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The Effect of The International Covenant of Civil And Political Rights on The United States of America

Monica E. Nussbaum

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
DEPARTMENT OF DEFENSE
OF THE UNITED STATES OF AMERICA

ISSUE: THE EFFECT OF THE INTERNATIONAL COVENANT
OF CIVIL AND POLITICAL RIGHTS ON THE UNITED STATES OF
AMERICA

Prepared by Monica E. Nussbaum
Fall 2004

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TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

1. The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
2. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 287.
3. Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/Conf. 183/9 (1998).
4. International Criminal Tribunal for Yugoslavia, May 25, 1993, U.N. Doc. S/25704 (1993).
5. VIENNA CONVENTION ON CONSULAR RELATIONS, 596 U.N.T.S 261 (1969).
6. CCPR Gen. Comment No. 13: *Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)* (Twenty-first Session 1984).

US DOCUMENTS

7. U.S. CONST.
8. Exec. Order No. 13,107, 63 FED. REG. 68991 (Dec. 10, 1998).
9. DoD MCO No. 1 (March 21, 2002).
10. United States: Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, 41 INT’L. LEGAL MATERIALS 1015 (2002).
11. FED. R. EVID. 403.
12. President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), available at: <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html>.

COURT AND TRIBUNAL CASES

13. United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002).
14. United States v. Bridegwater, 175 F. Supp. 2d 141 (P.R. Cir. 2001).
15. Ralk v. Lincoln County, Georgia, 81 F. Supp. 2d 1372 (S.D. Ga. 2000).
16. Perez v. Warden, 286 F.3d 1059 (8th Cir. 2002).

17. *Zadvydas v. Davis* 533 U.S. 678 (2001).
18. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
19. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
20. *Ex parte Quirin*, 317 U.S. 1 (1942).
21. *In re Yamashita*, 327 U.S. 1 (1946).
22. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003).
23. *Rasul v. US*, 215 F. Supp. 2d 55 (D.C. Cir. 2002).
24. *Lagrone v. Cockrell*, 2003 U.S. App. LEXIS 18150 (5th Cir. 2003).
25. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

TREATISES AND BOOKS

26. GERALD SIMPSON, *DETAINEES DENIED JUSTICE* (2001).
27. HURST HANNUM & DANA D. FISHER, *U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS* (1993).
28. MICHAEL O'FLAHERTY & LIZ HEFFERNAN, *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: INTERNATIONAL HUMAN RIGHTS LAW IN IRELAND* (1995).
29. JEREMY RABKIN, *INTERNATIONAL LAW VERSUS THE AMERICAN CONSTITUTION*, 16, R. JAMES WOOLSEY (ED.), *THE NATIONAL INTEREST ON INTERNATIONAL LAW & ORDER* (2003).
30. JEREMY RABKIN, *AFTER GUANTANAMO: THE WAR OVER THE GENEVA CONVENTION*, 63, R. JAMES WOOLSEY (ED.), *THE NATIONAL INTEREST ON INTERNATIONAL LAW & ORDER* (2003).
31. JOAN FITZPATRICK, *THE ROLE OF DOMESTIC COURTS IN ENFORCING INTERNATIONAL HUMAN RIGHTS LAW*, 247, HURST HANNUM (ED.), *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (3rd ed. 1999).
32. LOUIS HENKIN (ED.), *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (1981).
33. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (2nd ed. 1999).
34. SARAH JOSEPH (ET AL), *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* (2000).
35. THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989).

JOURNALS AND LAW REVIEW ARTICLES

36. Derek Jinks, *International Human Rights Law and the War On Terrorism*, 31 DENV. J. INT'L L. & POL'Y. 101 (2003), available at: http://www.law.du.edu/ilj/online_issues_folder/jinks.final_for_publication.pdf

37. Daryl A. Mundis, *Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L LAW 320 (2002).

MISCELLANEOUS

38. Human Rights Watch, *Human Rights Watch Letter*, November 15, 2001, available at: <http://www.globalpolicy.org/wtc/liberties/1115hrw.htm>.

39. The Center for Constitutional Rights, et al, *Petition to Inter-American Commission on Human Rights on Behalf of the Guantanamo Detainees*, February 25, 2002, available at: <http://www.derechos.org/nizkor/excep/ccrpetition.html>.

40. Michael N. Schmitt, *Trial, Detention or Release?*, Crimes of War Project, May 17, 2002, available at: <http://www.crimesofwar.org/expert/detain-schmitt.html>.

41. Thomas Mertens, *Criminal Justice after 9-11: ICC or Military Tribunals*, available at: http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_545-568_special_issue_Mertens.pdf.

42. *Rasul v. Bush & al Odah v. US*, Brief of Human Rights Institute of the International Bar Association for the District of Columbia Circuit, available at: <http://www.ibanet.org/pdf/HRIAMIbrRasulvBushHR1ofIBA.pdf>.

43. *Rasul v. Bush & al Odah v. US*, Brief of Amici Curiae Bipartisan Coalition of National and International Non-Governmental Organizations in Support of Petitioners, available at: http://www.humanrightsfirst.org/us_law/14077_frieiman_proofs.pdf.

44. Mr. Kevin McNamara, *Rights of Persons Held in the Custody of the United States in Afghanistan or Guantanamo Bay*, Committee on Legal Affairs and Human Rights, May 26, 2003, available at: <http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9817.htm>.

45. Minnesota Advocates for Human Rights, *How Does International Human Rights Law Address the Guantanamo Bay Detentions?*, available at: <http://www.mnadovcates.org/printview/8f754811-0189-4792-aa76-42a99d20eecd.html>.

46. American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists*, March 2003, available at: <http://www.actl.com/PDFs/MilitaryCommissions.pdf>.

47. American Bar Association Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions*, January 4, 2002, available at: <http://www.abanet.org/leadership/military.pdf>.

45. David Scheffer, Options for Prosecuting International Terrorists, United States Institute of Peace, November 14, 2001, available at: <http://www.usip.org/pubs/specialreports/sr78.pdf>.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

The international community formulated rules to protect ordinary individuals in their daily lives against the corruption and intrusion of their respective governments. This body of rules collectively is referred to as the law of international human rights. The attributes of international human rights imply that this body of laws applies in all circumstances.¹ More specifically, human rights law ascertains the minimum protections required to protect against the arbitrary exercise of power by governments or governmental actors.² Even though “[i]nternational law was seen as the law that sovereign states were willing to accept and also to insist upon,”³ state courts rarely adjudicated this body of laws as states interpreted it as applicable to states on the governmental level and not to the specific rights of individuals on an individual level.⁴

A. Issues

The International Covenant on Civil and Political Rights (ICCPR) enumerates minimum human rights standards identified by the international community through the United Nations. Although the United States generally refrains from participation in “grand international

¹ Derek Jinks, *International Human Rights Law and the War On Terrorism*, 31 DENV. J. INT’L L. & POL’Y. 101, 107 (2003) (stating that “the nature of international human rights law suggests

that it applies in all circumstances.”), available at:

http://www.law.du.edu/ilj/online_issues_folder/jinks.final_for_publication.pdf [reproduced in accompanying Notebook 2, Tab 36].

² *Id.* (discussing how “international human rights law defines the minimum rights protections necessary to prevent the arbitrary exercise of power.”) available at: http://www.law.du.edu/ilj/online_issues_folder/jinks.final_for_publication.pdf

³ JEREMY RABKIN, INTERNATIONAL LAW VERSUS THE AMERICAN CONSTITUTION, 16, 19, R. JAMES WOOLSEY (ED.), THE NATIONAL INTEREST ON INTERNATIONAL LAW & ORDER (2003) [reproduced in accompanying Notebook 2, Tab 29].

⁴ *Id.* at 19.

schemes”⁵ resulting in the intrusion of international mores into the domestic affairs of the U.S.,⁶ the U.S. determined that the Constitution provides protective measures for the underlying rights enumerated in the ICCPR.⁷ Furthermore, the Supreme Court and Congress have strengthened and enhanced these rights over time.⁸

The focus of this brief is to analyze for the Office of the Prosecutor for the Department of Defense in preparation for the U.S. Military Tribunals arising out of actions subsequent to the events on September 11, 2001 whether the ICCPR and its protections are 1) binding on the U.S., 2) binding on the U.S. military, and/or 3) binding on U.S. military tribunals. And, if so, do any factual scenarios exist which might render the ICCPR inapplicable? And, if the ICCPR is binding on U.S. military tribunals, to whom should its protections be available?

B. Summary of Conclusions

1. The ICCPR is binding on the U.S.

In general, the ICCPR is binding on the U.S as the U.S. Congress ratified the covenant in 1994, subject to numerous reservations, declarations, and understandings. Because the covenant was signed and ratified, the covenant and the protections within are the “supreme Law of the Land” pursuant to the U.S. Constitution Article VI, Section 2.⁹ Consequently, international human rights law conclusively establishes that the basic rights specified in the ICCPR apply to

⁵ *Id.*

⁶ *Id.*

⁷ HURST HANNUM & DANA D. FISHER, U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 281 (1993) [reproduced in accompanying Notebook 2, Tab 27].

⁸ *Id.*

⁹ U.S. Const. Art. VI, Section 2 [reproduced in accompanying Notebook 1, Tab 7].

all persons, as a matter of law, within the jurisdiction of the U.S.¹⁰ These basic rights include non-arbitrary detention, human conditions and treatment in detention, and fair trials.¹¹

The U.S. military is required to guarantee and implement ICCPR protections by the U.S. Constitution and Executive Order 13107¹² to civilians in their ordinary civilians lives. Military tribunals focus on non-civilians, in particular lawful and unlawful combatants, including terrorists and those who harbor terrorists.¹³ Because the jurisdiction of U.S. military tribunals is limited to enemy combatants detained for participation in hostilities during a continuing armed conflict,¹⁴ the applicable international laws are the Geneva Conventions¹⁵ and customary international humanitarian laws, not the ICCPR or other international human rights laws.¹⁶ Humanitarian law, not human rights law, governs the capture and detention of enemy combatants in armed conflict.¹⁷ However, if the U.S. military intends to prosecute civilians via military tribunals, then international human rights law and the protections of the ICCPR are applicable and binding.

2. The Non-Self Executing Declaration attached to the ICCPR by the U.S.

Congress indicates that the U.S. is not bound to guarantee that

¹⁰ Jinks, *supra* note 1, at 102.

¹¹ *Id.*

¹² Exec. Order No. 13,107, 63 FED. REG. 68991 (Dec. 10, 1998) [reproduced in accompanying Notebook 1, Tab 8].

¹³ DoD MCO No. 1 (March 21, 2002) [reproduced in accompanying Notebook 1, Tab 9].

¹⁴ United States: Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, 41 INT’L. LEGAL MATERIALS 1015 (2002) [reproduced in accompanying Notebook 1, Tab 10].

¹⁵ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 287 [reproduced in accompanying Notebook 1, Tab 2].

¹⁶ United States: Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, *supra* note 14.

¹⁷ *Id.*

individuals may maintain a private right of action to enforce the protections of the ICCPR in the U.S. federal court system without express Congressional authorization.

The non-self executing declaration attached to the ICCPR indicates that the U.S. is not bound to guarantee that individuals have a private right of action to enforce the protections of the ICCPR within the jurisdiction of the U.S. without express Congressional authorization implementing the ICCPR.¹⁸

3. The U.S. should afford ICCPR protections to citizens of states that are also signatories to the ICCPR.

According to the Vienna Conventions on Consular Relations discussing how to interpret multilateral treaties, signatory states to a convention must guarantee the protections of that convention to citizens of fellow signatory states.¹⁹ However, signatory states are not required but may guarantee protections to the citizens of non-signatory states. Furthermore, although a government might change and evolve, once a treaty is signed it remains signed. However, controversy does surround whether a state may expressly remove its signature. If the ICCPR is deemed binding on the U.S. military tribunals, then the U.S. is required to afford ICCPR protections to members of the Taliban. Although the U.S. did not recognize the Taliban as the lawful or de jure government of Afghanistan, the Taliban was the de facto government of Afghanistan. The government of Afghanistan before the rule of the Taliban did sign the ICCPR; therefore, the now defunct Taliban also was bound by the protections within the ICCPR, and the new interim government of Afghanistan, led by Hamid Karzi, also is bound by the ICCPR.

¹⁸ See Judicial section on page 27.

¹⁹ VIENNA CONVENTION ON CONSULAR RELATIONS, 596 U.N.T.S 261 (1969) [reproduced in accompanying Notebook 1, Tab 5].

4. The U.S. may afford ICCPR protections to individuals of entities that are not signatories to the ICCPR.

The U.S., its military, and its military tribunals are probably not required to afford ICCPR protections to individuals pledging sole allegiance to al Qaeda, a non-state entity and by default not eligible to sign the ICCPR. The U.S. would need to establish that members of al Qaeda are not citizens of a signatory state. The U.S. can establish this by proving that al Qaeda members pledge sole allegiance to al Qaeda and renounce citizenship to any state, and therefore are not citizens of a signatory state. The U.S. could also establish that al Qaeda members are not afforded ICCPR protections because allegiance to and membership in al Qaeda and action on the battlefield²⁰ in the war on terror render these individuals as unlawful enemy combatants, and thus are not governed by the ICCPR but instead by international humanitarian law.

II. FACTUAL BACKGROUND

A. Afghanistan and Guantanamo Bay, Cuba

Following the attacks on the U.S. on September 11, 2001, the U.S. joined a war against terrorism by instituting military action in Afghanistan against the al Qaeda terrorist organization and its sponsor, the de facto government of Afghanistan, the Taliban. Al Qaeda and the Taliban largely are composed of Islamist radicals who do not define war as between states and state actors (i.e. the military), as evidenced by continuing attacks on civilians who are understood to be legitimate targets by these organizations.²¹ Through this military action, the U.S. detained

²⁰ Because of the unique nature of the war on terror, the definition of what constitutes a battlefield will need to be defined. This definition probably is going to evolve to include regions outside of the geographic locality where armed hostilities are occurring, i.e. electronic warfare, educational and psychological warfare (for example, primary and secondary curriculum in school systems), and economic warfare.

²¹ JEREMY RABKIN, AFTER GUANTANAMO: THE WAR OVER THE GENEVA CONVENTION, 63, 73, R. JAMES WOOLSEY (ED.), THE NATIONAL INTEREST ON INTERNATIONAL LAW & ORDER (2003) (discussing how

hundreds of members of both al Qaeda and the Taliban. Beginning in 2002, the U.S. transported many of these detainees to Guantanamo Bay, Cuba.²² Guantanamo Bay, Cuba, located in southeast Cuba, was ceded to the U.S. in 1903 for use as a military base, and subsequently was made a U.S. concession by treaty in 1934.²³ Almost immediately after the beginning of transferring detainees to Guantanamo Bay, Cuba, the international community and legal scholars across the world began to raise concerns that the U.S. was engaged in unlawful activity, including torture of these detainees, primarily because the U.S. indicated that Guantanamo Bay, Cuba, is not “legally speaking . . . part of US territory;”²⁴ These allegations included that the detainees were barred from appealing to the U.S. courts and not provided with the basic levels of detention conditions required by the international human rights law.²⁵ The United Nations High Commissioner for Human Rights stated on January 16, 2002, that the detainees are entitled to

Islamist fundamentals “[d]o not think of war as a conflict between states from which ordinary humanity should, as much as possible be spared. They think of war as an all-out contest between peoples, so that American civilians . . . are no less legitimate targets than uniformed soldiers. Neither age nor sex nor disability makes a difference. The aim is simply to punish a whole society for its sins.) [reproduced in accompanying Notebook 2, Tab 30].

²² Minnesota Advocates for Human Rights, *How Does International Human Rights Law Address the Guantanamo Bay Detentions?*, at 1 (stating that the “[i]ndividuals, most of whom are believed to have been engaged in hostilities, who were captured by U.S. forces during the war in Afghanistan. The close to 700 detainees represent more than 40 different countries. Most detainees were fighting with Al Qaeda or Taliban forces; yet some are reported to have been detained far from the field of battle or in third-party countries.”), available at: <http://www.mnadovcates.org/printview/8f754811-0189-4792-aa76-42a99d20eecd.html> [reproduced in accompanying Notebook 2, Tab 45].

²³ Mr. Kevin McNamara, *Rights of Persons Held in the Custody of the United States in Afghanistan or Guantanamo Bay*, Committee on Legal Affairs and Human Rights, May 26, 2003, at 3, available at: <http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9817.htm> [reproduced in accompanying Notebook 2, Tab 44].

²⁴ Thomas Mertens, *Criminal Justice after 9-11: ICC or Military Tribunals*, at 556, available at: http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_545-568_special_issue_Mertens.pdf [reproduced in accompanying Notebook 2, Tab 41].

²⁵ *Id.*

international human rights law protections including the ICCPR.²⁶ In particular, the Commissioner stated that, “[a]ll detainees must at all times be treated humanely, consistent with the provisions of the ICCPR”²⁷ and that “[a]ny possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR....”²⁸ However, quickly after the first transport of detainees, the International Committee of the Red Cross (ICRC) visited the detainees and confirmed U.S. statements that the U.S. provided the detainees with adequate food and medical attention, and that their physical surroundings “offered no less protection from the elements than the hastily constructed facilities set up for their American guards.”²⁹

Although the U.S. contends that because the detention facilities are beyond the territorial jurisdiction of the U.S. barring application of the U.S. Constitution to this region and its protections,³⁰ the U.S. military system of justice generally “respects basic principles of fairness.”³¹ The U.S. began prosecuting detainees in August of 2004, via military commissions for criminal activities elucidated in the Military Order No. 1³² and Executive Order 13107.³³ The U.S. Executive Branch, particularly the Department of Defense, reiterates that “unlawful

²⁶ The Center for Constitutional Rights, et al, *Petition to Inter-American Commission on Human Rights on Behalf of the Guantanamo Detainees*, February 25, 2002, available at: <http://www.derechos.org/nizkor/excep/ccrpetition.html> [reproduced in accompanying Notebook 2, Tab 39].

²⁷ *Id.*

²⁸ *Id.*

²⁹ RABKIN, *supra* note 21.

³⁰ McNamara, *supra* note 23, at 3 (stating that “[t]he United States authorities contend that the base is not on USA soil, implying that the United States Constitution does not apply there. Accordingly, the prisoners do not enjoy protection of the fundamental rights enshrined in the Constitution and the place of the ordinary courts is taken by military tribunals.”).

³¹ Mertens, *supra* note 24, at 560.

³² DoD MCO No. 1, *supra* note 13.

combatants, saboteurs, and spies, among others, are not subject to the jurisdiction of courts-martial,”³⁴ and thus, “have historically been prosecuted by military commissions, which have been utilized to close the gap that might otherwise preclude trial of these categories of alleged offenders.”³⁵

The U.S. is currently in a precarious position. For principles of justice, the U.S. must ensure that the detainees are prosecuted according to both U.S. and international standards. Allowing U.S. military commissions to engage in illegitimate trials or worse, summary execution of Guantanamo detainees, as was desired by both the United Kingdom and France following World War II, does not honor the principles of justice and respect for humanity that the U.S. has promoted throughout the twentieth century. The U.S. cannot act in accordance to the standards of its adversaries.³⁶ The United States will need to observe restraint to satisfy its own self-respect and also to maintain its reputation in the international community.³⁷ However, this is not intended to insinuate that the U.S. must afford detainees every right and privilege of civilized society.³⁸

The U.S. must weigh the policy interests of deterring future acts of terrorism by punishing the perpetrators of September 11th and the incarceration of other potential terrorists,

³³ Exec. Order No. 13,107, *supra* note 12.

³⁴ Daryl A. Mundis, *Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT’L LAW 320, 321 (2002) [reproduced in accompanying Notebook 2, Tab 37].

³⁵ *Id.*

³⁶ RABKIN, *supra* note 21 at 73.

³⁷ *Id.*

³⁸ *Id.* at 75 (stating that “the United States also needs to remind Europeans that wars cannot always be fought by gentlemanly rules – not when the enemy disdains all civilized restraint. Europeans may need reminding on this point because, the British excepted, most of them did not do much fighting in the last great war against barbarism – or they did their fighting on the side of barbarism – and now regard actual war as something done only by other, less ennobled people.”).

gathering intelligence, protection of intelligence data and sources, speedy and efficient adjudication, and barring against providing terrorists with a microphone from which they might incite others³⁹ with the countervailing interests of U.S. notions of fairness and transparency, constitutional protections for resident aliens, U.S. objections to foreign military tribunals (e.g., China, Colombia, Egypt, Malaysia, Peru, Sudan, and Turkey), increasing the probability that U.S. soldiers will receive equitable treatment from other states, and ensuring compliance with international law to promote extradition of terrorists, and building international support for the war on terrorism.⁴⁰

B. Formation of the ICCPR

Throughout history, humankind has perpetually engaged in war, both internal and international. Although laws of war exist, horrific crimes and atrocities have been committed during both formal wars and acts of aggression. Consequently, by the end of World War II, many states came to agree that all of humanity should be afforded a minimum level of protections to bar against a repeat of these atrocities. The international community decided that some acts are so outrageous that states must come together to prevent them from occurring and to prosecute any entity, whether individual, group, or state, which engages in these acts. This body of law, known as human rights law, complements the law of warfare, known as humanitarian law. The first significant multilateral international instrument referencing human rights was the United Nations Charter.⁴¹ The international community, through the U.N., formed

³⁹ American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists*, March 2003, at 1, available at: <http://www.actl.com/PDFs/MilitaryCommissions.pdf> [reproduced in accompanying Notebook 2, Tab 46].

⁴⁰ *Id.* at 1-2.

⁴¹ MICHAEL O'FLAHERTY & LIZ HEFFERNAN, *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: INTERNATIONAL HUMAN RIGHTS LAW IN IRELAND 1* (1995) [reproduced in accompanying Notebook 2, Tab 28].

the Commission to draft a civil and political rights covenant.⁴² In 1954, the Commission finished its draft of the ICCPR and presented the U.N. General Assembly with the text for deliberation.⁴³ Over the next decade, the General Assembly refined the draft of the ICCPR and interjected numerous amendments.⁴⁴ On December 16, 1966, the ICCPR, the First Optional Protocol, and the International Covenant on Economic, Social, and Cultural Rights, together known as the International Bill of Rights, was adopted by the U.N. General Assembly and opened for state signature.⁴⁵ The International Bill of Rights came into effect in the late 1970s.⁴⁶ However, numerous conventions and treaties protecting specific populations, including women and children, have supplemented these texts.

The ICCPR, introduced by a preamble, is comprised of fifty-three articles divided into six parts.⁴⁷ These articles enumerate the rights afforded to all persons. The rights protected by the ICCPR include:

A right to life; a prohibition of torture; a prohibition of slavery; a right to liberty and security of the person, and to humane treatment in detention; a prohibition on retroactive criminal laws; equality before the law; a right to privacy; non-imprisonment for breach of contractual obligation; freedom of movement and residence; rights of aliens lawfully to reside within a State; freedom of thought, conscience and religion; freedom of opinion and expression; a prohibition of war propaganda or advocacy of national or racial hatred; a right to peaceful assembly;

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

a right to freedom of association; marriage and family rights; political rights of citizens; equal protection by law; and certain rights for minorities.⁴⁸

This paper will strictly focus on those articles most likely to be applicable to persons held in military detention. These articles include: Article 2: Equality of Treatment, Article 4: Derogation in Emergencies, Article 5: Destruction or Limitation of Rights, Article 9: Right to Liberty and Security, Article 10: The Treatment of Prisoners, Article 13: Rights of Aliens, Article 14: Fair Trial and Criminal Procedure, Article 15: Prohibition of Ex Post Facto Criminal Law, Article 16: Recognition before the Law, and Article 26: Equal Protection of the Law.

C. Purpose of the ICCPR

The international community created the ICCPR to protect against the horrific atrocities perpetrated by states against their citizens during World War I and II. During these wars, states frequently detained citizens without probable cause, subjected them to torture, humiliation, starvation, forced labor, death, and rape, took away personal and real property, and controlled travel and movement. Consequently, the International Bill of Rights, including the ICCPR, was enacted to force states to acknowledge, respect, and ensure the individual rights of persons. Respect for human rights “is the legitimate concern of all states,”⁴⁹ and protection of human rights “has become a task of international institutions.”⁵⁰

III. WHETHER THE ICCPR IS BINDING ON THE U.S.

A. U.S. Obligations to the ICCPR

⁴⁸ *Id.*

⁴⁹ LOUIS HENKIN (ED.), THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 33 (1981) [reproduced in accompanying Notebook 2, Tab 32].

⁵⁰ *Id.*

Customary international law, including human rights law and humanitarian law, are incorporated by the U.S. Constitution “Law of the Land” clause⁵¹ as U.S. law and must be given effect by both federal and state courts.⁵² Specifically, the U.S. government, including such agencies as the Department of Defense, must comply with the ICCPR as required by Executive Order.⁵³ The ICCPR obligates states both substantively and procedurally.⁵⁴ Substantively, states are obligated to respect the minimum standards of rights provided for in the ICCPR regarding treatment by a state to individuals within its control.⁵⁵ Under Article 2, state parties must abide by the following substantive obligations: 1) respect and ensure the rights recognized in the ICCPR and 2) ensure that both an effective domestic remedy is available to individuals in the event of a violation and enforcement of that remedy.⁵⁶ Procedurally, states are obligated to ensure that state procedures must guarantee that substantive obligations are protected.⁵⁷ In other words, states must both protect the rights of individuals and create procedures that protect the rights and provide for remuneration if a right is violated.

State parties are obligated to ensure that all individuals, citizens and aliens, subject to their jurisdictions and present within their territories are afforded the rights elucidated in the

⁵¹ U.S. CONST. *supra* note 9.

⁵² THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 114 (1989); Derek Jinks, *International Human Rights Law and the War On Terrorism*, 31 DENV. J. INT’L L. & POL’Y. 101, 106 (2003) (stating that “international human rights law clearly applies in that the United States has ratified several human rights treaties, including the ICCPR, and all treaties lawfully made under the U.S. Constitution are part of the “supreme law of the land.”), available at: http://www.law.du.edu/ilj/online_issues_folder/jinks.final_for_publication.pdf [reproduced in accompanying Notebook 2, Tab 35].

⁵³ Jinks, *supra* note 1, at 106.

⁵⁴ HANNUM & FISHER, *supra* note 7, at 54.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

ICCPR.⁵⁸ Although the ICCPR states that protections are to be afforded to “all individuals who are (i) within the territory of the State and (ii) subject to its jurisdiction.”⁵⁹ For example, a state will not escape the obligation to respect fundamental individual rights protected by the ICCPR when that state is exercising authority over persons outside of its physical territories.⁶⁰ Moreover, the ICCPR will apply, barring a U.S. reservation, to U.S. territory *stricto sensu* and to all locations within U.S. control, including foreign territories and U.S. possessions.⁶¹ However, if a party engaged in a war is not a party to the convention, other parties to the convention also engaged in the war are bound to enforce the convention in the relations to each other but not in their relations to the non-party unless and until that party agrees to respect and be bound by the protections in the ICCPR.⁶²

1. To Respect and Ensure

States are required to both respect and ensure the protections of the ICCPR. Consequently, states are obligated to adopt an effective domestic legal system guaranteeing those rights.⁶³ Respect of ICCPR rights means that states “fulfill the specific obligations that are the

⁵⁸ *Id.* at 57 (stating that “under customary international law aliens are generally subject to the jurisdiction of the State in whose territory they are physically present.”).

⁵⁹ The international community and the Human Rights Committee (created by the ICCPR to enforce the obligations of the ICCPR on states) has interpreted this clause to require both (i) and (ii) as only requiring (i) or (ii) effectively leaves a gap in the protections. *Id.* at 56.

⁶⁰ *Rasul v. Bush & al Odah v. U.S.*, Brief of Human Rights Institute of the International Bar Association for the District of Columbia Circuit, at 19, available at: <http://www.ibanet.org/pdf/HRIAmiBrRasulvBushHR1ofIBA.pdf> [reproduced in accompanying Notebook 2, Tab 42].

⁶¹ HANNUM & FISHER, *supra* note 7, at 57.

⁶² RABKIN, *supra* note 21 at 69.

⁶³ HANNUM & FISHER, *supra* note 7, at 56.

counterparts of those rights.”⁶⁴ Respect for ICCPR rights is interpreted as requiring more than mere fulfillment; in other words, suggesting action so that ICCPR rights are in fact respected.⁶⁵

2. To Give Effect

To give effect to the ICCPR means that a state must create mechanisms by which the rights effectively are protected if that state does not already have effective laws in place.⁶⁶ If the state already has effective legislation in place protecting the rights enumerated in the ICCPR, then the state need do no more.⁶⁷ Pursuant to Article 2, the U.S., as are all other state parties, is free to determine how to implement internally the protections of the ICCPR.⁶⁸ However, it should be noted that

[N]othing in the Convention that suggests that [any states] ... contemplated at the time they adopted the Convention that it would apply to war crimes and military commissions, but it is also true that the basic rights set forth in the Convention have been respected in ‘war crimes’ prosecutions conducted by the United Nations’ special tribunals.⁶⁹

3. To Provide for Effective Remedies

State parties must guarantee that individuals under their jurisdiction whose rights have been violated by state action have an effective remedy.⁷⁰ The General Comment by the HRC on

⁶⁴ *Id.* at 55 (1993).

⁶⁵ *Id.*

⁶⁶ *Id.* at 58.

⁶⁷ *Id.* at 58.

⁶⁸ *Id.* at 59.

⁶⁹ American Bar Association Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions, January 4, 2002, at 12-13, available at: <http://www.abanet.org/leadership/military.pdf> [reproduced in accompanying Notebook 2, Tab 47].

⁷⁰ HANNUM & FISHER, *supra* note 7, at 60.

this provision stresses the understanding that implementation is not dependent on constitutional or legislative mandates.⁷¹ Providing for effective remedies obliges states parties to enable individuals to enjoy their rights by providing redress for violations of their rights.⁷² In the U.S., courts have unanimously determined that the ICCPR does not give rise to a private cause of action due to the declaration of non-self executing attached to the covenant by Congress.⁷³ However, the ICCPR remains the supreme law of the land, and the U.S. remains internationally obligated to provide an alternative mechanism⁷⁴ - this has been largely accomplished by the protections found in the U.S. Constitution and the Bill of Rights. If an individual's rights protected by the ICCPR are violated by the U.S. or a governmental actor, then that individual must allege a violation of state or federal law in order to have standing within the U.S. court system. Solely asserting a violation of the ICCPR is not sufficient to create standing.⁷⁵

B. THE EFFECT OF THE U.S. NON-SELF EXECUTING DECLARATION

Many states parties attached statements of understanding, declarations, and reservations to the ICCPR upon ratification. Consequently, the international community has had to determine what effect these statements have upon the ICCPR substantively and with regard to enforcement mechanisms. These statements frequently are referred to as limitations. In general, a limitation is invalid unless it serves at least one of the interests listed in the clause it modifies.⁷⁶ However, even if a limitation serves an interest, if it destroys or aims to destroy the right, then it is

⁷¹ *Id.* at 84.

⁷² *Id.*

⁷³ See Judicial section on page27.

⁷⁴ HANNUM & FISHER, *supra* note 7, at 61.

⁷⁵ For further discussion see Judicial section on page27.

⁷⁶ The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; *see also* HANNUM & FISHER, *supra* note 7, at 136.

invalidated by Article 5(1).⁷⁷ Although states are free to balance and rank the rights enumerated in the ICCPR, this balancing and ranking is allowed so long as it does not hinder the recognition that should be given to all rights.⁷⁸ The U.S. has attached several understandings, reservations, and declarations to the ICCPR.

The first declaration and probably the most important limitation the U.S. has attached is that Articles 1-27 of the ICCPR are not self-executing and therefore, not enforceable in U.S. courts.⁷⁹ Furthermore, in assurance that the ICCPR does not modify U.S. domestic law, the non-self executing declaration bars giving effect to the rights without Congressional implementation through legislation.⁸⁰ General principles of international law reflect the notion that any reservation can be judged invalid if other parties or the governing body of the convention view that reservation as incongruous with the object and purpose of the treaty.⁸¹ In regards to the non-self executing declaration attached by the U.S., the U.S. has indicated that the protections of the ICCPR are protections that the U.S. enforces through already existing legislation such as the U.S. Constitution.

1. Congressional Response

Generally, states require legislative implementation when the executive is capable of unilaterally binding the state at the international level if the legislature exerts control over the

⁷⁷ The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, available at: http://www.unhcr.ch/html/menu3/b/a_ccpr.htm [reproduced in accompanying Notebook 1, Tab 1]; see also HANNUM & FISHER, *supra* note 7, at 136.

⁷⁸ HANNUM & FISHER, *supra* note 7, at 137.

⁷⁹ *Id.* at 270.

⁸⁰ *Id.* at 270-71.

⁸¹ MERON, *supra* note 52, at 12 (discussing how “every reservation which is not specifically permitted or prohibited must be assessed in light of its compatibility with the object and purpose of the treaty to which it is addressed.”). See also HANNUM & FISHER, *supra* note 7, at 272.

provisos of national law.⁸² The U.S. Congress declared when ratifying the ICCPR that the substantive provisions of the ICCPR are non-self executing.⁸³ The intent of the Senate is to specify that the ICCPR will not create a private cause of action in U.S. courts.⁸⁴ Furthermore, Congress stated that it is not considering implementing legislation to execute the ICCPR as U.S. law generally is in compliance with the requirements of the ICCPR.⁸⁵ Although this declaration effectively deprives the ICCPR of internal legal effects in the U.S., U.S. domestic law will still be judged according to the international standards of the ICCPR, and the U.S. will still be accountable to other state parties.⁸⁶

2. Executive Response

The Executive branch of the U.S. intends to use existing domestic law, primarily the rights and protections guaranteed by the U.S. Constitution, as the mechanism by which to fulfill its duty of internal implementation.⁸⁷ In 1996, former President Clinton signed Executive Order 13107 outlining the position of the U.S. government towards the ICCPR. The Executive Order states:

1. It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the

⁸² JOAN FITZPATRICK, THE ROLE OF DOMESTIC COURTS IN ENFORCING INTERNATIONAL HUMAN RIGHTS LAW, 247, 248, HURST HANNUM (ED.), GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (3rd ed. 1999) [reproduced in accompanying Notebook 2, Tab 31].

⁸³ HANNUM & FISHER, *supra* note 7, at 59.

⁸⁴ *Id.* at 275.

⁸⁵ *Id.*

⁸⁶ *Id.* at 59.

⁸⁷ *Id.* at 59.

international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.⁸⁸

2. It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including, inter alia, those of the United Nations, the International Labor Organization, and the Organization of American States.⁸⁹

3. All executive departments and agencies . . . shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.⁹⁰

4. Nothing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.⁹¹

5. This order does not supercede Federal statutes and does not impose any justiciable obligations on the executive branch.⁹²

The Executive Order seems counterintuitive as it requires the U.S. government and all of its executive departments and agencies to know and respect the protections listed in the ICCPR and to implement the obligations required by the ICCPR in its internal affairs while simultaneously

⁸⁸ Exec. Order No. 13,107, *supra* note 12.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

stating that the order does not create rights or benefits enforceable against the U.S., nor impose justiciable obligations on the executive branch. The executive branch, including the Department of Defense, is compelled to heed the terms of the ICCPR unless President Bush cancels the order.⁹³

As previously discussed, the law governing war, not the law of human rights, applies to military commissions. Even though historical and legal basis affirm the appropriateness and legality of military commissions, the U.S. must act adroitly with its use of military commissions to prosecute detainees at Guantanamo, because the U.S. has openly criticized foreign states for their use of military commissions.⁹⁴

The U.S. has repeatedly reiterated that Military Commission Order Number 1⁹⁵ does not grant jurisdiction to U.S. military commissions to try U.S. citizens.⁹⁶ Furthermore, the U.S. has declared that the process by which an individual will fall under the jurisdiction of military tribunals is quite lengthy as the detainee must first have been classified on the battlefield as an enemy combatant that needs to be detained. Following battlefield classification the President of the U.S. must determine by a written finding 1) that the suspect is or was a member of al

⁹² *Id.*

⁹³ Mundis, *supra* note 34, at 324.

⁹⁴ Human Rights Watch, *Human Rights Watch Letter*, November 15, 2001 (recognizing that the U.S. has “criticized the military courts in Peru that convicted U.S. citizen Lori Berenson for terrorism without adequate due process . . . [calling] on Peru to retry the case ‘in open civilian court with full rights of legal defense, in accordance with international judicial norms;’ condemned Nigeria for convicting and executing . . . Ken Saro-Wiwa and eight other activists after a trial before a special military court appointed by the government; [and] criticized the manner in which military tribunals are used to try accused terrorists in Egypt.), available at: <http://www.globalpolicy.org/wtc/liberties/1115hrw.htm> [reproduced in accompanying Notebook 2, Tab 38].

⁹⁵ DoD MCO No. 1, *supra* note 13.

⁹⁶ Mundis, *supra* note 34, at 321.

Qaeda,⁹⁷ 2) that the suspect “engaged in, aided and abetted, or conspired to commit acts of international terrorism or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy,”⁹⁸ or 3) that the suspect knowingly sheltered one or more persons falling into the prior two categories.⁹⁹ As will be discussed next, the Executive branch relies on considerable common law allowing for the use of military commissions, the inapplicability of individuals to bring suits against the U.S. for violations of ICCPR obligations, and the habeas proceedings of enemy aliens.¹⁰⁰

3. Judicial

In *Rodriguez-Fernandez v. Wilkinson*, the Court determined that although the U.S. was not constrained by the ICCPR as the ICCPR was non-self executing, the Court established that the ICCPR was “indicative of the customs and usages of civilized nations.”¹⁰¹ Additionally, the Court found that resolutions and declarations, although not technically binding, establish broadly

⁹⁷ President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), available at: <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> [reproduced in accompanying Notebook 1, Tab 12]. See also Mundis, *supra* note 34, at 321.

⁹⁸ President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, *supra* note 97. See also Mundis, *supra* note 34, at 321.

⁹⁹ President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, *supra* note 97. See also Mundis, *supra* note 34, at 321.

¹⁰⁰ Mundis, *supra* note 34, at 322.

¹⁰¹ *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) [reproduced in accompanying Notebook 1, Tab 25]; see also MERON, *supra* note 52, at 125 (discussing the *Rodriguez-Fernandez v. Wilkinson* case).

recognized principles.¹⁰² Courts have repeatedly determined that Legislative and Executive materials clearly indicate that the ICCPR was not intended to be self-executing.¹⁰³

In *Ralk v. Lincoln County, Georgia*, the Court determined that Ralk cannot proceed on a private right of action using the ICCPR, as it is not self-executing.¹⁰⁴ The Court reaffirms that without congressional action to incorporate the ICCPR protections into domestic law, individuals have no private right of action as the Senate declared Articles 1-27 to be non self-executing.¹⁰⁵ This Court reiterates that no U.S. judicial decisions have authorized a private right of action, although several have barred it.¹⁰⁶ In *Perez v. Warden*, the Court states that “the ICCPR does not bind federal courts because the treaty is not self-executing and Congress has yet to enact implementing legislation.”¹⁰⁷ Additionally, in *U.S. v. Duarte-Acero*, the Court stated that “the ICCPR does not create judicially-enforceable individual rights”¹⁰⁸ as “[t]reaties affect United States law only if they are self-executing or otherwise given effect by congressional legislation.”¹⁰⁹ In *U.S. v. Duarte-Acero*, the defendant, a Colombian citizen, was convicted of conspiring to murder U.S. Drug Enforcement Agency agents in Ecuador.¹¹⁰ Years later, the defendant was arrested in Ecuador and transferred to the U.S. after having served time in a

¹⁰² *Rodriguez-Fernandez*, 654 F.2d at 1382; see also MERON, *supra* note 52, at 125.

¹⁰³ *Ralk v. Lincoln County, Georgia*, 81 F. Supp. 2d 1372, 1381 (S.D. Ga. 2000) [reproduced in accompanying Notebook 1, Tab 15].

¹⁰⁴ *Id.*

¹⁰⁵ *Lagrone v. Cockrell*, 2003 U.S. App. LEXIS 18150, 36 (5th Cir. 2003) [reproduced in accompanying Notebook 1, Tab 24].

¹⁰⁶ *Ralk*, 81 F. Supp. 2d at 1381.

¹⁰⁷ *Perez v. Warden*, 286 F.3d 1059, 1063 (8th Cir. 2002) [reproduced in accompanying Notebook 1, Tab 16].

¹⁰⁸ *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002) [reproduced in accompanying Notebook 1, Tab 13].

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1280.

Colombian prison.¹¹¹ The defendant argued that prosecution in the U.S. violated his ICCPR rights as he had already served time for the act.¹¹² However, the Court held that the ICCPR was not binding on U.S. courts; therefore, the indictment and conviction did not need to be dismissed.¹¹³ Moreover, in *U.S. v. Bridgewater*, the Court stated that “[t]he protection of Article 9 of the ICCPR is unavailable because the ICCPR is not self-executing, through express acknowledgement by Congress. . . . Since the ICCPR is not self-executing, it does not give rise to privately enforceable rights under United States law.”¹¹⁴

In the particular case of Guantanamo Bay, the enemy combatants were unable to file habeas proceedings in the U.S. judicial system. The executive branch continually reiterated that the detainees did not have a right to sue the U.S. in U.S. courts under habeas proceedings pursuant to a line of cases including *Johnson v. Eisentrager*,¹¹⁵ *Ex parte Quirin*,¹¹⁶ and *In re Yamashita*.¹¹⁷ In these cases, the Court determined that the petitioners, enemy combatants, were lawfully tried by military commissions and thus the Court ruled in favor of the U.S.. Furthermore, the Court determined that the location and detention of the enemy aliens were relevant to determining whether the enemy aliens could bring habeas proceedings in the U.S. federal court system.¹¹⁸

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *United States v. Bridgewater*, 175 F. Supp. 2d 141, 147 (P.R. Cir. 2001) [reproduced in accompanying Notebook 1, Tab 14].

¹¹⁵ *Johnson v. Eisentrager*, 339 U.S. 763 (1950) [reproduced in accompanying Notebook 1, Tab 18].

¹¹⁶ *Ex parte Quirin*, 317 U.S. 1 (1942) [reproduced in accompanying Notebook 1, Tab 20].

¹¹⁷ *In re Yamashita*, 327 U.S. 1 (1946) [reproduced in accompanying Notebook 1, Tab 21].

¹¹⁸ *Johnson*, 339 U.S. at 763.

The *Johnson* court did not suggest that the mere “alien enemy” status of petitioners would be sufficient in itself for the denial of habeas jurisdiction; rather it emphasized that in the case of alien enemies habeas is not available when their acts and the situs of their trial and detention all lie outside of this nation’s territorial jurisdiction.¹¹⁹

The Court seemed to indicate that unless the U.S. possessed territorial jurisdiction where the habeas proceedings could not be brought, sovereign jurisdiction was not the relevant point.¹²⁰

Today, the Circuit Courts are split on whether Guantanamo Bay, Cuba is within the jurisdiction of the U.S. and whether detainees should be afforded constitutional protections. The *Gherebi v. Bush*¹²¹ case focuses on whether the U.S. federal court system has jurisdiction to hear habeas petitions brought by detainees at Guantanamo. The Court determined that “for purposes of our jurisdictional inquiry, it is apparent that the U.S. exercises exclusive territorial jurisdiction over Guantanamo and that by virtue of its exercise of such jurisdiction, habeas rights exist for persons located at the Base.”¹²² The Ninth Circuit Court of Appeals continued on to state that their focus was solely on the legal status of Guantanamo Bay, Cuba, with regard to the U.S. federal court system and not on the question of whether enemy combatants “are precluded from filing habeas petitions, or the question whether any particular constitutional issues may be raised.”¹²³ The Ninth Circuit Court does not indicate how it might rule if the question had been

¹¹⁹ *Gherebi v. Bush*, 352 F.3d 1278, 1284-85 (9th Cir. 2003) [reproduced in accompanying Notebook 1, Tab 22].

¹²⁰ *Johnson*, 339 U.S. at 763.

¹²¹ *Gherebi*, 352 F.3d at 1289.

¹²² *Id.*

¹²³ *Id.*

whether detainees have the right to file habeas petitions or other constitutionally based issues.¹²⁴ The question of whether detainees have constitutional rights to due process is hotly debated as evidenced by an Amici Curiae brief filed on behalf of Rasul and al Odah.¹²⁵ In contrast to the Ninth Circuit, the District of Columbia circuit found “that the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States.”¹²⁶ Therefore, the Court determined that “under *Eisentrager*, writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States,” and consequently that it “does not have jurisdiction to entertain the claims made by Petitioners in *Rasul* or Plaintiffs in *Odah*.”¹²⁷

IV. ICCPR PROTECTIONS APPLICABLE TO U.S. MILITARY TRIBUNALS

“Rights without remedies are strongly disfavored in American law, and the cases in which a person can be denied a right and left with no recourse whatsoever are few.”¹²⁸

A. Article 2 – Equality of Treatment

1. ... undertakes to respect ... ensure to all ... within its territory and ... jurisdiction the rights recognized in the present Covenant, without distinction

¹²⁴ See generally, *id.* at 1289 and 1299 (“emphasiz[ing] that the case before this Court does not require us to consider a habeas petition challenging the decisions of a military tribunal – a case that might raise different issues.”)

¹²⁵ *Rasul v. Bush & al Odah v. U.S.*, Brief of Amici Curiae Bipartisan Coalition of National and International Non-Governmental Organizations in Support of Petitioners, at 6 (discussing how “the Constitution does entitle the Guantanamo detainees to due process. The flexible standard of due process enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides a context-sensitive means to balance the real concerns of national security with the equally real possibility of an erroneous deprivation of freedom. *Mathews* makes clear that courts can protect national security without blinding themselves to the claims of those aliens held abroad by U.S. officials.”), available at: http://www.humanrightsfirst.org/us_law/14077_frieiman_proofs.pdf [reproduced in accompanying Notebook 2, Tab 43].

¹²⁶ *Rasul v. Bush*, 215 F. Supp. 2d 55, 72-73 (D.C. Cir. 2002) [reproduced in accompanying Notebook 1, Tab 23].

¹²⁷ *Id.*

¹²⁸ HANNUM & FISHER, *supra* note 7, at 87.

2. *Where not already provided for ..., each State Party ... undertakes to take the necessary steps, ..., to adopt such ... measures as may be necessary to give effect to the rights recognized in the present Covenant.*

3. *Each State Party to the present Covenant undertakes:*

(a) *To ensure that any person whose rights or freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*

(b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

(c) *To ensure that the competent authorities shall enforce such remedies when granted.*¹²⁹

Constitutional protections enforce much of Article 2. For example, the counterpart of the non-discrimination clause of ICCPR Article 2, Section 1 is the equal-protection guarantee in the U.S. Constitution.¹³⁰ If the U.S. military tribunals prosecute individuals in their capacity as individuals and not for violations of humanitarian law, then the U.S. military is required pursuant to both the U.S. Constitution Law of the Land clause and Executive Order 13107 to provide ICCPR Article 2 protections to civilian detainees. However, as evidenced by previously discussed case law, the detainees appear to be unable to bring suit in U.S. courts alleging violations of the ICCPR. The detainees will have to demonstrate that their rights, guaranteed by the U.S. Constitution or other federal legislation, not their rights guaranteed by the ICCPR, have been violated. Currently, no courts have ruled on this issue.

B. Article 4 – Derogation in Emergencies

1 . In time of public emergency which threatens the life of the nation ... States Parties ... may take measures derogating from their obligations ... to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with ... international law and do not involve discrimination

¹²⁹ The International Covenant on Civil and Political Rights, *supra* note 77.

¹³⁰ U.S. CONST. *supra* note 9; *see also* HANNUM & FISHER, *supra* note 7, at 67.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made

3. Any State Party ... availing itself of the right of derogation shall immediately inform the other States Parties ..., through the ... Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons¹³¹

The ICCPR allows states to derogate from their obligations to protect the enumerated rights if the following elements are met: a public emergency threatening the life of the nation that is officially proclaimed;¹³² proportionality in the measures undertaken compares with the scope of the emergency;¹³³ consistency in the measures taken with the international obligations of the state;¹³⁴ ensuring discriminatory measures are not used;¹³⁵ no derogation from ICCPR Articles 6, 7, 8, 11, 15, 16, and 18;¹³⁶ and prompt warning of any derogation and the reasons for the derogation is given to other states parties, through the Secretary-General of the U.N.¹³⁷

Scholars agree that war, internal disturbances, and civil strife most likely constitute a public emergency under Article 4¹³⁸ allowing a state to derogate from required ICCPR obligations. To the extent that the Article 4 clauses represent rights protected by the U.S. Constitution, these rights are also protected from derogation by domestic law.¹³⁹ For example, the equal protection clause of the U.S. Constitution satisfies the requirements barring

¹³¹ The International Covenant on Civil and Political Rights, *supra* note 77.

¹³² HANNUM & FISHER, *supra* note 7, at 143.

¹³³ *Id.* at 143.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 144.

¹³⁹ *Id.* at 90.

discrimination, as the equal protection clause applies whether or not the situation is ordinary or emergent.¹⁴⁰

Article 4 requires States immediately to notify other State Parties through the Secretary-General of the U.N. if they intend to derogate from the ICCPR.¹⁴¹ The format of the notice does not need to be made by a legal authority – the notice simply needs to be given by an agent with authority to make official acts.¹⁴² As of yet, the U.S. has not notified the Secretary-General of any intent to derogate from ICCPR protections. If the U.S. has identified that some of the detainees at Guantanamo are civilians and therefore should be governed under civilian law including the ICCPR, the U.S. must notify the Secretary-General of its intent to derogate from ICCPR protections – for example, the intent to detainee persons until the end of the conflict without being charged or tried, or without access to an attorney, or being held incommunicado. However, if by following international humanitarian laws, the U.S. has determined that all of the detainees are combatants,¹⁴³ lawful and unlawful, the U.S. does not need to send notification to the Secretary-General as the ICCPR is not the controlling authority for the situation. In this situation, international humanitarian laws control the situation.

C. Article 5 – Destruction or Limitation of Rights

1. Nothing ... may be interpreted as implying ... any right to engage in ... or perform any act aimed at the destruction ... of the rights and freedoms recognized herein or at their limitation ... greater ... than is provided for

2. ... no restriction upon or derogation from ... the fundamental human rights recognized or existing in any State Party ... pursuant to law, conventions,

¹⁴⁰ *Id.* at 146.

¹⁴¹ *Id.* at 147.

¹⁴² *Id.* at 145.

¹⁴³ The context of war drastically has changed. No longer are all of the combatants located on the battlefield. The international community will have to determine, with U.S. leadership, whether individuals who provide strategic support, i.e. electronic, financial, geographic, etc., will be considered combatants and what the scope of this will be.

*regulations or custom on the pretext that the ... Covenant does not recognize such rights or that it recognizes them to a lesser extent.*¹⁴⁴

This article simply states that state parties may not deviate from rights they have protected by claiming that the ICCPR does not recognize the rights previously protected by that state, or that the ICCPR recognizes state protected rights to a lesser extent; therefore, the state can reduce the protections.¹⁴⁵

D. Article 9 – Right to Liberty and Security

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except ... in accordance with ... law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

*5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*¹⁴⁶

The goal of ICCPR Article 9 is to ensure that states do not arbitrarily apply the law.¹⁴⁷

This article strives to guarantee that States consistently apply the rules to comparable cases.¹⁴⁸

¹⁴⁴ The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁴⁵ HANNUM & FISHER, *supra* note 7, at 90 (stating that “[o]n its face, this provision seems no more than a simple rule of interpretation disclaiming any reading of the Covenant affirmatively to create, under any interpretation, a right to act to destroy or, except as otherwise expressly provided, to limit its guarantees.”).

¹⁴⁶ The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁴⁷ GERALD SIMPSON, *DETAINEES DENIED JUSTICE* 347 (2001) [reproduced in accompanying Notebook 2, Tab 26].

¹⁴⁸ *Id.*

To date, cases comparable to the situation in Guantanamo do not exist. The ICCPR Article 9 requirements require that even if arrest and detention are lawful under national law, they must be lawful also under the ICCPR and cannot be unjust, unreasonable, discriminatory, and they must be proportional in light of the circumstances.¹⁴⁹ Article 9 is not limited to criminal cases; instead, it is couched in terms of all deprivations to liberty.¹⁵⁰ However, Article 9 does not require States not to incorporate national security concerns or to knowingly release persons who will most likely engage in violent activities nor return for hearings.¹⁵¹ In these situations, so long as the state operates by measures established by law, that are not arbitrary and are necessary, then the state has not violated Article 9.¹⁵² Because release on bail is the general rule regarding detention of suspects, to detain a suspect without the option of bail requires exceptional levels of justification by the detaining authorities.¹⁵³ Although the HRC has not indicated what the minimum detention period is, the HRC has indicated that promptly should be interpreted to mean

¹⁴⁹ HANNUM & FISHER, *supra* note 7, at 100; *see* SIMPSON, *supra* note 147 (stating that “the specific manner in which the arrest is made must not be discriminatory”); *see also* GERALD SIMPSON, *DETAINEES DENIED JUSTICE* 347 (2001) (discussing how “the specific manner of the arrest must be able to be deemed appropriate and proportional in view of the circumstances of the case”).

¹⁵⁰ HANNUM & FISHER, *supra* note 7, at 100; *see also* NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 338 (2nd ed. 1999) (discussing that the benefit of the ICCPR “extends not only to persons held on suspicion of having committed a criminal offence but to all persons deprived of their liberty by arrest or detention.”) [reproduced in accompanying Notebook 2, Tab 33].

¹⁵¹ *See* Michael N. Schmitt, *Trial, Detention or Release?*, Crimes of War Project, May 17, 2002, at 15, available at: <http://www.crimesofwar.org/expert/detain-schmitt.html> (discussing how “human rights law . . . prohibits indefinite detention and requires trial without undue delay. There is an exception in cases of national emergency, which, as noted, President Bush declared on September 14th. In fact, British authorities have detained individuals involved in hostilities in Northern Ireland for extended periods on the basis that they were dangerous. Such detentions can be appropriate in certain circumstances if the detaining power can demonstrate a valid need for continued detention and the need is regularly reassessed.”) [reproduced in accompanying Notebook 2, Tab 40].

¹⁵² RODLEY, *supra* note 150, at 334 (stating that “it may well be that measures are necessary to prevent an arrested or detained person from pursuing violent conspiracies, or colluding with alleged co-offenders, or warning them of the interest of the authorities”); *Id.* at 338 (discussing how the ICCPR “does not appear to prohibit per se administrative internment, provided that this internment is for reasons of ‘public security’, is not arbitrary, and is based on grounds and procedures established by law.”).

a period of days.¹⁵⁴ Article 9 is not interpreted to mean that only specific civilian courts can hear these cases, the term court includes administrative, constitutional, military and security courts.

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E. Article 10 – Treatment of Prisoners

*All persons deprived of ... liberty shall be treated with humanity and ... respect for the inherent dignity of the human person.*¹⁵⁶

Although the HRC repeatedly has discussed the detention of persons, the HRC has not issued a standard elucidating the minimum length of incommunicado detention.¹⁵⁷ Furthermore, the HRC has not discussed detention in the context of armed aggression or war when the detainees are enemy forces. The question seems to be, when do hostilities end?¹⁵⁸ After the culmination of hostilities, all detainees, including enemy forces, should be brought before a tribunal – civilian detainees should be afforded the rights under the ICCPR while combatant detainees should be afforded the rights under the Geneva Conventions for which they qualify.

F. Article 13 – Rights of Aliens

An alien lawfully in the territory ... may be expelled ... only in pursuance of a decision reached in accordance with law and shall, except where ... national security otherwise require[s], be allowed to submit the reasons against his

¹⁵³ SIMPSON, *supra* note 147, at 348.

¹⁵⁴ *Id.* at 348.

¹⁵⁵ *Id.* at 349.

¹⁵⁶ The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁵⁷ RODLEY, *supra* note 150, at 337 (discussing how “[t]he shortest period of detention incommunicado to bring forth a finding of an article 10(1) violation has been fifteen days, but this should not be interpreted as setting the minimum length of time which justifies such a finding – it seems merely to be the shortest period of incommunicado detention to have been considered by the [Human Rights] Committee in an individual case in which it considered article 10(1) to be applicable.”).

¹⁵⁸ Schmitt, *supra* note 151, at 15.

*expulsion and to have his case reviewed by, and be represented ... before, the competent authority or ... persons ... designated by the competent authority.*¹⁵⁹

In line with the ICCPR Article 13, the U.S. Constitution has similar requirements - “the Due Process Clause applies to lawfully resident aliens”¹⁶⁰ and requires that “they may not be expelled ‘without allowing a fair opportunity to be heard.’”¹⁶¹ The Court in *Zadvydas v. Davis* held that the Due Process Clause of the U.S. Constitution applies to aliens within the U.S. whether their presence is lawful, unlawful, temporary, or permanent.¹⁶² However, the U.S. does not guarantee constitutional protections to aliens located outside of the U.S.¹⁶³ The U.S. Supreme Court has repeatedly held in *Johnson v. Eisentrager*,¹⁶⁴ *Zadvydas v. Davis*,¹⁶⁵ and *United States v. Verdugo-Urquidez*¹⁶⁶ that extraterritorial aliens are not guaranteed the protections of the U.S. Constitution.¹⁶⁷

G. Article 14 – Fair Trial; Criminal Procedure

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge ... or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded ... for reasons of morals, public order... or national security ..., or ... the interest ... of the parties so requires, or to the extent strictly necessary in the opinion of the court ... where publicity would prejudice ... justice; but any

¹⁵⁹ The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁶⁰ HANNUM & FISHER, *supra* note 7, at 107.

¹⁶¹ *Id.*

¹⁶² *Zadvydas v. Davis* 533 U.S. 678 (2001) [reproduced in accompanying Notebook 1, Tab 17]; American Bar Association Task Force on Terrorism and the Law, *supra* note 69, at 10.

¹⁶³ American Bar Association Task Force on Terrorism and the Law, *supra* note 69, at 9.

¹⁶⁴ *Johnson*, 339 U.S. at 763.

¹⁶⁵ *Zadvydas*, 533 U.S. at 648.

¹⁶⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) [reproduced in accompanying Notebook 1, Tab 19].

¹⁶⁷ American Bar Association Task Force on Terrorism and the Law, *supra* note 69, at 9.

judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons....

2. Everyone charged with a criminal offence shall ... be presumed innocent until proved guilty....

3. In the determination of any criminal charge ..., everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail ... of the nature and cause of the charge...;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance ...; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, ...;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter...;

(g) Not to be compelled to testify against himself or to confess guilt.

5. Everyone convicted ... shall have the right to [review] by a higher tribunal

6. When a person has by a final decision been convicted ... and when subsequently his conviction has been reversed or ... pardoned on the ground that a new ... fact shows conclusively that there has been a miscarriage of justice, the person who has suffered ... shall be compensated according to law, unless it is proved that the non-disclosure of the ... fact ... is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted¹⁶⁸

The ICCPR Article 14 requirement can be summarized in one word: fairness. Article 14 discusses individual rights at trial. The Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution also protect the rights protected by Article 14 of the ICCPR.¹⁶⁹ The Covenant requires that convicted persons shall have the right to

¹⁶⁸ The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁶⁹ HANNUM & FISHER, *supra* note 7, at 111.

meaningful and impartial review by a higher reviewing body.¹⁷⁰ This reviewing authority does not need to be located within a separate branch of government from the trial court; it just needs to be legitimately and legally created.¹⁷¹ Article 14 contains many clauses specifically outlining the rules for trial. For example, Clause 3(C) states that the detainee must be brought before a judge without delay.¹⁷² The HRC has interpreted without delay to mean a few days at a minimum.¹⁷³ Article 14 does not explicitly discuss evidentiary procedures at trial. However, scholars and the international community suggest looking to the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁷⁴ and the International Criminal Court (ICC)¹⁷⁵ to formulate evidentiary rules. The ICTY states that it shall not be bound by national rules of evidence.¹⁷⁶ This seems to indicate that the ICTY rules of evidence are set at a lower standard as gathering international evidence is both difficult and at times violates state rules. Article 69 of the ICC appears to be similar to Federal Rules of Evidence 403¹⁷⁷ by providing that the Court has discretion to rule on the relevance or admissibility of evidence through weighing the probativity and prejudice that evidence may cause to the fairness of a trial.¹⁷⁸ However, it is important to

¹⁷⁰ Schmitt, *supra* note 151, at 5

¹⁷¹ *Id.*

¹⁷² The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁷³ Jinks, *supra* note 1, at 105.

¹⁷⁴ International Criminal Tribunal for Yugoslavia, May 25, 1993, U.N. Doc. S/25704 (1993) [reproduced in accompanying Notebook 1, Tab 4].

¹⁷⁵ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9 (1998) [reproduced in accompanying Notebook 1, Tab 3].

¹⁷⁶ Schmitt, *supra* note 151, at 7.

¹⁷⁷ FED. R. EVID. 403 [reproduced in accompanying Notebook 1, Tab 11].

¹⁷⁸ Michael N. Schmitt, *Trial, Detention or Release?*, Crimes of War Project, May 17, 2002, at 7, available at: <http://www.crimesofwar.org/expert/detain-schmitt.html>.; Rome Statute of the International Criminal Court, *supra* note 175.

note that the evidentiary rules seek “to ensure that the burden of proof in a criminal case lies with the prosecution, in the case of detention this being the detaining authorities.”¹⁷⁹

States are frequently concerned about revealing national security and intelligence to the public when prosecuting persons such as the detainees at Guantanamo suspected of international criminal activity. For this reason, the ICCPR in Article 14 allows prosecuting bodies to exclude the press and the public from the trial proceedings.¹⁸⁰ The HRC is also concerned about whether military tribunals may lawfully prosecute civilians.¹⁸¹ Because prosecution of civilians by military tribunals has occurred worldwide, the Committee decided that the ICCPR does not prohibit this act.¹⁸² However, the HRC stated that, “the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”¹⁸³

A fundamental underlying precept of American jurisprudence is that “all persons shall be equal before the courts” - civil as well as criminal.¹⁸⁴ This right is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which require fair trials “before competent, independent and impartial tribunals according to law.”¹⁸⁵ The Sixth Amendment to the U.S.

¹⁷⁹ SIMPSON, *supra* note 147, at 351.

¹⁸⁰ Schmitt, *supra* note 151, at 8 (showing that “for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public ...”), available at: <http://www.crimesofwar.org/expert/detain-schmitt.html>.

¹⁸¹ CCPR Gen. Comment No. 13: *Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)* (Twenty-first Session 1984) [reproduced in accompanying Notebook 1, Tab 6]; Mundis, *supra* note 34, at 325.

¹⁸² Mundis, *supra* note 34, at 325.

¹⁸³ CCPR Gen. Comment No. 13, *supra* note 183. See also Mundis, *supra* note 34, at 325.

¹⁸⁴ HANNUM & FISHER, *supra* note 7, at 109.

¹⁸⁵ *Id.* at 110.

Constitution, applicable only in criminal proceedings, guarantees the right to a public trial and an impartial jury.¹⁸⁶

H. Article 15 – Prohibition of Retroactive Application of Criminal Law

1. No one shall be held guilty of ... any act or omission which did not constitute a criminal offence, under ... law, at the time when it was committed. ...

*2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*¹⁸⁷

The premise of this article is shared by the fundamental beliefs of the U.S. and the foundation of the U.S. criminal justice system. Individuals are innocent until proven guilty in a court of law and that individuals cannot be held criminally liable for acts committed that at the time they were committed were not criminal. In the context of current military tribunals, Article 15 is not a hurdle as terrorist acts can be “prosecuted under the U.S. Antiterrorist Act of 1990 or under international law as a crime against humanity (murder).”¹⁸⁸ Furthermore, the Geneva Conventions and international humanitarian law govern violations of the laws of war.

I. Article 16 – Recognition Before the Law

*Everyone shall have the right to recognition everywhere as a person before the law.*¹⁸⁹

ICCPR Article 16 is “a plainly unexceptionable proposition which is wholly consistent with United States law.”¹⁹⁰ In addition, this article was planned to underscore that aliens should be acknowledged as persons before the law; e.g., having recourse to the courts.¹⁹¹

¹⁸⁶ *Id.*

¹⁸⁷ The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁸⁸ Mundis, *supra* note 34, at 327.

¹⁸⁹ The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁹⁰ HANNUM & FISHER, *supra* note 7, at 115.

J. Article 26 – Equal Protection of the Law

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground*¹⁹²

In line with Constitutional tests for legality, the U.S. entered an understanding to ICCPR Article 26 declaring that the U.S. will hold the distinctions identified in Article 2 and Article 26 legal if they are at least rationally related to a legitimate governmental objective.¹⁹³ It should be noted that the constitutional test of rational relation to a legitimate governmental objective is the minimum test. Legal scholars have noted that Article 26 is independently a substantive right and does not depend upon violation of another ICCPR protection.¹⁹⁴

V. WHO SHOULD BE AFFORDED ICCPR PROTECTIONS

The U.S. should afford ICCPR protections to citizens of states that are also signatories to the ICCPR provided that those citizens acted in their capacity as citizens and not as members of either a military or terrorist organization. Although the ICCPR is binding on the U.S. and its agencies, including the Department of Defense, with respect to its citizens and foreign nationals residing within the jurisdictional territory of the U.S., the ICCPR is, by and large, not binding on U.S. military commissions. The relevant international law governing military commissions arises out of the Geneva Conventions. International humanitarian law applies to armed conflict.¹⁹⁵ Humanitarian law, not human rights law, governs the seizure and detention of enemy

¹⁹¹ *Id.*

¹⁹² The International Covenant on Civil and Political Rights, *supra* note 77.

¹⁹³ HANNUM & FISHER, *supra* note 7, at 86.

¹⁹⁴ *Id.* at 125.

¹⁹⁵ United States: Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, *supra* note 14.

combatants in armed conflict.¹⁹⁶ However, if the military commissions intend to engage in prosecuting individuals of other states in their capacity as individuals and not in their capacity as members of a military or terrorist organization, then the military is required to provide these individuals with the protections of the ICCPR. The HRC, in General Comment Number 13, asserts that the use of military tribunals to try civilians could present obstacles as regards the equitable, impartial, and independent administration of justice.¹⁹⁷ Frequently, military tribunals are not established because the exceptional procedures utilized do not fully comply with customary principles of justice.¹⁹⁸ According to the American Bar Association (ABA), the federal court system has jurisdiction to hear habeas corpus proceedings from persons facing military commissions that are present in the U.S. or U.S. citizens.¹⁹⁹ Additionally, the ABA has determined that military commissions are capable of seeking justice while providing due process.²⁰⁰

VI. WHO MAY BE AFFORDED ICCPR PROTECTIONS

The treatment of terrorist suspects and official Taliban forces should be differentiated regarding prisoner of war status.²⁰¹ Although the Taliban did not sign the ICCPR, the prior government of Afghanistan did sign. Therefore, the Taliban remained obligated under the

¹⁹⁶ *Id.*

¹⁹⁷ McNamara, *supra* note 23, at 13.

¹⁹⁸ *Id.*

¹⁹⁹ American Bar Association Task Force on Terrorism and the Law, *supra* note 69, at 15.

²⁰⁰ *Id.* at 14.

²⁰¹ David Scheffer, Options for Prosecuting International Terrorists, United States Institute of Peace, November 14, 2001, at 1 (stating that “[t]he terrorist suspects should not be granted prisoner of war status if apprehended, although officially organized forces of the Taliban in Afghanistan probably would qualify for prisoner of war status”) available at: <http://www.usip.org/pubs/specialreports/sr78.pdf> [reproduced in accompanying Notebook 2, Tab 48].

ICCPR according to the HRC.²⁰² Additionally, the U.S. may afford ICCPR protections to individuals of entities that are not signatories to the ICCPR provided that those individuals acted in their capacity as individuals and not as members of a military or terrorist organization.

VI. CONCLUSION

The ICCPR is binding on the U.S., the U.S. military, and on U.S. military commissions if the commissions prosecute individuals in their capacity as individuals and not in their capacity as members of a military or terrorist organizations. In summary, the U.S., absent cause, should afford ICCPR protections to citizens of states that are signatories to the ICCPR. The U.S. may, even though not required, afford ICCPR protections to individuals of entities or states that are not signatories to the ICCPR. The Non-Self Executing Declaration attached to the ICCPR indicates that the U.S. is not required to guarantee that individuals may maintain a private right of action to enforce the protections of the ICCPR within the jurisdiction of the U.S. without express Congressional authorization.

In the end, U.S. participation in the ICCPR is not a legal, but a political issue.²⁰³ The U.S. must carefully weigh the benefits and detriments of using a military tribunal to prosecute civilians. If the military tribunal will only prosecute persons alleged to have violated international humanitarian law, then the international community as well as the legal community in the U.S. is not likely to oppose vigorously the use of the military tribunals. However, if the military commission plans to prosecute individuals who are not members of a military or terrorist organization and who are suspected of violating criminal laws, then the international community

²⁰² SARAH JOSEPH (ET AL), THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 5 (2000) (stating that “[t]he HRC has consistently taken the view that successor States automatically succeed to their predecessors’ obligations under the ICCPR and the Optional Protocols.”) [reproduced in accompanying Notebook 2, Tab 34].

²⁰³ HANNUM & FISHER, *supra* note 7, at 288.

as well as the domestic legal community will increase their opposition to the military tribunal, regardless of the protections the military tribunal affords to the detainees. The past stance of the U.S. in regard to the use of foreign military tribunals to prosecute civilians sheds considerable doubt on the trustworthiness of the U.S. and its adherence to international standards and norms.²⁰⁴

Although the U.S. should continue to reevaluate the lawfulness and status of the detention of persons at Guantanamo Bay and in Afghanistan,²⁰⁵ international humanitarian law allows for continued detention of enemy combatants, regardless of their specific status under the Geneva Conventions.²⁰⁶ Overall, “the U.S. government remains responsible to its own people to make its own decisions about how to defend the American people.”²⁰⁷ As Justice Robert Jackson famously stated, “a constitutional bill of rights cannot be interpreted as a suicide pact.”²⁰⁸

²⁰⁴ Mertens, *supra* note 24, at 563-64 (discussing how the use of military tribunals by the United States “devalues the earlier US critique of similar courts in other countries and makes any future critique look hypocritical. The use of these commissions will undermine the willingness of other countries to extradite suspects and aggravate the tension that already exists between the US and other countries because of the Order’s neglect of international standards for due process . . .”).

²⁰⁵ McNamara, *supra* note 23, at 5 (discussing how “[t]he prisoners at Guantanamo Bay and in Afghanistan should have access as soon as possible to a competent tribunal to examine the lawfulness of their detention.”).

²⁰⁶ See United States: Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, *supra* note 14 (stating that “[u]nder international humanitarian law, states engaged in armed conflict have the right to capture and detain enemy combatants, whether or not the combatants are POWs. In this case, active hostilities are ongoing. The United States is therefore fully entitled to hold the detainees.”). *Id.* (discussing how “[p]etitioners have mistakenly applied the peacetime human rights law concept of ‘prolonged detention’ to the wartime humanitarian law concept of capture and detention of enemy combatants, lawful and unlawful.”).

²⁰⁷ Rabkin, *supra* note 3, at 75.

²⁰⁸ *Id.*