each cell and in communal areas—so that the detainees know the direction of Mecca. Once prayer call sounds, detainees receive 20 minutes of uninterrupted time to practice their faith. The guard force strives to ensure detainees are not interrupted during the 20 minutes following the prayer call, even if detainees are not involved in religious activity. The majority of detainees are in communal living accommodations, where they are able to pray communally. Even detainees who are in single-cell living accommodations conduct prayer together.

Joint Task Force Guantanamo schedules detainee medical appointments, interviews, classes, legal visits, and other activities mindful of the prayer call schedule. Every detainee at Guantanamo is issued a personal copy of the Quran in the language of his choice. Strict measures are in place throughout the facility to ensure that the Quran is handled appropriately by U.S. personnel. The Joint Task Force recognizes Islamic holy periods like Ramadan by modifying meal schedules in observance of religious requirements. Special accommodations are made to adhere to Islamic dietary needs. Department of Defense personnel deployed to Guantanamo receive cultural training to ensure they understand Islamic practices.

therapy, physical therapy, and biomedical repair), and administrative staff. The Naval Hospital Guantanamo provides additional consultative services from numerous medical professionals including an anesthesiologist, a general surgeon, an orthopedic surgeon, a licensed dietician, and a physical therapist. Specialists, including medical professionals practicing in the area of dermatology, cardiology, otorhinolaryngology (ear, nose, and throat), gastroenterology, urology, and audiology, are routinely brought in, and JMG has the ability to request specialists from other areas as needed.

Non-refoulement and transfers

Mr. Ameziane was repatriated to Algeria by the U.S. government in December 2013. At the outset, it is worth noting that Mr. Ameziane does not allege that he has been subjected to torture by the Government of Algeria since his transfer.

The United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured in that country. This includes transfers of Guantanamo detainees.¹⁶ The U.S. government's policy is reflected in a statutory statement of U.S. policy and memorialized in court submissions. For example, Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." When contemplating such a transfer of a detainee to another country, the United States considers the totality of relevant factors relating to the individual to be transferred and the government in question, including any security and humane treatment assurances received and the reliability of those assurances.

To further the goal of ensuring humane transfers in all contexts, including in the context of armed conflict, Executive Order 13491 required the formation of a special U.S. government task force to study and evaluate the practices of transferring individuals to other nations in order to ensure consistency with all applicable laws and U.S. policies pertaining to treatment. The Special Task Force issued a set of recommendations to ensure that U.S. transfer practices comply with the domestic laws, international obligations, and policies of the United States and

¹⁶ The United States maintains its longstanding position that neither Article XXVI nor any other article of the American Declaration contains an express or implied *non-refoulement* commitment. *See, e.g.,* Pierre v. United States, Petition No. P-1431-08, Response of the Government of the United States of America, Feb. 18, 2011, at 2–3. We have appended the *Pierre* filing as Annex 3. We have no objection to the Commission sharing this letter with Mr. Ameziane, and that letter contains no privacy protected information or other information about Mr. Pierre that, in our view, would preclude sharing it with Mr. Ameziane.

do not result in the transfer of individuals to face torture. The full text of the unclassified portion of the Special Task Force's report is publicly available.¹⁷

All transfers of detainees from Guantanamo are conditioned on the receipt of assurances of humane treatment from the receiving government. The U.S. government will transfer a detainee only if it determines that the transfer is consistent with our humane transfer policy. In making any such determination, U.S. officials consider the totality of relevant factors relating to the individual to be transferred and the proposed recipient government. When considering a transfer, the United States may consider, among other factors: the individual's allegations of prior or potential future mistreatment in the receiving State; the receiving State's overall human rights record; the specific factors suggesting that the individual in question is at risk of being tortured in the receiving State; whether similarly situated individuals have been tortured in the receiving State; and any humane treatment assurances provided by the receiving State (including an assessment of their credibility).

The essential question in evaluating foreign government assurances relating to humane treatment is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, it is more likely than not that the individual will be tortured in the country to which he is being transferred. Although the content of any specific set of assurances must be determined on a case-by-case basis, assurances should fundamentally reflect a credible and reliable commitment by the receiving State to treat the transferred individual humanely and that such treatment would be consistent with applicable international and domestic law.

The U.S. government considers a number of factors in evaluating the adequacy of assurances offered by the receiving State, including, but not limited to, information regarding the judicial and penal conditions and practices of the receiving country; U.S. relations with the receiving country; the receiving country's capacity and incentives to fulfill its assurances; political or legal developments in that country; the country's record in complying with similar assurances; the particular person or entity providing the assurances; and the

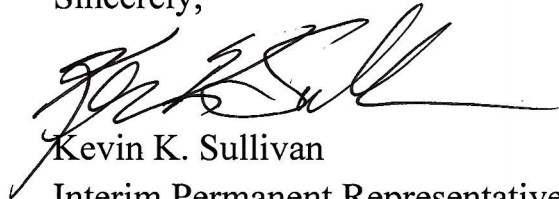
¹⁷ See https://www.justice.gov/oip/foia-library/2009_report_special_task_force_interrogation_and_transfer_policies/download.

relationship between that person or entity and the entity that will detain and/or monitor the individual transferee's activity.

In a case in which the United States became aware of credible allegations that humane treatment assurances were not being honored, the United States would take diplomatic or other steps to ensure that the detainee in question would be appropriately treated, and to make clear the bilateral implications of continued non-observance of commitments made to the U.S. government. A failure to honor humane treatment commitments would be a significant factor in determining whether to make any future detainee transfers from U.S. custody to the custody of a foreign government against which such a finding had been made. In specific cases where the United States had concerns about whether these commitments would be honored by the receiving country, the United States would not proceed with transfers to that country predicated on such assurances until those concerns had been appropriately addressed. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.¹⁸

We trust this information is useful to the Commission. Please accept renewed assurances of my highest consideration.

Sincerely,



Kevin K. Sullivan
Interim Permanent Representative

¹⁸ For more information about U.S. transfer and humane treatment laws, policies, and practices, please see the U.S. Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, Dec. 2016, at https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf.

- Annexes:
1. Submission of the Government of the United States to the Inter-American Commission on Human Rights with Respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V/II. Doc., Mar. 30, 2015.
 2. Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015
 3. Pierre v. United States, Petition No. P-1431-08, Response of the Government of the United States of America, Feb. 18, 2011