

American Bar Association – UPR Submission – United States of America – November 2010**A. Introduction and Summary:**

1. The American Bar Association (ABA), founded in 1878, is an independent, voluntary, non-governmental organization of lawyers and judges with nearly 400,000 members worldwide. It regards human rights and the rule of law as cornerstones of a free society and is committed to strengthening them in the United States of America and internationally.
2. The ABA commends the U.S. for recent steps taken to improve compliance with U.S. international human rights commitments. Among other measures, the President has banned torture and cruel, inhuman or degrading treatment or punishment by all agencies of the U.S. government;¹ closed secret interrogation centers formerly operated by the Central Intelligence Agency;² announced his intention to close the detention center at the U.S. Naval Base at Guantanamo Bay, Cuba;³ and signed a law enhancing procedural safeguards for persons accused of war crimes in trials before military commissions.⁴ Nonetheless, despite these and other positive measures, the ABA believes that more can and should be done to enhance U.S. respect for human rights. In order to comply with the restrictions on the length of this document, this submission addresses only the following four issues:
 - a. **Torture and Cruel, Inhuman or Degrading Treatment or Punishment (“CID”):** The U.S. should take all measures necessary to ensure that no person in U.S. custody or physical control is subjected to torture or CID.
 - b. **Trials of Suspected Terrorists:** Suspected terrorists should be tried before Article III federal courts,⁵ unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice;
 - c. **Indefinite Detention of Suspected Terrorists:** The government reportedly plans to hold nearly 50 suspected terrorists in indefinite detention at Guantanamo or some other detention facility. In cases where no other country can or will receive the detainees, the government claims the authority to detain indefinitely even those who are no longer considered to be unprivileged belligerents.

¹ Executive Order, *Ensuring Lawful Interrogations*, Jan. 22, 2009.

² *Id.*, section 4(a).

³ Executive Order, Jan. 22, 2009, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*.

⁴ Military Commissions Act of 2009, Pub. L. 111-84.

⁵ “Article III federal courts” are the civilian courts established under Article III of the United States Constitution, which establishes the judicial branch of the federal government of the United States.

- d. **Capital Punishment:** Some jurisdictions in the U.S. continue to impose the death penalty unfairly in a manner that reflects significant racial disparities and fails to meet fundamental standards of competency of defense counsel and judicial review of constitutional claims following conviction.
3. Our concerns are detailed in the following sections of this submission. Our recommendations are summarized in the concluding section.

B. Torture and Cruel, Inhuman or Degrading Treatment or Punishment (“CID”):

4. Under the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), the International Covenant on Civil and Political Rights (“ICCPR”), and the Geneva Conventions, the U.S. is obligated to prohibit torture and CID. ABA policy adopted in 2004 condemns torture and CID, and calls on the U.S. government to take all measures necessary to ensure that no person within the custody or under the physical control of the U.S. government is subjected to torture or CID. (App. A hereto.)
5. Current U.S. prohibitions of torture and CID lack sufficient status in law, are unclear, and their implementation lacks transparency. In ratifying CAT and the ICCPR, the U.S. attached reservations stating that the U.S. “considers itself bound by the obligation ... to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as [that] term ... means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments” to the U.S. Constitution.⁶ Similar language appears in the principal U.S. law on torture and CID.⁷
6. In the past these reservations were sometimes interpreted broadly to permit such harsh interrogation techniques as “water boarding,” considered by most experts to be a form of torture. In an effort to correct such abuses, the President has issued an Executive Order banning all torture and CID, and mandating that all interrogations of persons in U.S. custody or physical control be carried out only by techniques specified in the Army Field Manual.⁸
7. This was an important positive step. However, the ABA remains concerned that an Executive Order lacks the weight of a law passed by Congress. An Executive Order is reversible by the will of a President. It is also ambiguous. The Order’s restrictions on torture and CID appear in a section governing interrogation “in armed conflicts.”⁹ It is unclear as to whether or not this policy restricts torture or CID outside the context of armed conflict. Further, its implementation has been less than transparent. The Order set up a task force to examine implementation of the Order. An August 2009 press release by the Attorney General stated that the task force had concluded that there was no need for any U.S. government agency to

⁶ U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), Reservation (1).

⁷ Detainee Treatment Act of 2005, Dec. 31, 2005, section 1003(d).

⁸ Executive Order, Jan. 22, 2009, *Ensuring Lawful Interrogations*.

⁹ *Id.*, section 3.

use techniques not authorized by the Army Field Manual.¹⁰ But the question remains as to whether or not this policy is confined to the context of armed conflict. The answer is uncertain, because the task force report has not been made public.

8. In short, the ABA believes that more can and should be done to ensure that no person within U.S. custody or physical control is subjected to torture or CID.

C. Trials of “Suspected Terrorists”:¹¹

9. The ICCPR requires that all persons tried for criminal offenses “shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,” in which basic procedural safeguards are guaranteed.¹² Common Article 3 of the Geneva Conventions requires that trials in armed conflicts be conducted only by a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” ABA policy adopted in 2009 recommends that persons charged with criminal offenses “should be prosecuted in Article III federal courts, unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice; ...” (App. C hereto.) In cases tried before military commissions in which the death penalty is sought, the ABA further recommends compliance with its Guidelines for death penalty defense.¹³
10. In November 2009 the U.S. Attorney General acted in a manner consistent with the spirit of the ABA recommendation. He announced that Khalid Sheikh Mohammed and four other persons allegedly responsible for the terrorist attacks on the U.S. on September 11, 2009, would be tried in federal civilian court in New York City.¹⁴ He also announced that five other accused terrorists, who apparently could not practicably be tried in a federal civilian court, would be tried before military commissions.¹⁵ However, after cost and security concerns were raised, the Attorney General appeared to leave open the possibility that the trial might instead be conducted before a military commission.¹⁶
11. It thus remains in doubt whether persons accused of terrorist crimes, whose trials before civilian courts were deemed practicable, may now be tried before military commissions, for

¹⁰ U.S. Department of Justice, Office of Public Affairs, August 24, 2009, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President*.

¹¹ Throughout this submission, the broad term “suspected terrorists” includes both alleged criminals who are arrested in peacetime, as well as “unprivileged belligerents” who are captured in armed conflicts and who engage in terrorist activities. Some ABA documents use the term “enemy combatants.” However, the phrase “unlawful enemy combatants” is no longer used by the U.S., which instead now uses the phrase, “unprivileged belligerents.”

¹² ICCPR, Art. 14. The ABA urged compliance with this Article in policy adopted in February 2002. (App. B hereto.)

¹³ Letter from ABA President William Neukom to President Bush, Feb. 27, 2008. (App. D. hereto.)

¹⁴ C. Savage, *U.S. To Try Avowed 9/11 Mastermind Before Civilian Court in New York*, NEW YORK TIMES, Nov. 14, 2009, p. A1.

¹⁵ *Id.*

¹⁶ C. Savage, *Holder Won't Rule Out 9/11 Trial in New York*, NEW YORK TIMES, April 15, 2010, p. A18.

reasons extraneous to the charges and the evidence. In November 2009 the ABA President expressed the ABA's support for the original determination by the Attorney General to try the defendants in civilian courts. (App. E hereto.) The ABA adheres to that position.

D. Indefinite Detention of Suspected Terrorists:

12. The ICCPR prohibits arbitrary detention.¹⁷ ABA policy adopted in 2009 recommends that persons no longer deemed to be enemy combatants be "promptly released or resettled." (App. C hereto.) The same ABA policy recommends that persons still detained as enemy combatants and who are not tried, released or resettled, be granted prompt *habeas corpus* hearings with full due process rights.
13. The U.S. does not appear to comply with either recommendation. In cases where the government has determined that detainees are not unprivileged belligerents, but no other country can or will receive them, the government opposes their release, contending that it may detain them indefinitely. Appellate courts to date have sustained this position.¹⁸
14. Other detainees continue to be deemed unprivileged belligerents, but cannot practicably be brought to trial. The government reportedly plans to detain indefinitely nearly 50 such prisoners without trial, release or resettlement.¹⁹ Although all such persons are entitled to review of the lawfulness of their detention through *habeas corpus*,²⁰ the *habeas* procedures adopted to date by federal courts arguably fall short of granting full due process rights.²¹

E. Capital Punishment:

15. The ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination ("CERD") bar racial discrimination in the administration of capital punishment. The ICCPR also requires that capital trials comply with procedural safeguards. Since 1997 the ABA has called for a moratorium on capital punishment in jurisdictions within the U.S., until they can administer it fairly and impartially, in a manner that minimizes the risk that innocent persons may be executed, without racial discrimination, with assurances of competent defense counsel, and with independent post-conviction and collateral review of constitutional claims (App. F hereto). ABA Guidelines for death penalty defense should also be followed.²²

¹⁷ ICCPR, art. 9.1.

¹⁸ *Kiyemba v. Obama*, 555 F.3d 1022 (D.C.Cir. 2009), *cert. vacated and remanded*, 130 S.Ct. 1235 (2010).

¹⁹ C. Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, NEW YORK TIMES, Jan. 22, 2010.

²⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

²¹ *E.g., Al-Bihani v. Obama*, 590 F.3d 866, 869-70 (D.C. Cir. 2010) (allowing rebuttable presumption in favor of the accuracy of government's evidence, and admission of hearsay evidence).

²² American Bar Association, *Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases*, Revised Edition, February 2003,

<http://www.abanet.org/moratorium/policy/2000s/2003%20ABA%20Guidelines%20on%20Appointment%20and%20Perf.%20of%20Counsel%20in%20Death%20Penalty%20Cases.pdf>

16. Those conditions have not been met. Significant racial disparities in capital sentencing persist.²³ Post-conviction collateral review continues to be sharply curtailed by the Antiterrorism and Effective Death Penalty Reform Act of 1996.²⁴ Serious deficiencies in the competence of capital counsel remain, in part because Congress in 1996 eliminated all federal funding from Post-Conviction Defender Organizations.²⁵

F. **Recommendations:**

17. The ABA recommends as follows:

- a. **Torture and CID:** The U.S. should take all necessary steps to ensure that no person in U.S. custody or physical control is subjected to torture or CID.
- b. **Trials of Suspected Terrorists:** Suspected terrorists should be tried in Article III federal civilian courts, unless in cases of recognized war crimes the Attorney General certifies that they cannot practicably be tried in such courts and can be tried before other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice. Death penalty cases should comply with the ABA Guidelines.
- c. **Indefinite Detention of Suspected Terrorists:** Detainees no longer deemed to be unprivileged belligerents should be promptly released or resettled. Detainees still deemed to be unprivileged belligerents, and who are not tried, released or resettled, should be granted prompt *habeas corpus* review with full due process safeguards.
- d. **Capital Punishment:** No death penalty should be carried out in the U.S. until the sentencing jurisdictions can administer capital punishment fairly and impartially, in a manner that minimizes the risk that innocent persons may be executed, without racial discrimination, with assurances of competent defense counsel, and with independent post-conviction and collateral review of constitutional claims.

²³ ABA Press Release, ABA Study: State Death Penalty Systems Deeply Flawed; *Based on Multi-state Findings, Bar Association Renews Call for Nationwide Moratorium on Executions*, Washington, D.C., Oct. 29, 2007 (“Every state studied appears to have significant racial disparities in imposing the death penalty, particularly associated with the race of the victim, but little has been done to rectify the problem.”).

²⁴ Testimony of former ABA President Michael Greco on behalf of the ABA before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Hearing on “The Adequacy of Representation in Capital Cases,” April 8, 2008, pp. 4, 5-13.

²⁵ *Id.* pp. 4-5.