

# THE ROLE OF INTERNATIONAL LAW AND INSTITUTIONS IN U.S. DETENTION POLICY AND PRACTICES

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Djamel Ameziane has been held at the U.S. Naval Base at Guantanamo Bay, Cuba for more than ten years without formal charges or a trial. His story exemplifies many of the problems that face the remaining 166 detainees still being held at Guantanamo Bay.<sup>1</sup> Failing to obtain relief from U.S. authorities, Mr. Ameziane has petitioned for relief from the Inter-American Commission on Human Rights. His petition raises the question—what role can or should international law and international institutions play in resolving the cases of the remaining detainees at Guantanamo Bay?

## I. PERSONAL BACKGROUND

Mr. Ameziane was born in 1967 in Algeria to a family of four boys and four girls.<sup>2</sup> Following graduation from high school, Mr. Ameziane obtained a college-level diploma and worked as a hydraulics technician.<sup>3</sup> However, the region of Algeria where he lived is known for frequent violent conflict between the Algerian Army and Islamic resistance groups, and Mr. Ameziane fled the country in 1992 to escape the escalating violence and insecurity.<sup>4</sup> He first went to Austria where he worked as a chef.<sup>5</sup> He was forced to leave Austria in 1995 when his visa expired and he was unable to renew it due to the enactment of stricter immigration

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1. *The Guantanamo Docket—The Detainees*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/held> (last visited June 21, 2013).
2. Petition and Request for Precautionary Measures, Inter-Am. Comm'n H.R., ¶ 36 (Aug. 6, 2008), [hereinafter Petition], available at [http://ccrjustice.org/files/Petition and Request for Precautionary Measures\\_Ameziane v United States \(2\).pdf](http://ccrjustice.org/files/Petition%20and%20Request%20for%20Precautionary%20Measures_Ameziane%20v%20United%20States%20(2).pdf).
3. Admissibility Djamel Ameziane, Petition No. 900-08, Inter-Am. Comm'n H.R., Report No. 17/12, OEA/Ser.L./V/II.144, doc. 21 ¶ 9 (2012) [hereinafter Admissibility Report], available at [http://ccrjustice.org/files/2012-03-30 Ameziane IACHR Admissibility Decision.pdf](http://ccrjustice.org/files/2012-03-30_Ameziane_IACHR_Admissibility_Decision.pdf).
4. Petition, *supra* note 2, ¶ 37.
5. *Id.* ¶¶ 37-38.

policies.<sup>6</sup> He then travelled to Canada, where he sought asylum.<sup>7</sup> He obtained a temporary work permit and began a new life in Canada while he awaited a decision on his asylum application.<sup>8</sup>

Five years later, in 2000, Canada denied his asylum application.<sup>9</sup> Mr. Ameziane left Canada and traveled to Afghanistan rather than face deportation to Algeria, believing that he could freely practice his religion in Afghanistan.<sup>10</sup> During the ten months he spent in Afghanistan, he stayed in Arab guest houses and studied Arabic and the Koran.<sup>11</sup> When the United States invaded Afghanistan in 2001, he fled to Pakistan, where he was arrested by Pakistani authorities at a mosque and turned over to U.S. forces.<sup>12</sup> He was taken to a detention facility at the U.S.-occupied air base in Kandahar, Afghanistan.<sup>13</sup> There, Mr. Ameziane claims to have been beaten without provocation and subjected to inhumane and degrading treatment.<sup>14</sup>

In February 2002, the U.S. government transferred Mr. Ameziane from Kandahar Air Base to the Naval Base at Guantanamo Bay, Cuba, shortly after the latter facility had been opened to receive prisoners from the war on terrorism.<sup>15</sup> He was initially held at the infamous Camp X-Ray for three months; he was then transferred to Camp VI, a maximum-security facility where he has been held in isolation for long periods of time.<sup>16</sup> During his imprisonment, Mr. Ameziane has been repeatedly interrogated.<sup>17</sup> According to Mr. Ameziane, many of those interrogations have included beatings, water boarding, sleep deprivation, and religious desecration, among other interrogation techniques.<sup>18</sup>

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6. *Id.* ¶ 38.

7. Admissibility Report, *supra* note 3, ¶ 9.

8. *Id.* at ¶ 38.

9. *Id.*

10. Admissibility Report, *supra* note 3, ¶ 9.

11. DEP'T OF DEFENSE, JTF-GTMO DETAINEE ASSESSMENT 3-4 (2008), available at <http://projects.nytimes.com/guantanamo/detainees/310-djamel-saiid-ali-ameziane> [hereinafter DETAINEE ASSESSMENT].

12. Admissibility Report, *supra* note 3, ¶ 10; DETAINEE ASSESSMENT, *supra* note 11, at 4. Mr. Ameziane alleged that he was captured by local police, who sold him to U.S. forces for a bounty. Petition, *supra* note 2, ¶ 39.

13. Petition, *supra* note 2, ¶ 3.

14. *Id.*

15. *Id.* ¶ 4.

16. *Id.*

17. *Id.* ¶ 5.

18. *Id.*; see also Admissibility Report, *supra* note 3, at ¶¶ 11-13.

## II. U.S. LEGAL PROCEEDINGS

### A. Administrative Proceedings

In 2002, then-U.S. President Bush issued a memorandum determining that the detainees held at Guantanamo Bay were “unlawful combatants” not entitled to the protection of the Geneva Conventions on the Laws of War.<sup>19</sup> An international outcry arose, as that unilateral determination was seemingly inconsistent with Article 5 of Geneva Convention (III) Relative to the Treatment of Prisoners of War, which states that when a person’s status is in doubt, that person shall enjoy the protection of the Geneva Convention until his or her status has been determined by a competent tribunal.<sup>20</sup> In response to this international pressure and U.S. Supreme Court decisions in *Rasul v. Bush*<sup>21</sup> and *Hamdi v. Rumsfeld*,<sup>22</sup> the U.S. government set up Combatant Status Review Tribunals (CSRT) to assess the status of the detainees at Guantanamo Bay.

In 2004, the first CSRT to review Mr. Ameziane’s case determined him to be an enemy combatant.<sup>23</sup> The CSRT based its determination on the following facts. First, the CSRT determined that Mr. Ameziane traveled to Afghanistan from Canada in 2000 on a fraudulent passport.<sup>24</sup> Second, he was given money by a Tunisian man he met at an al Umah mosque in Canada<sup>25</sup> who instructed him to stay at a guesthouse in Kabul, Afghanistan, which was the residence of other Taliban fighters and run by an al Qaeda communications specialist.<sup>26</sup> Third, the CSRT determined that Mr.

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19. Memorandum on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf).

20. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. The United States is a party to the Geneva Conventions, which are part of the supreme law of the land. *See* U.S. CONST. art. VI, § 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

21. 542 U.S. 466, 484 (2004) (holding that noncitizen detainees held at Guantanamo Bay could invoke the jurisdiction of U.S. courts through a habeas corpus petition).

22. 542 U.S. 507, 533 (2004) (holding that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker”).

23. Memorandum from the Combatant Status Review Tribunal to the Personal Representative of Djamel Saiid Ali Ameziane (Sept. 30, 2004) [hereinafter CSRT Memo], *available at* <http://projects.nytimes.com/guantanamo/detainees/310-djamel-saiid-ali-ameziane/documents/5>.

24. *Id.*

25. *See id.*; Memorandum from the Office for the Admin. Review of the Detention of Enemy Combatants at U.S. Navy Base Guantanamo Bay, Cuba, to Djamel Saiid Ali Ameziane (Mar. 25, 2006) [hereinafter 2006 ARB Memo], *available at* <http://projects.nytimes.com/guantanamo/detainees/310-djamel-saiid-ali-ameziane/documents/3>.

26. *See* CSRT Memo, *supra* note 23; Memorandum from the Office for the Admin. Review of the Detention of Enemy Combatants at U.S. Navy Base Guantanamo Bay, Cuba, to Djamel Saiid Ali Ameziane (May 12, 2005) [hereinafter 2005 ARB Memo], *available at* <http://projects.nytimes.com/guantanamo/detainees/310-djamel-saiid-ali-ameziane/documents/1>.

Ameziane traveled through the Tora Bora Mountains with other Taliban fighters during the U.S. bombing campaign before illegally crossing into Pakistan.<sup>27</sup>

In 2005, Mr. Ameziane's case was reviewed by the Office for the Administrative Review of the Detention of Enemy Combatants at U.S. Navy Base Guantanamo Bay, Cuba. In its report, the Administrative Review Board listed the above-mentioned events as reasons for Mr. Ameziane's continued detention, but also listed reasons for Mr. Ameziane's release. Reasons favoring release included the fact that Mr. Ameziane never received any military or terrorist training and never saw any fighting.<sup>28</sup> In addition, Mr. Ameziane was never issued a weapon nor did he receive any training while in Afghanistan and ultimately decided to leave Afghanistan because the opposition was killing Arabs.<sup>29</sup>

In 2006, the Administrative Review Board reviewed Mr. Ameziane's case a second time. In addition to the reasons for continued detention listed by the first Administrative Review, the second Administrative Review listed additional reasons, including Mr. Ameziane's initial denial of his Algerian birthplace and citizenship.<sup>30</sup> The Administrative Review also listed Mr. Ameziane's provision of an alias upon U.S. detention as a reason for continued detention.<sup>31</sup>

In 2007, Ameziane was once again brought before an Administrative Review Board. The third Administrative Review stated that a source claimed to have seen Mr. Ameziane at the al Farouq Training Camp, which was founded by al Qaeda and at which all students received weapons training, attended a commando course, and received instruction in topography and explosives.<sup>32</sup>

#### B. Habeas Corpus Claim in U.S. Courts (*Ameziane v. Obama*)

Beginning in February 2005, Mr. Ameziane also pursued legal relief in the U.S. court system by filing a habeas corpus petition in the U.S. District Court for the District of Columbia.<sup>33</sup> His case was stayed for several years awaiting the Supreme Court's decision in the consolidated

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27. See CSRT Memo, *supra* note 23.

28. 2005 ARB Memo, *supra* note 26.

29. *Id.*

30. 2006 ARB Memo, *supra* note 25.

31. *Id.*

32. Memorandum from the Office for the Admin. Review of the Detention of Enemy Combatants at U.S. Navy Base Guantanamo Bay, Cuba, to Ismail Saiid Ali Bin Nasr (May 15, 2007) [hereinafter 2007 ARB Memo], available at <http://projects.nytimes.com/guantanamo/detainees/310-djamel-saiid-ali-ameziane/documents/9>.

33. See Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Ameziane v. Obama*, Civil Action No. 05-392 (ESH) (D.D.C. Apr. 30, 2009), available at <https://www.ccrjustice.org/files/2005-02-24%20Habeas%20Petition%2005-392.pdf>.

cases of *Boumediene v. Bush* and *Al Odah v. United States*.<sup>34</sup> On June 12, 2008, the Supreme Court ruled that detainees at Guantanamo Bay have the constitutional right to petition for habeas corpus relief.<sup>35</sup>

On January 22, 2009, President Obama issued an Executive Order directing the closure of the Guantanamo Bay detention facility “as soon as practicable, and no later than 1 year from the date of this order.”<sup>36</sup> That Executive Order also established the Guantanamo Review Task Force and mandated immediate review of all detainees to “determine, on a rolling basis and as promptly as possible . . . whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States.”<sup>37</sup>

On May 8, 2009, the Guantanamo Review Task Force issued a decision approving Djamel Ameziane for transfer.<sup>38</sup> On June 15, 2012, the U.S. government filed a coordinated motion in the subset of Guantanamo habeas cases involving petitioners who had been issued transfer decisions, seeking to designate those decisions as “protected” information.<sup>39</sup> At a hearing on June 30, the U.S. District Court for the District of Columbia “denied the government’s motion to protect Mr. Ameziane’s Task Force transfer decision.”<sup>40</sup> On appeal, the D.C. Circuit reversed the district court and held that the government’s motion to designate Mr. Ameziane’s Task Force transfer decision as “protected” information under the Protective Order should have been granted.<sup>41</sup>

After multiple stays and motions were placed on his case, Mr. Ameziane petitioned the Supreme Court for a writ of certiorari, which was denied on March 21, 2011.<sup>42</sup> Mr. Ameziane’s habeas case currently

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34. *Boumediene v. Bush*, 553 U.S. 723 (2008).

35. *Id.* at 732.

36. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898–99 (Jan. 22, 2009).

37. *Id.* at 4899.

38. *Ameziane v. Obama*, 699 F.3d 488, 491 (D.C. Cir. 2012).

39. *Id.* The *Ameziane* Court noted:

In support of the motion, the government submitted a declaration by Ambassador Daniel Fried, the Special Envoy for the Closure of the Guantanamo Bay Detention Facility. Ambassador Fried explained that if these petitioners, in an effort to be resettled in European countries of their choice, all “approach the same small group of governments at the same time, particularly if they relay information about formal U.S. government decisions resulting from review by the . . . Task Force, it could confuse, undermine, or jeopardize our diplomatic efforts with those countries and could put at risk our ability to move as many [detainees] to safe and responsible locations as might otherwise be the case.”

*Id.*

40. *Id.*

41. *Id.* at 498–99.

42. *Ameziane v. Obama/Ameziane v. United States*, CTR. FOR CONST. RIGHTS, <https://ccrjustice.org/Ameziane> (last visited Apr. 14, 2013).

remains stayed indefinitely.<sup>43</sup> Meanwhile, Mr. Ameziane seeks a third country, such as Canada, where he may safely resettle.<sup>44</sup>

### III. GUANTANAMO BAY DETAINEE PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Failing to receive timely relief in U.S. courts, Mr. Ameziane also pursued international remedies by filing a petition with the Inter-American Commission on Human Rights (IACHR or Commission) in 2008. In his petition, Mr. Ameziane claims that he has been arbitrarily and indefinitely detained and subjected to torture and other violations of his fundamental human rights.<sup>45</sup> He requests that the IACHR issue precautionary measures to prevent further harm to his fundamental rights, find the United States in violation of Articles I, III, V, VI, XI, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man, and order the United States to provide reparations.<sup>46</sup>

The IACHR is an organ of the Organization of American States (OAS) whose mission is to promote and protect human rights in the American hemisphere.<sup>47</sup> Created by the OAS in 1959, the Commission has its headquarters in Washington, D.C., and together with the Inter-American Court of Human Rights, the Commission is one of the institutions within the Inter-American system for the protection of human rights.<sup>48</sup> The United States is a party to the OAS and, thus, is subject to the jurisdiction of the IACHR.<sup>49</sup> The IACHR is charged with determining the admissibility of petitions in contentious cases, encouraging friendly settlements of disputes, and investigating and reporting on human rights in the Americas.<sup>50</sup> By contrast, the Inter-American Court of Human Rights hears and decides contentious cases and issues advisory opinions.<sup>51</sup> The United States is not a party to the American Convention on Human Rights and, as a result, cannot be brought before the Inter-American Court of Human Rights.<sup>52</sup>

If an alleged victim of a human rights violation files a petition with the IACHR, it will investigate the matter, request information from the

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43. *Id.*

44. Petition, *supra* note 2, ¶ 228.

45. Petition, *supra* note 2, ¶ 1.

46. Petition, *supra* note 2, ¶ 232.

47. Statute of the Inter-American Commission on Human Rights art. 1, O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

48. *What Is the IACHR?*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Sept. 19, 2012); Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOB. STUD. L. REV. 639, 640-41 (2010).

49. Statute of the Inter-American Commission on Human Rights, *supra* note 47, at art. 18.

50. Shaver, *supra* note 48, at 641.

51. *Id.*

52. *See id.* at 644, 650.

State party, and attempt to facilitate a settlement of the matter. If no settlement is reached, the IACHR will issue a report that includes findings of facts, conclusions, and recommendations.<sup>53</sup> The IACHR may publish the report as a separate document and/or include it in its annual report to the OAS General Assembly.<sup>54</sup>

The IACHR had already addressed the situation of the detainees at Guantanamo Bay as early as 2002, when it issued precautionary measures regarding those detainees.<sup>55</sup> The U.S. government responded to the 2002 Request for Precautionary Measures and participated in the hearings; however, the United States took the position that the IACHR did not have jurisdiction to issue precautionary measures.<sup>56</sup> The United States argued that the detainees' situation was governed by the law of armed conflict or international humanitarian law, not international human rights law,<sup>57</sup> such as the American Declaration of the Rights and Duties of Man (American Declaration)<sup>58</sup> or the American Convention on Human Rights.<sup>59</sup> Furthermore, the U.S. government argued that because it was not a party to the American Convention on Human Rights, the Commission did not have jurisdiction to adopt precautionary measures regarding the U.S. detention of suspected terrorists at Guantanamo Bay.<sup>60</sup>

Despite the United States' objections, the Commission decided to request that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.<sup>61</sup> The measures were maintained and expanded in

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53. THOMAS BUERGENTHAL ET AL., *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 277, 290-91 (4th ed. 2009).

54. *Id.*

55. *Precautionary Measures 2002*, INTER-AM. COMM'N ON HUMAN RIGHTS, <http://www.cidh.org/medidas/2002.eng.htm> (last visited Apr. 14, 2013). The IACHR's Rules of Procedure provide that, in serious and urgent situations, the Commission may request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case, as well as to persons under the jurisdiction of the State concerned, independently of any pending petition or case. *See IACHR: Precautionary Measures*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Apr. 14, 2013).

56. *See* Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba, Apr. 15, 2002, 41 I.L.M. 1015; Additional Response of the United States to Request for Precautionary Measures—Detention of Enemy Combatants at Guantanamo Bay, Cuba (July 15, 2002), *available at* <http://www.state.gov/s/l/38642.htm>.

57. Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba, *supra* note 56, at 1016.

58. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965).

59. American Convention on Human Rights O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1 Doc. 65, Rev. 1 Corr. 1 (1970).

60. Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba, *supra* note 56, at 1016.

61. *See Precautionary Measures 2002*, *supra* note 55.

2002, 2003, and 2004.<sup>62</sup> The measures were then expanded and reiterated in 2005.<sup>63</sup>

The IACHR also issued precautionary measures with respect to another Guantanamo Bay detainee, Omar Khadr, on March 21, 2006.<sup>64</sup> Part of that precautionary measure reads:

The Commission requested that the [United States], *inter alia*, adopt the measures necessary to ensure that [Mr. Khadr] is not subjected to torture or cruel, inhumane, or degrading treatment and to protect his right to physical, mental, and moral integrity, including measures to prevent him being kept incommunicado for long periods or subjected to forms of interrogation that infringe international standards of humane treatment.<sup>65</sup>

In total, the IACHR has held eight hearings related to the situation of the detainees at Guantanamo Bay, “in the years 2002, 2003, 2005 (two), 2007, 2008, and 2010.”<sup>66</sup> “Additionally, in 2007 and 2011, the IACHR requested authorization to carry out a visit to the Guantanamo detention center.”<sup>67</sup> In both instances, the U.S. government replied that “the only institution with the competence to be allowed access to the detainees was the International Red Cross, and that a visit by the IACHR would therefore have to be limited to a guided visit of the installations, without access to detainees.”<sup>68</sup> The IACHR expressed to the U.S. government that “these conditions were not acceptable and declined to conduct the visit under such circumstances.”<sup>69</sup> “Doing so would have limited the functions of the Commission and implied a lack of recognition for its mandate as a principal

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62. Inter-American Commission on Human Rights, Precautionary Measures No. 259 (Oct. 28, 2005), available at <http://www.asil.org/pdfs/ilibmeasures051115.pdf>.

63. *Id.* For a summary of the measures, see *International Law in Brief*, AM. SOC’Y OF INT’L L. (Nov. 15, 2005), <http://www.asil.org/ilib051115.cfm#j3>.

64. Annual Report of the Inter-American Commission on Human Rights 2006, OEA/Ser.L/V/II.127, Doc. 4, rev. 1, at 42-43 (2007), available at <http://www.cidh.org/annualrep/2006eng/CHAPTER.III.ENG.pdf>.

65. *Id.* at 43. Mr. Khadr later pled guilty before a military commission to killing an American soldier with a hand grenade and was transferred to Canada in September 2012 to complete his sentence. *Omar Khadr Returns to Canada*, CBC NEWS (Sept. 29, 2012), <http://www.cbc.ca/news/canada/story/2012/09/29/omar-khadr-repatriation.html>.

66. Press Release, Org. of Am. States, 10 Years After Detentions in Guantanamo Began, the IACHR Repeats Its Call To Close the Detention Center (Jan. 11, 2012), available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/003.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/003.asp).

67. *Id.*; see also Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007), available at <http://www.unhcr.org/refworld/pdfid/50bcb16b2.pdf>; Inter Am. Comm’n on Human Rights, Regarding the Situation of the Detainees at Guantanamo Bay, United States, Res. 2/11 (July 22, 2011).

68. Press Release, Org. of Am. States, *supra* note 66.

69. *Id.*

organ of the Organization of American States charged with the observation and defense of human rights in the hemisphere.”<sup>70</sup>

As noted above, on August 6, 2008, the Center for Constitutional Rights and the Center for Justice and International Law filed *Ameziane v. United States*, a petition and request for precautionary measures with the IACHR.<sup>71</sup> The Center for Constitutional Rights, acting on behalf of Ameziane, claimed that Ameziane was subjected to treatment that amounted to torture while in the custody of the United States, was being detained arbitrarily due to the stay placed on his habeas corpus claim in U.S. courts, and additionally, that upon release he should not be forced to go back to Algeria.<sup>72</sup>

On October 29, 2010, the IACHR issued urgent precautionary measures in favor of Ameziane.<sup>73</sup> The IACHR requested that the U.S. government refrain from the use of torture, provide adequate medical care, ensure that all possible measures are taken to provide a transparent and fair decision-making process regarding Mr. Ameziane’s fate, and ensure that in the case of a release of Mr. Ameziane, he is not released to any country where his life would be at risk.<sup>74</sup>

#### A. The IACHR Admissibility Decision with Respect to Djamel Ameziane

On October 29, 2010, the IACHR held a hearing regarding the admissibility of Mr. Ameziane’s petition.<sup>75</sup> At the hearing, Mr. Ameziane’s attorneys provided testimony regarding the lack of remedies available through the U.S. courts and the danger of returning Mr. Ameziane to Algeria against his will.<sup>76</sup> Representatives of the U.S. government attended the hearing and addressed the general situation of the detainees at Guantanamo Bay, but declined to provide any information specifically with

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70. *Id.*

71. *See* Petition, *supra* note 2.

72. *Id.* ¶¶ 1, 228.

73. Letter from the Executive Secretary of the Inter-American Commission of Human Rights to the Center for Constitutional Rights (Aug. 20, 2008), *available at* <https://www.ccrjustice.org/files/2008-08-20%20IACHR%20Initial%20Response.pdf> (granting Petition for Precautionary Measures).

74. *See id.* Mr. Ameziane states in the Petition that he is from the northern region of Algeria which is plagued with political instability and frequent violent clashes. Admissibility Report, *supra* note 3, ¶ 9. Additionally, government agents are known to subject practicing Muslims to harassment. *Id.*

75. Admissibility Report, *supra* note 3, ¶ 8. While jurisdiction deals with a tribunal’s authority to hear a case, admissibility refers to other legal or prudential bars, such as the requirement to exhaust domestic remedies.

76. *See id.* ¶ 22.

respect to Mr. Ameziane.<sup>77</sup> The United States also filed no written response to the petition.<sup>78</sup>

On March 20, 2012, the IACHR issued an Admissibility Report.<sup>79</sup> This decision is noteworthy because it marks the first time the IACHR has accepted jurisdiction and will proceed to the merits in connection with the case of an individual Guantanamo Bay detainee.

In its Admissibility Report, the IACHR determined that it does have competence to consider the petition, despite the U.S. objections to its jurisdiction over any of the detainees at Guantanamo Bay.<sup>80</sup> The IACHR stated that under Article 23 of its Rules of Procedure, petitioners may file complaints alleging violations of rights protected by the American Declaration.<sup>81</sup> The United States is bound to respect the American Declaration and the IACHR is competent to receive petitions alleging violations of the American Declaration by virtue of the U.S. ratification of the OAS Charter and in conformance with Article 20 of the IACHR's Statute and Article 49 of its Rules of Procedure.<sup>82</sup> Pursuant to Article 20, the IACHR may examine communications submitted to it and other available information and make recommendations regarding the observance of fundamental human rights to OAS Member States who are not also parties to the IACHR.<sup>83</sup> The IACHR also reaffirmed its view, contrary to the U.S. position, "that in situations of armed conflict, both international human rights law and international humanitarian law apply."<sup>84</sup>

With respect to its geographic or territorial reach, the IACHR stated that a State's duty to observe and protect human rights extends not only to its own territory, but also to other locations where the State exercises authority and control over the alleged victim.<sup>85</sup> In Ameziane's case, the

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77. *See id.* ¶¶ 8, 26.

78. *Id.* ¶ 4.

79. *Id.*

80. *See id.* ¶ 27. Although the United States did not provide any arguments specific to Mr. Ameziane, it is reasonable to assume that the U.S. objections to the IACHR's jurisdiction set forth in the U.S. responses to the requests for precautionary measures also apply here.

81. *Id.*

82. *See id.* The American Declaration is "the normative instrument that embodies the authoritative interpretation of the fundamental rights of the individual, which Article 3(l) of the OAS Charter proclaims." BUERGENTHAL, *supra* note 53, at 262.

83. Statute of the Inter-American Commission on Human Rights, *supra* note 47, at art. 20. Cuba is a member of the OAS, but its participation was suspended for many years following the Cuban Revolution. *See Member States*, ORG. OF AM. STATES [http://www.oas.org/en/member\\_states/default.asp](http://www.oas.org/en/member_states/default.asp) (last visited Apr. 14, 2013). During its suspension, the IACHR took the position that Cuba must still abide by its human rights obligations under the OAS Charter and the American Declaration. Shaver, *supra* note 48, at 672. In 2009, the OAS voted to lift the suspension, subject to Cuba's compliance with certain human rights obligations. *See Member States, supra.*

84. Admissibility Report, *supra* note 3, ¶ 28; *see also* Coard v. United States, Case 10.951, Inter. Am. Comm'n H.R., Report No. 109/99 (1999).

85. Admissibility Report, *supra* note 3, ¶¶ 29-35.

IACHR asserted that it has competence to make recommendations to the United States regarding actions taken by the United States in third countries not parties to the OAS or the Inter-American human rights system, including “three different moments” identified by the IACHR: (1) “the apprehension of Mr. Ameziane by U.S. officials in Pakistan (regardless if he was transferred for a ‘bounty,’ or otherwise captured by the Pakistanis;” (2) Mr. Ameziane’s one-month detention at the airbase in Kandahar, Afghanistan; and (3) Mr. Ameziane’s subsequent detention of more than a decade at Guantanamo Bay in Cuba.<sup>86</sup>

The IACHR also determined that Mr. Ameziane had met all other admissibility requirements. Although his habeas petition is still pending in U.S. court, the IACHR stated that there has been unwarranted delay in a ruling on the matter, constituting an exception to the requirement that a petitioner first exhaust domestic remedies.<sup>87</sup> In addition, the IACHR noted that Mr. Ameziane has not been allowed access to U.S. courts to pursue claims regarding his alleged mistreatment.<sup>88</sup> The IACHR also stated that Mr. Ameziane had filed the petition within a reasonable time and that it is not duplicative.<sup>89</sup> Finally, the IACHR stated that the allegations contained in the petition are not manifestly groundless or out of order and, thus, it will proceed to consider the merits of the case.<sup>90</sup>

#### B. Analysis of the IACHR Admissibility Decision in *Ameziane*

The IACHR is correct that Article 20 of its Statute gives it jurisdiction over petitions filed against OAS Members that are not members of the American Convention on Human Rights, at least with respect to making recommendations for the observance of fundamental human rights as reflected in the American Declaration.<sup>91</sup> And although it did not refer to any legal authority, the IACHR appears to be in good company with other international tribunals in asserting that international human rights law may apply alongside international humanitarian law in situations of armed conflict.<sup>92</sup>

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86. *Id.*

87. *Id.* ¶¶ 36-43.

88. *Id.* ¶ 40.

89. *Id.*

90. *Id.* ¶¶ 50-51.

91. Statute of the Inter-American Commission on Human Rights, *supra* note 47, at art. 20.

92. Although the IACHR did not refer to its own case law, in the case of *Coard v. United States*, it previously determined:

[W]hile international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a “common nucleus of non-derogable rights and a common purpose of protecting

For example, the International Court of Justice (ICJ) stated, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, that the protection of international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR)<sup>93</sup> and the Convention on the Rights of the Child,<sup>94</sup> does not cease in cases of armed conflict.<sup>95</sup> Like the United States in the Guantanamo detainee cases, Israel had asserted that international human rights treaties were inapplicable in the Palestinian Occupied Territory, which was subject only to international humanitarian law.<sup>96</sup> In rejecting Israel's argument, the ICJ quoted extensively from its prior Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

[T]he 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. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. . . . As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of

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human life and dignity," and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission.

Coard v. United States, Case 10.951, Inter. Am. Comm'n H.R., Report No. 109/99, ¶ 39 (1999); see also *Abella v. Argentina*, Case 11.137, Inter. Am. Comm'n H.R., Report No. 55/97 (1997).

93. International Covenant on Civil and Political Rights, G.A. Res. 2200(A) (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966).

94. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

95. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136 (July 9); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 266 (July 8).

96. See *Legal Consequences of Construction of a Wall*, 2004 I.C.J. at 177.

international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>97</sup>

Thus, both international human rights law and international humanitarian law may apply to a situation to help define whether a right has been violated. The European Court of Human Rights is in agreement with this principle. For example, in the case of *Al-Jedda v. United Kingdom*, the court stated that international human rights law was applicable along with the laws of war in determining whether the prolonged detention of persons during the recent occupation of Iraq was lawful.<sup>98</sup> There are also a number of United Nations Resolutions that affirm the co-existence of both international human rights law and international humanitarian law.<sup>99</sup>

Of course, the present IACHR Report only addresses admissibility. When the IACHR issues its report on the merits of the case, it will have an opportunity to expand on the relationship between international human rights law and international humanitarian law and to consider how and to what extent international human rights law may inform the legality of Mr. Ameziane's detention and treatment under the *lex specialis* of international humanitarian law.

The IACHR may be on somewhat less solid legal footing in its Admissibility Report in its asserted extension of jurisdiction globally to all of the relevant actions of the United States, wherever those may occur. The IACHR's legal reasoning in this regard was minimal. While it did refer to one of its prior cases, *Coard v. United States*,<sup>100</sup> as precedent, it failed to carefully and separately examine each of the "three different moments" to

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97. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 240.

98. *Al-Jedda v. The United Kingdom*, App. No. 27021/08, Eur. Ct. H.R. (July 7, 2011). Other examples involve the related cases of *Isayeva, Yusupova and Bazayeva v. Russia*, App. nos. 57947-49/00, Eur. Ct. H.R. (Feb. 24, 2005), and *Isayeva v. Russia*, App. no. 57950/00, Eur. Ct. H.R. (Feb. 24, 2005), where the European Court of Human Rights assessed whether civilian deaths resulting from a Russian bombing in Chechnya constituted a violation of right to life under Article 2 of European Convention of Human Rights. See Press Release, European Court of Human Rights, Chamber Judgment in Six Applications Against Russia (Feb. 24, 2005), available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1272770-1326591#{"itemid":\["003-1272770-1326591"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1272770-1326591#{). In this regard, the court took into account whether the methods and means of warfare were permitted under international humanitarian law. See *id.*

99. See, e.g., G.A. Res. 2675, U.N. Doc. A/Res/2675 (Dec. 9, 1970), available at <http://www.icrc.org/ihl.nsf/COM/475-760018> ("Fundamental Human Rights, as accepted in International Law and laid down in international instruments, continue to apply fully in situations of armed conflict."); S.C. Res. 237, U.N. Doc. S/Res/237 (June 14, 1967), available at <http://unispal.un.org/UNISPAL.NSF/0/E02B4F9D23B2EFF3852560C3005CB95A> ("Considering that essential and inalienable human rights should be respected even during the vicissitudes of war . . .").

100. Case No. 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, ¶¶ 37, 39, 41, 43 (1999). *Coard* involved a claim by certain Grenadian citizens that they were unlawfully detained by U.S. authorities following the invasion of Grenada in 1983. *Id.* ¶ 1.

which it referred in its Admissibility Report in assessing its ability to extend its jurisdiction to U.S. activities in Pakistan, Afghanistan, and Cuba.<sup>101</sup>

For example, both Mr. Ameziane and the U.S. government appear to agree that Mr. Ameziane was apprehended by non-U.S. forces in Pakistan.<sup>102</sup> In fact, the IACHR itself stated, “Mr. Ameziane attempted to flee to Pakistan but was captured by Pakistani authorities and turned over to U.S. officials.”<sup>103</sup> By contrast, in the “Analysis of Admissibility” portion of its Report, the IACHR described the relevant event as, “the apprehension of Mr. Ameziane by U.S. officials in Pakistan (regardless if he was transferred for a ‘bounty,’ or otherwise captured by the Pakistanis).”<sup>104</sup> There is no explanation of why the IACHR considers these facts to constitute “an apprehension . . . by U.S. officials,” nor is there any explanation as to why it does not matter for jurisdictional purposes whether Mr. Ameziane was transferred to U.S. forces for a bounty or was otherwise captured by the Pakistanis.<sup>105</sup>

The IACHR opined that a State’s duty to protect the rights of any person under the American Declaration may extend extraterritorially when “the person concerned is present in the territory of one State, but subject to the control of another State, usually through the acts of the latter’s agents abroad.”<sup>106</sup> Thus, the pivotal question appears to be whether Mr. Ameziane is “subject to the control” of the United States at each relevant moment in time. In the case of his arrest, however, assuming Pakistani officials were the arresting authorities, Mr. Ameziane cannot be said to have been subject to U.S. control at the moment of his arrest, and thus, the IACHR cannot establish jurisdiction over that activity.

The IACHR has no enforcement power of its own. If the IACHR wishes its jurisprudence to be respected and followed, it must do a better job of explaining and justifying its rationale to persuade States to comply. In this regard, the IACHR might have done a more thorough job of considering and applying the jurisprudence of other international or regional human rights bodies in considering its (extra)territorial reach.<sup>107</sup>

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101. The IACHR did refer to the U.S. Supreme Court’s decision in *Rasul* for the proposition that the United States exercises de jure and de facto jurisdiction over Guantanamo Bay. Admissibility Report, *supra* note 3, ¶ 33.

102. See Petition, *supra* note 2, ¶ 2; Admissibility Report, *supra* note 3, ¶ 10.

103. Admissibility Report, *supra* note 3, ¶ 10.

104. *Id.* ¶ 29.

105. See *id.* ¶ 29-35.

106. *Id.* ¶ 30.

107. Reference to relevant rules of international law is specifically provided for as an accepted method of treaty interpretation under article 31 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. In accordance with this principle, the IACHR and the Inter-American Court often refer to decisions of other international tribunals, especially the European Court of Human Rights. See, e.g., *Coard v. United States*, Case No. 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, ¶¶ 39, 57 (1999).

The IACHR did refer to one case from the European Court of Human Rights, the *Al-Skeini* case,<sup>108</sup> where the European Court ruled that the United Kingdom could be held responsible under the European Convention on Human Rights and Fundamental Freedoms (European Convention)<sup>109</sup> for the death of certain Iraqi nationals because the United Kingdom and the United States were Occupying Powers in Iraq within the meaning of the laws of war and were together exercising the powers of a sovereign government there.<sup>110</sup> As a general rule, the European Court of Human Rights has taken the position that the meaning of “within the jurisdiction” of a Member State of the European Convention is “primarily territorial.”<sup>111</sup> Any extra-territorial applications of the European Convention are therefore exceptional and require special justification.<sup>112</sup> The European Court has identified two such exceptional circumstances—when the Member State has “effective control” of a territory as a result of a military occupation or when it is acting on foreign soil with the consent, invitation and acquiescence of the government of that territory.<sup>113</sup> Occasional, short-term or sporadic excursions into a foreign country do not give the Member State the level of control necessary for the application of the European Convention to those extra-territorial activities.<sup>114</sup>

Under the IACHR’s “subject to control” test from *Coard*, the IACHR is probably correct that Mr. Ameziane’s detention at the air base in Kandahar falls within the IACHR’s reach. The petitioners provided some evidence that the air base in Kandahar was subject to U.S. control at the time of Mr. Ameziane’s detention there, which the United States did not dispute, thus meeting the *Coard* test for extraterritorial jurisdiction.<sup>115</sup> By contrast, under the tests established by the European Court of Human Rights, the United States must be an Occupying Power in Afghanistan or be operating in Afghanistan with the invitation and consent of the Afghani government for the extraterritorial principle to apply.<sup>116</sup> The United States was operating in Afghanistan pursuant to United Nations Security Council resolutions as part of an international coalition force when Mr. Ameziane

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108. Admissibility Report, *supra* note 3, ¶ 30 n.6.

109. European Convention on Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, C.E.T.S. No. 005.

110. *Al-Skeini v. The United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. ¶¶ 143-49 (July 7, 2011).

111. *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. ¶ 58 (Dec. 12, 2001) (no jurisdiction over Member States’ participation in NATO bombing in Kosovo); *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. ¶ 82 (Mar. 30, 2005) (no jurisdiction over Turkish troops’ military activities in Northern Iraq).

112. *Bankovic*, App. No. 52207/99, Eur. Ct. H.R. ¶ 61; *Issa*, App. No. 31821/96, Eur. Ct. H.R. ¶ 68.

113. *Bankovic*, App. No. 52207/99, Eur. Ct. H.R. ¶¶ 60, 71; *see also Issa*, App. No. 31821/96, Eur. Ct. H.R. ¶ 69.

114. *Bankovic*, App. No. 52207/99, Eur. Ct. H.R. ¶ 82.

115. *See* Petition, *supra* note 2, ¶ 16.

116. *Bankovic*, App. No. 52207/99, Eur. Ct. H.R. ¶ 60.

was held there in late 2001 and early 2002.<sup>117</sup> The extent of exclusive U.S. control is uncertain in light of the international nature of the operation. There is also no agreement in the scholarly literature on whether the United States was an Occupying Power in Afghanistan.<sup>118</sup> Likewise, it is not clear at what point it could be said that the United States and the international coalition had the consent of the Afghani government.<sup>119</sup> Thus, the extraterritorial reach of the IACHR under the European approach is not clear and probably deserved more careful analysis.

The IACHR appears to be on firmer legal ground in asserting that the United States' duties under the American Convention on Human Rights extend to Mr. Ameziane's detention and treatment at Guantanamo Bay. Cuba is also subject to the American Declaration, both as a member of the OAS and as a matter of customary international law. In addition, the U.S. Supreme Court's decisions in the Guantanamo Bay detainee cases hold that the United States exercises "complete jurisdiction and control" over Guantanamo Bay.<sup>120</sup> Thus, it is clear that Mr. Ameziane is subject to the control of the United States at Guantanamo Bay.

As the European Court of Human Rights has recognized, assertion of the reach of a regional human rights treaty extraterritorially is an exceptional event. A State may argue that the application of a regional agreement to activities in third countries was not envisioned when the state joined the treaty and, thus, is a violation of its sovereignty and consent to be

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117. See, e.g., S.C. Res. 56/1386, ¶1, U.N. Doc. S/RES/1386 (Dec. 20, 2001), available at [http://www.isaf.nato.int/images/stories/File/official-texts/resolution\\_1386.pdf](http://www.isaf.nato.int/images/stories/File/official-texts/resolution_1386.pdf).

118. See Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 2 (2006); Ryan T. Williams, *Dangerous Precedent: America's Illegal War in Afghanistan*, 33 UNIV. PA. J. INT'L L. 563, 599 (2011); Marco Sassòli & Marie-Louise Tougas, *International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan*, 56 MCGILL L. J. 959, 969 (2011). The International Court of Justice (ICJ) has set forth the following test for an occupying power:

[U]nder customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, 229-231 (December 19) (citation omitted), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>. In one advisory opinion, the ICJ opined that the International Covenant on Civil and Political Rights applied to Israel's construction of a wall in the occupied Palestinian territory. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136, 178-81 (July 9).

119. See Bosi, *supra* note 118, at 821-23.

120. See *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (citing Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations art. III, Feb. 23, 1903, T.S. 418).

bound.<sup>121</sup> On the other hand, it may be argued that many of the human rights obligations reflected in the American Declaration are binding by way of customary international law regardless of treaty obligations.<sup>122</sup> In addition, as the United Nations Human Rights Committee (UNHRC) reasoned when examining the (extra)territorial reach of the International Covenant on Civil and Political Rights<sup>123</sup>: “[I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”<sup>124</sup> Given these potentially competing views of the international obligations, any assertions of extraterritorial jurisdiction should not be made lightly and should be well justified. The persuasive value of the IACHR’s decision on the admissibility of Mr. Ameziane’s petition and the scope of IACHR jurisdiction would be enhanced had the IACHR engaged in a separate and more thorough analysis of each of the “three different moments” of U.S. activity with respect to Mr. Ameziane.

The IACHR’s reasoning with respect to other admissibility requirements of the petition is also weak at times. The IACHR spent several paragraphs of its Admissibility Report reciting petitioner’s allegations regarding the operation of the CSRTs and U.S. law and then reached a conclusion, with little explanation of its reasoning or independent examination of the law.<sup>125</sup> It must be acknowledged that the United States chose not to provide any information regarding the specifics of Mr. Ameziane’s case,<sup>126</sup> which likely limited the ability of the IACHR in examining the matter. However, information about U.S. law is certainly publicly available and an independent examination to confirm the petitioner’s account, similar to the International Court of Justice’s independent examinations to ensure a claim is well founded in fact and law

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121. See, e.g., *Bankovic*, App. No. 52207/99, Eur. Ct. H.R. ¶¶ 35-36.

122. See BUERGENTHAL, *supra* note 53, at 262-63. Customary international law is defined as the general practice of states accepted as law. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. 933, 3 Bevans 1179. The U.S. Supreme Court has long held that customary international law is part of U.S. law. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

123. Many of the human rights set forth in the American Declaration mirror those in other international human rights instruments, such as the United Nations Universal Declaration of Human Rights and the ICCPR.

124. *Burgos/Delia Saldias de Lopez v. Uruguay*, Comunicación No. 52/1979, ¶ 12.3 (July 29, 1981). There, the UNHRC was interpreting the language of article 1 of the ICCPR’s Optional Protocol. *Id.* It stated that the phrase “individuals subject to its jurisdiction” referred to “the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred” rather than “to the place where the violation occurred.” *Id.* ¶ 12.2. Thus, a State may “be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State.” *Id.* ¶ 12.3.

125. See *Admissibility Report*, *supra* note 3, ¶¶ 36-43.

126. See *id.* ¶ 42.

under article 53(2) of its Statute,<sup>127</sup> would lend more credibility to the IACHR's conclusions. As Thomas Buergenthal, a former justice of the ICJ and the Inter-American Court, has pointed out, the effectiveness of the IACHR's efforts to enforce human rights depend on its prestige and credibility, on public opinion pressure that its recommendations generate, and on resolutions that the OAS General Assembly may be willing to adopt in support of the IACHR's findings.<sup>128</sup> Thus, as the IACHR proceeds with its examination of the merits in *Ameziane*, it will be important for it to do a better job of explaining and supporting its reasoning if it wishes its decisions and recommendations to be respected and enforced.

#### IV. RELATED INTERNATIONAL LEGAL DEVELOPMENTS

The appeal to the Inter-American Human Rights system is not the only attempt to invoke international law and utilize international tribunals to seek justice for Guantanamo Bay detainees who believe they have been wrongfully detained or treated by the United States.

For example, Australian David Hicks had been detained at Guantanamo Bay from 2002 to 2007 when he was released back to Australia after a plea deal.<sup>129</sup> He has filed a petition with the UNHRC alleging that the United States and Australia violated the ICCPR in connection with his treatment.<sup>130</sup> He hopes to have his conviction overturned and plea agreement nullified, as well as to receive compensation for his alleged ill treatment while in U.S. custody.<sup>131</sup> As of this writing, his petition is still pending before the UNHRC.

More recently, Guantanamo Bay detainee Abu Zubaydah filed a petition with the European Court of Human Rights, seeking a ruling that Poland violated the European Convention on Human Rights and Fundamental Freedoms by aiding the United States in detaining and allegedly torturing Zubaydah at a secret prison operated by the U.S. Central

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127. Statute of the International Court of Justice, *supra* note 122, at art. 53(2); *see also, e.g.*, United States Diplomatic and Consular Staff in Tehran, (United States v. Iran), 1980 I.C.J. 3, ¶ 33 (May 24).

128. BUERGENTHAL, *supra* note 53, at 274.

129. *David Hicks Seeks To Clear Name and Get Compensation Through UNHRC*, NEWS.COM.AU (Aug. 21, 2011, 9:56 PM), <http://www.news.com.au/national-old/david-hicks-seeks-to-clear-name-and-get-compensation-through-un-human-rights-committee/story-e6frkw0-1226119247114> [hereinafter *Hicks Seeks To Clear Name*].

130. *See* Communication from David Hicks to the U.N. Hum. Rights Comm. (Sept. 20, 2010), *available at* <http://thejusticecampaign.org/wordpress/wp-content/uploads/2011/06/UN-Communication.pdf>.

131. *Hicks Seeks To Clear Name*, *supra* note 129.

Intelligence Agency (CIA) in Poland.<sup>132</sup> Mr. Zubaydah was not the only detainee in the war on terror to file a petition with the European Court of Human Rights alleging torture and other cruel, inhuman, and degrading treatment at secret prisons in Europe. Abd al-Rahim al Nashiri, accused USS Cole bomber, also complained that he had been mistreated at CIA-run prisons in Poland and Romania.<sup>133</sup>

These cases demonstrate that the detainees at Guantanamo Bay will continue to seek out international tribunals and to rely on international law to try to hold the United States accountable for its treatment of them in the war on terror. While the jurisdiction and enforcement power of many of these international tribunals is limited and may not directly reach actions by the United States, they are developing customary international law and can have a significant impact on the ability of the United States to pursue suspected terrorists abroad. For example, while the jurisdiction of the European Court of Human Rights is limited to European States belonging to the European Convention on Human Rights and Fundamental Freedoms, a ruling by that court that European countries cannot assist the United States in detaining and interrogating suspected terrorists will limit U.S. options as to where and how it may conduct interrogations if the United States does not wish to bring these suspected terrorists onto U.S. soil.<sup>134</sup> Similarly, some European States have refused or delayed extradition of criminals<sup>135</sup> and suspected terrorists to the United States for trial due to concerns that their treatment in the United States may violate European Convention standards.<sup>136</sup> Concerns over human rights violations may also dissuade some European nations from supporting U.S. military action in Afghanistan and elsewhere around the world. In addition, although the United States has not given the UNHRC jurisdiction to hear individual complaints against it, a ruling by the UNHRC that Australia has aided and abetted the United States in violating human rights under the ICCPR will

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132. Christian Lowe, *Guantanamo Inmate Seeks European Court Ruling Against Poland*, REUTERS (Jan. 28, 2013), <http://www.reuters.com/article/2013/01/28/us-poland-cia-echr-idUSBRE90ROWG20130128>.

133. *See id.*

134. A recent decision by the European Court of Justice finding that the United Nations' terrorist sanctions program violated fundamental norms of human rights certainly caused the Member States of the European Union and the United States to change that program to provide more process rather than lose the ability to cut off funding for terrorists. *See Kadi v. Council of the European Union*, 47 I.L.M. 927 (2008); Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from Its List, U.N. Press Release SC/10785 (Oct. 5, 2012) (announcing delisting of Kadi from the U.N. Al-Qaida sanctions program), *available at* <http://www.un.org/News/Press/docs/2012/sc10785.doc.htm>.

135. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

136. *See Abu Hamza v. Home Sec'y*, [2012] EWCA (Admin) 2736, *available at* <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/abu-hamza-summary-05102012.pdf>.

not only be embarrassing, but could lead Australia to reduce its cooperation with the United States.

## V. CONCLUSION

The United States must heed international law if it wishes to effectively pursue its war on terror. In some cases, the United States is directly bound by international legal norms through binding treaties and customary international law, such as those set forth in the Geneva Conventions on the Laws of War and related federal court decisions. In cases such as *Rasul*, *Hamdi*, and *Boumediene*, the U.S. Supreme Court has shown a willingness to enforce those international law-based rules. In other cases where jurisdiction over or applicability of certain international law rules to the United States may be less direct or enforceable, it would still behoove the United States to comply with international law norms if it desires the cooperation of other countries who are directly subject to those international laws and institutions in the global war on terror. In addition, following the rule of law allows the United States to maintain its international reputation as a country that respects the rule of law and human rights in particular. When the United States fails to respect the rule of law, it provides justification to its enemies to do the same.