



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 38 | Number 1

Article 1

Fall 2016

Repairing U.S. Violations: Applying Customary International Law and Implementing the ICC Hague Detention Centre Practices to Confinement Conditions at GTMO

Patrice Corpus
Loyola Law School

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Comparative and Foreign Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Patrice Corpus, *Repairing U.S. Violations: Applying Customary International Law and Implementing the ICC Hague Detention Centre Practices to Confinement Conditions at GTMO*, 38 Loy. L.A. Int'l & Comp. L. Rev. 1 ().

Available at: <https://digitalcommons.lmu.edu/ilr/vol38/iss1/1>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

Repairing U.S. Violations: Applying Customary International Law and Implementing the ICC Hague Detention Centre Practices to Confinement Conditions at GTMO

PATRICE CORPUS*

These are enemy combatants, as you know, picked up on the battlefield.

They are not fighting for a country as is covered by the Geneva Convention. . .

If I was in the same condition, then I would want to be detained in the same manner that we are detaining these enemy combatants.¹

*Maj. Gen. Geoffrey Miller
Commander JTP Guantanamo
Deputy Commanding General for Detainee Operations, Iraq*

I. INTRODUCTION

Major General Geoffrey Miller (“Gen. Miller”) was the Commander of the Joint Task Force Guantanamo detention facilities located

* J.D., Loyola Law School, Los Angeles, May 2016. Thank you to Professor David Glazier for his guidance and assistance on this topic. I would also like to thank the editors and staff of ILR for their contributions to this article. Finally, thank you to my family for their invaluable support.

1. Rebecca Leung, *Camp Delta: Guantanamo Bay*, CBS NEWS (Sept. 16, 2003), <http://www.cbsnews.com/news/camp-delta-guantanamo-bay-16-09-2003/> (last visited Oct. 15, 2014).

at Guantanamo Bay, Cuba since November 2002 until August 2003 when he was called to assist the Department of Defense in developing more effective interrogation techniques at the Abu Ghraib prison in Iraq.² Gen. Miller's statements to *60 Minutes* journalists addressed Guantanamo Bay ("GTMO") detainees' legal status, detention in secret and without trial, and protections given based on their status.³

Despite increasing public awareness and opposition towards the GTMO facility, the United States ("U.S.") maintains that GTMO detainees are "unlawful combatants," and therefore, outside the protections provided by the Geneva Conventions.⁴ The U.S. also stated that the GTMO facility was not under governmental jurisdiction for purposes of complying with international law.⁵ Despite the justifications provided by the U.S. Government, the GTMO detention facility was met with widespread criticism for its substandard confinement conditions and treatment of detainees.⁶ Undeterred, the U.S. staunchly defended the legality of its operation at GTMO.⁷

Orange jumpsuits have become an icon of the GTMO facilities since they were first shown in photographs of GTMO detainees enduring maltreatment.⁸ In the U.S., numerous individuals, including members of Amnesty International,⁹ conduct protests outside the White

2. Wikipedia, *Geoffrey D. Miller*, http://en.wikipedia.org/wiki/Geoffrey_D._Miller (last visited Nov. 15, 2014).

3. Leung, *supra*, note 1.

4. Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, HUMAN RIGHTS BRIEF 9, 1 (2002); Memorandum from George Bush to Vice President et al., *Humane Treatment of Taliban and al Qaeda Detainees*, CBG / AP & CNN (Feb. 7, 2002), https://www.aclu.org/files/assets/20100615_dos_release_1_doc_-_already_released.pdf; Department of Defense Directive 2310.01E, 5, 6 (2014), <http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf> (last visited Oct. 24, 2014).

5. Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (Mar. 10, 2006), <http://www.state.gov/documents/organization/98969.pdf>.

6. See *Amnesty International Report 2005 Speech by Irene Khan at Foreign Press Association*, AMNESTY INTERNATIONAL (May 25, 2005), <https://web.archive.org/web/20060220210041/http://web.amnesty.org/library/Index/ENGPOL100142005>; see also Richard Norton-Taylor & Suzanne Goldenberg, *Judge's anger at US torture*, THE GUARDIAN (Feb. 16, 2006, 9:10 PM), <http://www.theguardian.com/uk/2006/feb/17/politics.world>.

7. Ed Pilkington, *US responds to Guantánamo Bay and NSA criticisms made by UN committee*, THE GUARDIAN (Mar. 14, 2014), <http://www.theguardian.com/world/2014/mar/14/us-guantanamo-bay-nsa-un-committee>.

8. Wikipedia, *Guantanamo Bay detainee uniforms*, http://en.wikipedia.org/wiki/Guantanamo_Bay_detainee_uniforms (last visited Mar. 12, 2015).

9. *The Cell Tour*, AMNESTY INTERNATIONAL (Nov. 11, 2008), <http://celltour.amnesty.org/>

House¹⁰ and the Supreme Court of the United States,¹¹ donning orange jumpsuits while objecting to GTMO detention practices and demanding its closure. Similarly, the Islamic State of Iraq and the Levant (“ISIL”) dresses its hostages in orange jumpsuits during videotaped executions, likely to elicit the negative reputation the U.S. has garnered regarding its detention practices at GTMO.¹² On August 19, 2014, ISIL released a video of American journalist James Wright Foley dressed in an orange jumpsuit while beheaded by “Jihadi John.”¹³ ISIL again dressed hostages in orange jumpsuits throughout propaganda videos condemning President Obama and the U.S., followed by the beheadings of American-Israeli journalist Steven Sotloff on September 2, 2014,¹⁴ and British aid worker David Haines just days later.¹⁵ Alan Henning, a volunteer humanitarian aid worker, also wore an orange jumpsuit when he was executed by ISIL, just like the hostages before him.¹⁶ Most recently, on February 15, 2015, ISIL released a video depicting the beheadings of 21 Egyptian Coptic Christian fishermen donning blue jumpsuits, and while not orange, are similar to those initially worn by GTMO detainees.¹⁷

10. Elisha Fieldstadt, *Guantanamo Protestors Rally at White House on 13th Anniversary*, NBC NEWS (Jan. 11, 2015), <http://www.nbcnews.com/news/us-news/guantanamo-protesters-rally-white-house-13th-anniversary-n284086>; Katherine Driessen, *Protestors condemn Guantanamo Bay on 10th anniversary with march from White House*, WASH. POST (Jan. 11, 2012), http://www.washingtonpost.com/local/protesters-condemn-guantanamo-bay-on-10th-anniversary-with-march-from-white-house/2012/01/11/gIQAVYIDSP_story.html.

11. *80 Arrested Outside Supreme Court*, CBS NEWS (Jan. 11, 2008, 7:19 PM), <http://www.cbsnews.com/news/80-arrested-outside-supreme-court/>.

12. Patricia Zengerle, *US official: “No coincidence” Islamic State victims in Guantanamo-like jumpsuits*, REUTERS (Feb. 5, 2015, 11:43 AM), <http://www.reuters.com/article/2015/02/05/us-usa-guantanamo-congress-islamicstate-idUSKBN0L91YF20150205>.

13. Lee Ferran & Rym Momtaz, *Video Appears to Show Beheading of Journalist James Foley, Who Went Missing in Syria*, ABC NEWS (Aug. 19, 2014, 5:55 PM), <http://abcnews.go.com/Blotter/james-foley-video-appears-show-beheading-journalist-missing/story?id=25043593>.

14. John Bacon & Kim Hjelmgaard, *Obama vows to bring Islamic State killers to justice*, USA TODAY (Sept. 3, 2014, 6:43 PM), <http://www.usatoday.com/story/news/usanow/2014/09/03/steven-sotloff-video-judged-authentic/15005539/>.

15. *David Haines’s ‘evil murder’ condemned by PM*, BBC NEWS (Sept. 14, 2014), <http://www.bbc.com/news/uk-29195872>; Greg Botelho, *ISIS executes British aid worker David Haines; Cameron vows justice*, CNN (Sept. 14, 2014, 2:24 PM), <http://www.cnn.com/2014/09/13/world/meast/isis-haines-family-message/>.

16. *Alan Henning ‘killed by Islamic State,’* BBC NEWS (Oct. 4, 2014), <http://www.bbc.com/news/uk-29485405>.

17. *ISIS video appears to show beheadings of Egyptian Coptic Christians in Libya*, CNN (Feb. 16, 2015, 7:34 AM), <http://www.cnn.com/2015/02/15/middleeast/isis-video-beheadings-christians/>.

Given the relative sophistication of ISIL's public media campaigns, it is very likely that the routine use of orange jumpsuits is a conscious decision to evoke negative memories of U.S. detention practices at GTMO.¹⁸ Although GTMO protestors and ISIL convey starkly different messages, both groups have used the iconic orange jumpsuit as a symbol to represent the substandard detention conditions at GTMO and the harm those practices have brought to the U.S.

This note will address steps that the U.S. can take to minimize the harm GTMO detention practices have had on domestic and international perception of the U.S. Also, the note will argue that international humanitarian, human rights, and customary international law apply to GTMO detainees. In addition, this note maintains that the U.S. facility currently operates under procedures, living conditions, and treatments that violate the rights of detainees under international standards. Furthermore, the note will argue that closure of the GTMO detention facility, or at a minimum, adherence to international standards governing confinement conditions and accommodations, is a vital step the U.S. can take to enhance its positive perception around the world, and must take to remedy its continuing violation of international standards.

Section II discusses the conditions of confinement at the various camps located at GTMO and briefly details the treatment of GTMO detainees themselves as it relates to confinement conditions. Section III discusses the scope of legal authority the U.S. maintains over GTMO detainees and critically assesses whether the U.S. evaded its international obligation under humanitarian, human rights, and customary law. Section IV addresses the current legal status of GTMO detainees, and the classification and protections afforded based on those classifications. Section V introduces the International Criminal Court ("ICC") and will compare GTMO detention practices with those at The Hague Detention Centre ("Detention Centre"), an exemplary facility in both construction and management, where inmates are housed during pre-trial, trial and appellate proceedings for international crimes against humanity, genocide, war crimes and crimes of aggression.

This note will conclude that, although international treaties on detention conditions is sparse, customary international law still provides minimum standards for detention conditions that apply to the U.S., the

18. Dan Lamothe, *Once again, militants use Guantanamo-inspired orange suit in an execution*, WASH. POST (Aug. 28, 2014), <https://www.washingtonpost.com/news/checkpoint/wp/2014/08/28/once-again-militants-use-guantanamos-orange-jumpsuit-in-an-execution/>.

GTMO facility, and the detainees therein. Furthermore, this note contends that the U.S. should amend its failure to comply with international law by implementing those standards and guidelines currently in practice at the ICC Detention Centre at the GTMO detention facility. Finally, this note purports that restoring U.S.' image as a world leader necessitates closure or renovation of the GTMO detention facility.

II. CATEGORIES OF DETAINEES AND OVERVIEW OF VARIOUS CONDITIONS OF CONFINEMENT AT THE GUANTANAMO BAY DETENTION FACILITY

In 1898, the U.S. established a military base at Guantanamo Bay, Cuba during the Spanish-American War.¹⁹ Following the war, the U.S. obtained a lease of the property which granted it "complete jurisdiction and control" over the land while Cuba retained sovereignty.²⁰ In 1934, the parties agreed that the lease would be permanent and would only be broken upon mutual agreement or U.S. abandonment.²¹

Following the September 11, 2001 attacks and subsequent invasion of Afghanistan, the U.S. Government began construction of the GTMO detention facility.²² Since January 11, 2002, when the first detainees arrived at Guantanamo Bay, the U.S. government has maintained three separate camps, some divided into sub-camps, to house incoming detainees.²³ Since President Barack Obama took office, reports state that three camps are currently utilized.²⁴ There have been 780 acknowledged detainees held at the GTMO facility to date.²⁵ Today, one hundred and twenty-two detainees are being held at the facility.²⁶ Of that population, fifty-five detainees have been cleared for release and await transfer, three who have been convicted by a Guantanamo military commission

19. Scott Packard, *How Guantanamo Bay Became the Place the U.S. Keeps Detainees: A former Marine looks back on his tenure commanding the now-infamous U.S. Naval base*, THE ATLANTIC (Sept. 4, 2013) <http://www.theatlantic.com/national/archive/2013/09/how-guantanamo-bay-became-the-place-the-us-keeps-detainees/279308/>.

20. Janet Munro-Nelson, *Demographics of Guantanamo Bay Prison*, THE BEACON (Aug. 2011), <http://the-beacon.info/countries/united-states/demographics-of-guantanamo-bay-prison/>.

21. Treaty of Relations, U.S.-Cuba, art. 3, May 29, 1934, T.S. No. 866.

22. Munro-Nelson, *supra* note 20, at 2.

23. *Id.*

24. *Id.* at 3.

25. *The Guantánamo Docket*, N.Y. TIMES (Jan. 2015), <http://projects.nytimes.com/guantanamo>.

26. *Guantánamo by the Numbers*, Human Rights First: American Ideals. Universal Values (Mar. 2, 2015) <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf> (Detainee numbers referred to in this section refer to data from early 2015, when this article was written).

still remain at GTMO, twenty-nine detainees have been designated for trial or commission, and thirty-five detainees have been approved for indefinite detention without trial.²⁷ The conditions of confinement at each of the camps arguably violate international standards the U.S. is bound to follow.

The first subsection will address the different classifications of GTMO detainees. These distinctions will be used to compare GTMO detainees with detained persons at the ICC Detention Centre. The remaining subsections will outline the conditions of confinement that have been used since January 2002. Since the U.S. Department of Defense has released minimal information regarding the detention center, this article draws from various sources including: public statements by the Department of Defense; media coverage; information given by former GTMO detainees who have been released; accounts from detainees' lawyers; and reports by journalists who were given controlled tours of the base.

A. *Categories of Detainees at Guantanamo Bay*

The detention center at Guantanamo Bay, Cuba houses detainees of various classifications.²⁸ While the status of detainees should directly impact the protections of confinement and treatment afforded to each individual, in practice, the status has had no such effect.²⁹ Four categories for detainees exist at GTMO: long-term preventative detainees who have been approved for indefinite detention while having never been charged or convicted of a crime (35); detainees currently pending or engaged in trial or military commission (29); detainees who have been convicted and are serving sentences at GTMO (3), and detainees who have been cleared for release (5).³⁰

Since 2002, the U.S. has expanded classifications for detainees.³¹ GTMO detainees were collectively deemed "unlawful combatants" be-

27. *Id.*; David Leigh et al., *Guantánamo leaks lift lid on world's most controversial prison*, THE GUARDIAN (Apr. 11, 2011, 11:44 PM), <http://www.theguardian.com/world/2011/apr/25/guantanamo-files-lift-lid-prison>; *No trial, transfer or release: Gitmo's 'indefinite detainees' identified*, RT (June 19, 2013, 12:28 AM), <http://rt.com/usa/gitmo-indefinite-detainees-identified-845/> (The title asserts that detainees are either pending or in trial, transferred for detention, released or detained indefinitely.).

28. *Guantánamo by the Numbers*, *supra* note 26.

29. Dep't of Def. News Briefing by Secretary Rumsfeld and Gen. Myers (Jan. 11, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031> [hereinafter Rumsfeld News Briefing].

30. *Guantánamo by the Numbers*, *supra* note 26.

31. *The Guantánamo Docket*, *supra* note 25.

cause they did not satisfy the requirements set out by the Geneva Conventions for prisoner of war status for individuals captured during an armed conflict.³² These individuals, labeled “unlawful combatants,” are either set for trial or have been assigned to indefinite detention.³³ Over time, the U.S. created tribunals to assess the “unlawful combatants” status.³⁴ The individuals who are no longer considered “unlawful combatants” are categorized as detainees set for release but awaiting a country to receive them.³⁵

Detainee classification is significant on a wider scale for analyzing the protections afforded to detainees based on their status, and specifically for this note, to address the distinction in categories between GTMO and the ICC Detention Centre at The Hague. At the ICC, there are two main categories of detained persons: individuals remanded in custody during pretrial, trial and appellate proceedings; and individuals who have been convicted and await transfer to a host State’s prison facility.³⁶ Despite non-identical detainee classifications between GTMO and the ICC Detention Centre, U.S. violations of international standards should be alleviated because of its incompliance with international standards. Furthermore, ICC Detention Centre practices should be viewed as a model for retrofitting purposes. The protections analyzed and argued for in this note are those that provide minimum guarantees and safeguards for all persons, regardless of classification, who are detained or imprisoned.

B. Camp X-Ray

Camp X-Ray, although closed, was the first operational detention camp used at GTMO.³⁷ Detainees arrived on January 11, 2002 and relocated in April 2002, to the newly-opened Camp Delta.³⁸ In Camp X-Ray, detainees were confined in “separate make-shift rooms, made of chain-link fencing,” corrugated metal roofs, and concrete floor measur-

32. Rumsfeld News Briefing, *supra* note 29.

33. *The Guantánamo Docket*, *supra* note 25.

34. *Id.*; Wikipedia, *Combatant Status Review Tribunal*, http://en.wikipedia.org/wiki/Combatant_Status_Review_Tribunal (last visited Feb. 28, 2015).

35. *The Guantánamo Docket*, *supra* note 25.

36. Steven Arrigg Koh, *Geography and Justice: Why Prison Location Matters in U.S. and International Theories of Criminal Punishment*, 46 VAND. J. TRANSNAT’L L. 1267, 1286-1287 (2013).

37. Munro-Nelson, *supra* note 20, at 2.

38. *Id.*

ing 6 feet by 8 feet per cell.³⁹ Detainees were provided very few amenities, including: a foam sleeping mat, two buckets (one to be used as a toilet), a one-quart canteen, two orange jumpsuits, one pair of flip-flops, two bath towels (one to be used as a prayer mat), a washcloth, toothpaste, soap and shampoo.⁴⁰

C. Camp Iguana

Camp Iguana is a lower security camp located half a mile from Camp Delta,⁴¹ is roughly half an acre, and detainees are confined in wooden huts.⁴² Each hut has twin beds and air conditioning.⁴³ Current detainees housed in Camp Iguana have increased phone calls, access to books, laundry and a garden.⁴⁴ From 2002 to January 2004, it housed the six juvenile detainees who were between 13 and 15 years of age when transferred to GTMO.⁴⁵ The camp reopened in 2005 to house detainees who have been judged by the Combatant Status Review Tribunal, as no longer an “unlawful combatant.”⁴⁶ The Combatant Status Review Tribunal is a forum in which detainees could contest their status as “unlawful combatants.”⁴⁷ Detainees determined to no longer be “unlawful combatants” are transferred off Guantanamo Bay,⁴⁸ but housed in Camp Iguana in the interim.⁴⁹

D. Camp Delta

1. Conditions in Delta Camps 1-3

Delta Camps 1-3 are similar in structure to one another—cells are 8 feet long, 6 feet and 8 inches wide and 8 feet high with walls composed of part metal mesh, allowing for minimal fresh air and filtered

39. *Id.*

40. *Id.*

41. *Id.* at 3.

42. *Id.*

43. *Id.*

44. *Id.*

45. See *Guantanamo's Children: The Wikileaks Testimonies*, CTR. FOR THE STUDY OF HUMAN RIGHTS IN THE AMERICAS (2014), <http://humanrights.ucdavis.edu/reports/guantanamos-children-the-wikileaks-testimonies/guantanamos-children-the-wikileaks-testimonies> (last visited on Nov. 21, 2014); Munro-Nelson, *supra* note 20, at 3.

46. *Combatant Status Review Tribunal*, *supra* note 34.

47. *Id.*

48. Dep't of Def. News Release No. 651-04 (July 7, 2004), <http://www.defense.gov/releases/release.aspx?releaseid=7530>.

49. Munro-Nelson, *supra* note 20, at 3.

light, and a steel roof.⁵⁰ The cells include a toilet, sink and mattress.⁵¹ Delta Camps 1-3 provide no air-conditioning, and use of exhaust fans offer limited relief.⁵² In addition to the harsh daytime conditions detainees are forced to endure, those housed in Delta Camps 1-3 are also subjected to fluorescent lighting which remain on throughout the day and night.⁵³

2. Conditions in Delta Camp 4

Delta Camp 4 opened on February 28, 2003 and initially used to house detainees with good behavior or who cooperated with the interrogation process.⁵⁴ The camp is designed akin to a prisoner of war facility in order to allow detainees more opportunity to interact with one another.⁵⁵ Camp 4 is composed of four communal living rooms capable of housing up to 10 detainees in each communal living space and includes communal dormitories, showers and toilets.⁵⁶ Detainees are provided a bed with a mattress, and a personal locker for writing materials and books.⁵⁷ External amenities include a soccer field, basketball and volleyball courts, and a small common outdoor area.⁵⁸ Detainees in Camp 4 were provided art and English classes as well as a television, however, these were removed following riots in 2006 and have not been re-issued.⁵⁹

3. Conditions in Delta Camp 5

Camp 5, designed to house 100 detainees, is modeled directly after the Miami Correctional Facility in Bunker Hill, Indiana.⁶⁰ Barbed wire surrounds Camp 5 and heavy green sheets are draped along the walls to obstruct any external view or airflow into the facility to offer detainees some relief.⁶¹ The Camp is a two-story, maximum security, multi-

50. *Id.* at 4.

51. *Id.* at 3, 5.

52. *Id.*

53. *Id.*

54. *Id.* at 3.

55. *Id.*

56. Guantanamo Bay – Camp Delta, GLOBAL SECURITY, http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm (last visited Oct. 15, 2014); Munro-Nelson, *supra* note 20, at 3.

57. *Guantanamo Bay - Camp Delta*, *supra* note 56, at 5.

58. *Id.*; Munro-Nelson, *supra* note 20, at 3.

59. Munro-Nelson, *supra* note 20, at 4.

60. *Guantanamo Bay – Camp Delta*, *supra* note 56, at 5.

61. *Id.*

winged complex made of concrete and prefabricated steel cells that measures 9 feet by 12 feet.⁶² Each cell includes a small window looking onto an interior corridor manned by military police and a narrow frosted window on the outside wall which provides limited access to natural light.⁶³ Instead, sunlight has been replaced with fluorescent lights that are left on 24 hours a day.⁶⁴ In addition to constant light, the camp is centrally air-conditioned with the temperature under the guards' control.⁶⁵ Recreation time occurs in a cage-like pen with no opportunity for communal interaction while cameras monitor every room within the facility 24 hours a day.⁶⁶ One detainee housed in Camp 5 stated "I'm fighting for my sanity," and a year later the same individual said, "the walls are really beginning to close in on me now."⁶⁷ This detainee's reaction to his housing situation highlights inhumane treatment and its effects on the human psyche.

4. Conditions in Delta Camp 6 and 7

Camp 6 was initially designed to provide detainees with communal living spaces akin to Camp 4.⁶⁸ Unfortunately, Camp 6 was redesigned following detainee protests in 2006 and the deaths of three detainees housed in Camp 1.⁶⁹ After the protests, security at GTMO was tightened further and Camp 6 was retrofitted into a maximum-security facility to comply with American Corrections Association standards.⁷⁰ Camp 6 is modeled directly after a jail in Lenawee County, Michigan⁷¹ and is intended to accommodate roughly 178 detainees.⁷² Comprised of prefabricated units, the two-story building is surrounded by high concrete walls

62. *United States of America Cruel and Inhuman: Conditions of Isolation for Detainees at Guantanamo Bay*, AMNESTY INT'L, AI Index: AMR 51/051/2007 (2007), <http://www.amnesty.ie/sites/default/files/report/2010/04/guantanamo%20conditions%20main%20text-FINAL.pdf> (last visited Oct. 23, 2014) [hereinafter *United States of America Cruel and Inhuman*]; Munro-Nelson, *supra* note 20, at 3.

63. *Id.*

64. Munro-Nelson, *supra* note 20, at 4.

65. *Id.*

66. Guantanamo Bay – Camp Delta, *supra* note 56, at 5.

67. *Current Conditions of Confinement at Guantanamo: Still in Violation of the Law*, CTR. FOR CONSTITUTIONAL RIGHTS (Feb. 23, 2009), <http://ccrjustice.org/learn-more/reports/current-conditions-confinement-guantanamo> [hereinafter *Current Conditions of Confinement at Guantanamo*].

68. *United States of America Cruel and Inhuman*, *supra* note 62, at 9-10

69. *Id.*; Guantanamo Bay – Camp Delta, *supra* note 56.

70. *Id.*

71. Guantanamo Bay – Camp Delta, *supra* note 56, at 6.

72. *United States of America Cruel and Inhuman*, *supra* note 62, at 3.

and photos of the building show no windows discernible on the façade.⁷³ Within the facility, detainees remain confined in individual steel cells that measure 6 feet by 12 feet for at least 22 hours a day.⁷⁴ The only window is a strip of glass a few inches wide, located adjacent to the cell door.⁷⁵ The window looks onto the interior corridor patrolled by military police.⁷⁶ The cells' walls, doors, ceilings and floors are comprised of prefabricated steel, causing each individual movement to reverberate and echo, resulting in constant noise within the facility.⁷⁷ Each cell contains a built-in bed and a combined metal toilet and sink unit.⁷⁸ The only source of air is from air conditioning controlled by military police.⁷⁹ Reported to permanently be on too high, one lawyer stated that her client huddled on the floor trying to keep warm and was too cold to sit on the chair.⁸⁰ One detainee described Camp 6 as a "dungeon above the ground."⁸¹

The exercise yard in Camp 6 is divided into individual areas by chain-link fencing and provides little opportunity for interaction among detainees.⁸² High concrete walls surround the yard with mesh fencing covering the top, thus providing no view to the outside.⁸³ Detainees report that the height of the walls and the mesh fencing results in the sun filtering through only for a short period of the day.⁸⁴ Detainees are allowed two hours of exercise a day; however, exercise is often offered late at night and guards reportedly encourage detainees to refuse yard time and take a shower instead.⁸⁵ Given the limited exposure in the yard and the practice of offering yard time at night or encouraging use of the shower in lieu of the yard, detainees may not see daylight for days at a time.⁸⁶

Minimal communication between detainees is compounded by

73. *Id.* at 3, 5.

74. *Id.* at 3, 15.

75. *Id.* at 3.

76. *Id.*

77. *Id.* at 6.

78. *Id.* at 4.

79. *Id.*

80. *Id.*

81. Declaration of Sabin Willett, *Huzaiifa Parhat et al. v. Robert M. Gates*, United States Court of Appeals, District of Columbia Circuit (2007) (No. 06-1397).

82. *United States of America Cruel and Inhuman*, *supra* note 62, at 5.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

constant exposure to guards.⁸⁷ The level of exposure by guards extends to surveillance while detainees are in their cells.⁸⁸ It has been reported to occur while detainees use the in-cell toilets because detainees are not allowed to cover themselves from the view of guards at any time.⁸⁹ It has further been alleged that female guards observe detainees while using the toilet and during showers.⁹⁰ One lawyer has described time spent in Camp 6 as “a combination of no peace and nothing to do.”⁹¹

Little is known of Camp 7 except that it is purportedly used for “high value” detainees previously held by the U.S. Central Intelligence Agency.⁹² The Human Rights Watch contends that conditions at Camp 7 are worse than those at Camps 5 and 6.⁹³ There are believed to be 15 detainees held in Camp 7.⁹⁴

5. Conditions in Camp Echo

Camp Echo is composed of roughly 12 single-story concrete buildings used to house detainees scheduled for Military Commission hearings.⁹⁵ It is maintained that “[d]etention as an enemy combatant in Camp Echo is detention under the law of war, and is not punitive or criminal in nature.”⁹⁶ However, Camp Echo claims some of the harshest conditions at GTMO with a collection of windowless huts measuring 6 feet by 8 feet and divided into two small cells.⁹⁷ The cells contain shower and sleeping areas, with a table and chairs for interrogations.⁹⁸ Detainees spend a minimum of 23 hours per day confined to their cells at the rear of the concrete hut, with no exposure to natural light, and fluorescent lighting on 24 hours a day.⁹⁹ In October 2003, the International Committee of the Red Cross (“ICRC”) described conditions in the facility as “extremely harsh.”¹⁰⁰

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 6.

92. Munro-Nelson, *supra* note 20, at 5.

93. *Id.*

94. *Id.*

95. *Id.* at 4.

96. *Fact Sheet: Camp Echo and Camp Five*, JOINT TASK FORCE - GUANTANAMO BAY (June 2004) at 20, http://www.pegc.us/archive/JTF-GTMO_press_kit_20070418.pdf [hereinafter *Fact Sheet: Camp Echo and Camp Five*].

97. *United States of America Cruel and Inhuman*, *supra* note 62, at 8, 14.

98. *Id.*

99. *Id.* at 8.

100. *Id.*

*E. Treatment of Detainees, as Directly Related to Confinement
Conditions, at the GTMO Detention Facility*

Although the treatment of detainees is not the central issue of this note, detainee experiences still play a large role in overall confinement conditions at GTMO. Solitary confinement, sensory deprivation, environmental manipulation and limiting basic necessities are practices that directly influence and are affected by confinement conditions throughout all of the camps. Camp 4, consisting of merely 80 beds, is the only camp that provides communal living arrangements for detainees, as such, a majority of GTMO detainees are relegated to the solitary conditions pervasive among the remaining camps.¹⁰¹ Confinement in cells for lengthy periods, generally 22-24 hours a day, is exacerbated by the overall size and accommodations of the cell in which they are imprisoned.¹⁰² Cells range in size from 6 feet by 8 feet, only slightly larger than a king size bed, to 6 feet by 12 feet and 9 feet by 12 feet in total size.¹⁰³ The use of sensory deprivation and environmental manipulation, including control over air circulation and lights, is routinely used at GTMO.¹⁰⁴ Detainees are routinely subjected to over- and under-stimulation.¹⁰⁵ The temperature in the cells is regularly too cold and detainees are helpless to control the temperature or flow of air entering their cells through the vents.¹⁰⁶ The constant light in the cells is a contributing factor to sleep deprivation experienced by GTMO detainees.¹⁰⁷ Basic necessities such as toilet paper, sleeping mats, and bed sheets are considered a privilege and are routinely removed as a disciplinary measure and only returned in exchange for cooperating in interrogations.¹⁰⁸ Interrogators are considered to have too much control over the basic needs of detainees.¹⁰⁹ Interrogators and military police attempt to control detainees through use of back-to-back orders of thirty days in isolation.¹¹⁰ The ICRC has expressed concern that “only those who cooperated with interrogators received greater privileges – a clear breach

101. *Current Conditions of Confinement at Guantanamo*, *supra* note 67, at 4.

102. *United States of America Cruel and Inhuman*, *supra* note 62, at 3.

103. *Id.* at 14-15.

104. *Id.* at 4.

105. *Id.*

106. *Current Conditions of Confinement at Guantanamo*, *supra* note 67, at 7.

107. *Id.*

108. *Id.*; David Rose, *The Real Truth About Camp Delta*, THE OBSERVER (Oct. 2, 2004, 7:56 PM), <http://www.theguardian.com/world/2004/oct/03/bookextracts.usa>.

109. *Id.*

110. *Id.*

of the Geneva Conventions.”¹¹¹

III. THE LEGAL FRAMEWORK OF AUTHORITY OVER GUANTANAMO BAY DETAINEES

*You are in a place where there is no law – we are the
law.*¹¹²

- U.S. military intelligence officer

The U.S. is party to multiple international humanitarian and human rights law treaties that are relevant to the conditions at GTMO.¹¹³ Moreover, customary international law is arguably applicable in affording minimum protections to GTMO detainees. As such, this section provides an overview of relevant international laws that may guarantee safeguards against the inhumane confinement and treatment of GTMO detainees. Despite the U.S. Government's twelve-year assertion that GTMO detainees are “unlawful combatants” and not subject to international protections,¹¹⁴ this section contends that customary international law does afford minimum protections to GTMO detainees. This section also asserts that many international humanitarian and human rights laws are similarly applicable and add to the minimum protections detainees are entitled to. Lastly, this section maintains that pursuant to the applicability of international law, the U.S. should either retrofit its GTMO facility to comply with international obligations or close the facility entirely to remediate the breach of international law and salvage its reputation in the world.

A. International Humanitarian Law

The U.S. is party to the four Geneva Conventions of 1949 (“Geneva Conventions”),¹¹⁵ which form the foundation of international humani-

111. *Id.*

112. *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, CTR. FOR CONSTITUTIONAL RIGHTS (2007), http://ccrjustice.org/files/Report_ReportOnTorture.pdf (last visited Oct. 23, 2014) [hereinafter *Report on Torture*].

113. Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protections of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Fourth Geneva Convention]; International Covenant on Civil and Political Rights, arts. 2, 7, 10, Sept. 8, 1992, 58 FR 45934 [hereinafter ICCPR].

114. Chlopak, *supra* note 4, at 2.

115. TREATIES AND STATES PARTIES TO SUCH TREATIES, CONVENTION (III) RELATIVE TO

tarian law concerning international armed conflicts.¹¹⁶ The U.S. believes that the Geneva Conventions are not applicable to GTMO detainees since the detainees are not prisoners of war, rather, detainees are purported “unlawful combatants.”¹¹⁷ However, this belief does not excuse the U.S. from complying with the Geneva Conventions’ prohibitions against cruel, inhuman and degrading treatment.

The Geneva Conventions encompass two common articles, Article 2 and Article 3, relevant to this note.¹¹⁸ Common Article 2, relating to international armed conflicts, states that the full text of the Geneva Conventions apply to all cases of international conflict that may arise between two or more States that are parties to it.¹¹⁹ Likewise, Common Article 3 states that when an armed conflict, not of an international character, occurs in the territory of a nation that has ratified the Geneva Conventions, each Party to the conflict is bound to apply the following minimum provisions: “persons taking no active part in the hostilities. . . shall in all circumstances be treated humanely” thereby barring states from applying “cruel treatment” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”¹²⁰ Thus, the Geneva Conventions, to which the U.S. is a Party, prohibit inhumane treatment and require that individuals are free from degrading treatment.¹²¹

Common Article 3 of the Geneva Conventions applies to “all cases of declared war *or of any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹²² Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War (“Third Geneva Convention”) states that “prisoners of war must at all times be humanely treat-

THE TREATMENT OF PRISONERS OF WAR. GENEVA, 12 AUGUST 1949. ICRC (last visited Sept. 22, 2015),

https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 [hereinafter States Party to Geneva Convention].

116. Wikipedia, *Geneva Conventions*, http://en.wikipedia.org/wiki/Geneva_Conventions (last visited Dec. 10, 2014).

117. Rumsfeld News Briefing, *supra* note 29.

118. Geneva Conventions, *supra* note 116.

119. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114; 75 U.N.T.S. 31 [hereinafter Convention for the Amelioration of the Condition].

120. *Id.* at 1-2; Geneva Conventions, *supra* note 116, at 5.

121. *Id.*; See generally Convention for the Amelioration of the Condition, *supra* note 119, at 1-2.

122. Emphasis added. Third Geneva Convention, *supra* note 113, at 1.

ed.”¹²³ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”) protects persons who find themselves in the event of a conflict or occupation in the hands of a Party to the conflict or occupying power of which the person is not a national.¹²⁴ The Fourth Geneva Convention states, “Nationals of a State which is not bound by the Convention are not protected by it.”¹²⁵ While the United States argues that GTMO detainees are neither prisoners of war nor civilians protected by the Geneva Conventions,¹²⁶ the minimum protections under Common Article 3 of the Geneva Conventions should still apply to GTMO detainees. Given the broad safeguards for detained persons, even as parties of a non-international conflict, the United States is still in violation of international human rights law. Specifically, the detention conditions at the GTMO facility, particularly the lack of livable cell sizes, privacy, and exposure to the outside and to other detainees, demonstrate how the U.S. fails to uphold its obligations under the Geneva Conventions.

B. International Human Rights Law

Many international instruments take the form of soft law, which have the features of a formal treaty but fall short of the requirements to be one.¹²⁷ Soft law is used to assist states in coordinating their behavior,¹²⁸ and is designed to evolve in response to shifting international circumstances.¹²⁹ The bodies of law addressed below are soft law, however, their authority is prevalent among the countries in the United Nations.

The United Nations adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“The Body of Principles”) for the purpose of assuring that all persons under any form of detention or imprisonment be treated in a humane manner and with the respect for the inherent dignity of the human person.¹³⁰ Principle 6 of the text asserts that “no person under any form of

123. *Id.*

124. Fourth Geneva Convention, *supra* note 113, at 2.

125. *Id.*

126. Rumsfeld News Briefing, *supra* note 29, at 5.

127. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, at 175, https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=168.

128. *Id.* at 178.

129. *Id.* at 171.

130. Body of Principles for the Protection of All Persons under Any Form of Detention or

detention or imprisonment shall be subjected to cruel, inhuman or degrading treatment or punishment” where the interpretation extends to the widest possible protection against abuses.¹³¹ The protections prohibit holding a detained person “in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or his awareness of place and the passing of time.”¹³² At GTMO, the routine use of solitary confinement and sensory deprivation practices, including playing music during sleeping hours, maintaining 24 hour a day artificial lighting and confinement to small spaces, constitute an unlawful deprivation of detainees’ “natural senses” and “awareness of the passing of time,” thereby violating The Body of Principles.

At the core of The Basic Principles for the Treatment of Prisoners, adopted by the United Nations General Assembly in 1990, is the principle that “all prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”¹³³ It further states that all prisoners “shall retain the human rights and fundamental freedoms set out under the Universal Declaration of Human Rights.”¹³⁴ When the country is party, prisoners’ rights are protected by the International Covenant on Economic and Social Rights, the International Covenant on Civil and Political Rights and other United Nations covenants.¹³⁵

In 1992, the U.S. became Party to the International Covenant on Civil and Political Rights (“ICCPR”).¹³⁶ Dedicated to the preservation and promotion of human rights, the ICCPR articulates several “core principles” for the treatment of persons.¹³⁷ Article 2 of the ICCPR explains that these principles protect persons within a State Party’s territory, as well as those subject to its jurisdiction.¹³⁸ After the U.S. asserted that Guantanamo Bay is beyond its jurisdiction, the ICCPR’s Human Rights Committee, developed by the ICCPR to oversee compliance, provided further clarification of Article 2, explaining that “a State party must respect and ensure the rights laid down in the Covenant to anyone within their power or effective control of that State party, even if not

Imprisonment, G.A. Res. 43/173, Principle 1 (Dec. 9, 1988) [hereinafter *Body of Principles*].

131. *Id.* at 3.

132. *Id.*

133. Basic Principles of the Treatment of Prisoners, G.A. Res. 111, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49, at 200 (Dec. 14, 1990) [hereinafter *Basic Principles*].

134. *Id.*

135. *Id.*

136. ICCPR, *supra* note 113.

137. *Id.* at Art. 2.

138. *Id.*

situated within the territory of the State party.”¹³⁹

The U.S. ratified the ICCPR with reservations, including one that specified that where the U.S. is bound by Article 7’s classification of “cruel, inhuman or degrading treatment or punishment,” the meaning would be interpreted according to the Fifth, Eighth and/or Fourteenth Amendments of the U.S. Constitution.¹⁴⁰ Stating, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”¹⁴¹ Article 9 of the ICCPR further reads: “no one shall be subjected to arbitrary arrest or detention.”¹⁴² Thus, “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹⁴³ Surely this understanding is consistent with the U.S. Constitution.

The 1934 Treaty between the U.S. and Cuba granted U.S. jurisdiction over Guantanamo Bay, effectively giving the U.S. exclusive control of that area since 1898.¹⁴⁴ Given the fact that GTMO detainees are under the exclusive control of the U.S., one can reasonably conclude that Article 7 of the ICCPR is applicable to detainees held at Guantanamo Bay.¹⁴⁵ Accordingly, any allowance of female guards to watch male detainees while using his in-cell toilet or showering amounts to a form of sexual abuse and stands in violation of international standards prohibiting cruel, inhumane or degrading treatment under the ICCPR.¹⁴⁶ Constant observation may also violate the right to privacy and respect for human dignity, both of which are expressly addressed in the ICCPR.¹⁴⁷

In October 1986, the U.S. ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”).¹⁴⁸ Article 16 of the treaty sets forth that each State party “shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treat-

139. Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

140. ICCPR, *supra* note 113, at 19.

141. *Id.* at Art. 7, at 175.

142. *Id.* at Art. 9.

143. *Id.* at Art. 10, at 176.

144. Packard, *supra* note 19.

145. *Id.*

146. *United States of America Cruel and Inhuman*, *supra* note 62, at 5.

147. *Id.*

148. Wikipedia, *United Nations Convention Against Torture*, http://en.wikipedia.org/wiki/United_Nations_Convention_against_Torture (last visited Nov. 17, 2014).

ment or punishment. . .” which does not amount to torture as defined by Article 1 under the Convention Against Torture.¹⁴⁹

On November 20, 2014, the U.N. Committee created by the Convention Against Torture released its periodic report on U.S. compliance.¹⁵⁰ The Committee reiterated in their report, “any territory” includes “all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.”¹⁵¹ Moreover, the Committee specifically stated that “any territory” includes detention facilities where prohibited acts are committed.¹⁵² The report also discusses extraterritoriality and welcomes the U.S. position concerning the extraterritoriality of the Convention Against Torture to “certain areas beyond” its sovereign territory.¹⁵³ Given this position, application of the Convention Against Torture would extend to places where the U.S. controls as a governing authority like the U.S. Naval Station at Guantanamo Bay, Cuba. In light of the language within the Convention Against Torture and subsequent reports by its Committee, the treaty clearly applies to GTMO detainees since the 1934 Treaty granted U.S. jurisdiction over Guantanamo Bay, and the U.S. has exercised exclusive control over Guantanamo Bay.

C. Customary International Law

Customary international law originates from “a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁵⁴ A practice is considered customary international law when the custom becomes more than habit or procedure and is felt by those who adhere to it, to be an obligation; departure from the custom could then result in some form of sanction.¹⁵⁵ Customary international law may arise through legal instruments and, although not binding in the same

149. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 16, UN GENERAL ASSEMBLY (Dec. 10, 1984), <http://www.refworld.org/docid/3ae6b3a94.html>.

150. Committee against Torture, Concluding observations on the third and fifth periodic reports of United States of America at 3, (Nov. 20, 2014), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_COC_USA_18893_E.pdf.

151. *Id.*

152. *Id.*

153. *Id.*

154. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987).

155. J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 59 (6th ed. 1963).

manner as treaties that contain mandates, provide detailed guidance regarding general rules and often reflect norms of customary law.¹⁵⁶

Customary international law is of much importance to the conditions of confinement experienced by GTMO detainees.¹⁵⁷ The U.S.' position that detainees are simply "unlawful combatants" leaves detainees with little international protections. Thus, it may be necessary to turn to customary international law for guidance. Much of international law is rooted in customary international practices that have evolved into treaty-based international law.¹⁵⁸ International humanitarian and human rights law discussed above provides the fundamental protection against cruel, inhumane and degrading treatment while also providing for the protection of the inherent dignity of the person.¹⁵⁹ Nevertheless, these laws fail to establish detailed guidelines regarding conditions of confinement.¹⁶⁰ The application of customary international law to set guidelines for minimum standards of confinement conditions is appropriate given the historical use of customary international law.¹⁶¹ Additionally, as will be discussed in Part V, the ICC Detention Centre is the embodiment of customary international law practices pertaining to conditions of confinement and may be used as an archetype of such principles and protections.¹⁶²

The Lieber Code was an instruction signed by President Lincoln and provided to the Union Forces during the American Civil War.¹⁶³ It dictated how soldiers should conduct themselves in times of war by covering topics including martial law, military jurisdiction, and the treatment of prisoners of war.¹⁶⁴ The Lieber Code was the first attempt to codify the law of armed conflict, and while only binding on the U.S.,

156. Migration-Related Detention and International Law: UN Declarations, Principles, Guidelines, GLOBAL DETENTION PROJECT, <http://www.globaldetentionproject.org/law/legal-framework/international/un-declarations-principles-guidelines.html> (last visited Dec. 12, 2014).

157. Rumsfeld News Briefing, *supra* note 29, at 2.

158. Wikipedia, Lieber Code, http://en.wikipedia.org/wiki/Lieber_Code (last visited Dec. 12, 2014).

159. *Id.*

160. *Standard Minimum Rules for the Treatment of Prisoners*, UNITED NATIONS (Aug. 30, 1955), <http://www.refworld.org/docid/3ae6b36e8.html> [hereinafter *Standard Minimum Rules*].

161. *Restatement of the Law, Third, the Foreign Relations Law of the United States*, *supra* note 154, at 32.

162. See *The ICC Detention Centre*, INT'L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/detention/Pages/detention.aspx (last visited Dec. 11, 2014).

163. *Lieber Code*, *supra* note 158.

164. *Id.*

it paralleled the “laws and customs of war existing at that time.”¹⁶⁵ The Lieber Code was an important early step towards the development of the modern customary international law of armed conflict.¹⁶⁶ The Hague Regulations of 1907, and the four Geneva Conventions of 1949, are treaty-based international laws that reflect customary international law with progressive development.¹⁶⁷ Although some of the practices allowed under the Lieber Code are considered illegal by today’s standards, the Lieber Code remains significant since it embodied and mandated customary practices of that time, and as armed conflicts have evolved, the rules governing those conflicts have as well.¹⁶⁸

Although the U.S. maintains that international humanitarian and human rights laws do not apply to GTMO detainees because Guantanamo Bay is outside U.S. jurisdiction, the prohibition of torture, cruel, inhumane and degrading treatment still applies under customary international law. The prohibition of such treatment has *jus cogens* status, which is recognized in international law as a principle, which no State may deviate from.¹⁶⁹

Though not ratified by the U.S., Additional Protocols I and II to the Geneva Conventions are considered customary international law.¹⁷⁰ Article 75 of Additional Protocol I to the Geneva Conventions states that “persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article.”¹⁷¹ The Obama Administration stated that Article 75 sets forth fundamental guarantees and is consistent with current U.S. policies and practice.¹⁷²

165. Instructions for the Government of Armies of the United States in the Field (Lieber Code), ICRC, <https://www.icrc.org/ihl/INTRO/110?OpenDocument> (last visited Dec. 12, 2014) [hereinafter Instructions for the Government of Armies].

166. Lieber Code, *supra* note 158.

167. *Id.*

168. *Id.*

169. Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, in *MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* vol. 5, 595 (Lal Chand Vohrah et al. eds., 2003).

170. Cornelio Sommaruga, *Appeal by the International Committee of the Red Cross on the 20th anniversary of the adoption of the Additional Protocols of 1977*, ICRC (Oct. 21, 1997), <https://www.icrc.org/eng/resources/documents/article/other/57jnux.htm>.

171. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 UNTS 609 [hereinafter Protocol I].

172. *Fact Sheet: New Actions on Guantanamo and Detainee Policy*, The White House Office of the Press Secretary 6 (Mar. 7, 2011).

Furthermore, the Obama Administration has remarked that the U.S. government will treat Article 75 as legally binding (even though the Senate has not ratified).¹⁷³ Article 75 prohibits outrages upon personal dignity, torture “at any time and in any place whatsoever, whether committed by civilian or by military agents,” and humiliating and degrading treatment.¹⁷⁴ The U.S. asserts that GTMO detainees are not protected by the Geneva Conventions.¹⁷⁵ However, the Geneva Conventions should apply to GTMO detainees since the protections within are customary international law. Also, the Obama Administration has declared that certain provisions of the Geneva Conventions are applicable to the situation on Guantanamo Bay.¹⁷⁶

The United Nations Standard Minimum Rules for the Treatment of Prisoners (“SMRs”) sets out accepted principles and practices for the treatment of prisoners and the management of institutions.¹⁷⁷ The text sets forth standards for convicted prisoners, untried prisoners and prisoners without charge.¹⁷⁸ The SMRs is based on a general consensus and elements found within the “most adequate systems of today;” meeting the minimum conditions of confinement accepted as suitable by the United Nations.¹⁷⁹ Part I of the SMRs sets out rules for accommodation that are applicable to all categories of prisoners.¹⁸⁰ Sleeping accommodations “shall meet all requirements” of health, with regard for climatic conditions, cubic content of air, minimum floor space, lighting, heating and ventilation.¹⁸¹ The SMRs also state that windows should be constructed to allow in fresh air in addition to being large enough for prisoners to read or work in natural light,¹⁸² and prisoners shall be provided with personal hygiene articles that are necessary for health and cleanli-

173. *Id.*; *Obama Ratifies Bush: The Administration embraces military tribunals at Gitmo*, WALL ST. J. (Mar. 8, 2011), http://www.wsj.com/news/articles/SB10001424052748703386704576186791361222486?mod=WSJ_Opinion_LEADTop&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748703386704576186791361222486.html%3Fmod%3DWSJ_Opinion_LEADTop.

174. Protocol I, *supra* note 171, at 1.

175. Wikipedia, *Guantanamo Bay detention camp*, https://en.wikipedia.org/wiki/Guantanamo_Bay_detention_camp (last visited Jan. 4, 2016).

176. *US detainees to get Geneva rights*, BBC NEWS (July 11, 2006, 4:26 PM), <http://news.bbc.co.uk/2/hi/americas/5169600.stm>.

177. See Standard Minimum Rules, *supra* note 160.

178. *Id.* at 1.

179. *Id.*

180. *Id.*

181. *Id.* at 2.

182. *Id.*

ness.¹⁸³ In regards to physical health, prisoners shall have at least one hour of “suitable exercise in the open air daily” and shall receive physical and recreational training during that period of exercise.¹⁸⁴ Part II addresses special categories of prisoners including convicted prisoners under sentence, prisoners awaiting trial, and prisoners without charge.¹⁸⁵ For convicted prisoners, their treatment should not emphasize their exclusion from the community, but rather “their continuing part in it.”¹⁸⁶ Prisoners awaiting trial are presumed innocent and shall be treated as such.¹⁸⁷ They shall also be kept separate from convicted prisoners.¹⁸⁸ The SMRs asserts that persons detained without charge are to be accorded the protections afforded in both Part I and Section C of Part II for untried prisoners.¹⁸⁹

Regardless of detainee classification, the sleeping accommodations of GTMO detainees fail to meet minimum conditions set out by general consensus in light of the SMRs guidelines. The practice that bedding is a privilege at the GTMO facility is a violation of the sleeping accommodation requirements. Furthermore, the lack of fresh air and natural light fails to meet standards where GTMO detainees have either limited or no access to natural light in their cells. The SMRs clearly addresses that windows shall allow for fresh air and light.¹⁹⁰ Furthermore, the excessive use of the air conditioning unit in conjunction with the limited personal items of clothing and bedding violate the SMRs minimum safeguards for accommodations for detainees’ health. Given the standard of living and sparse accommodations, the U.S. appears to fall below the low threshold of minimum protections afforded to any person held in confinement.

D. United States Law, Directives and Guidelines

Since 1994, the U.S. has followed the Department of Defense Directive 2310.01, officially entitled “DOD Program for Enemy Prisoners of War and Other Detainees,” that sets forth broad policy guidelines for the treatment of traditional prisoners of war.¹⁹¹ On September 6, 2006,

183. *Id.* at 3.

184. *Id.*

185. *Id.* at 9, 13-14.

186. *Id.* at 9.

187. *Id.*

188. *Id.* at 13.

189. *Id.* at 14.

190. *Id.* at 2.

191. *The Legal Basis of U.S. Detention Policies*, THE HERITAGE FOUNDATION,

the directive was re-issued titled “Department of Defense Directive 2310.01E” (“The Directive”) and has last been updated on August 19, 2014.¹⁹² The Directive acts as the manual of United States detention policy and sets forth guidelines for “all DOD detention operations necessary and appropriate to ensure the safe, secure, and humane detention of all enemy combatants, both lawful and unlawful, regardless of the nature of the conflict.”¹⁹³ The Directive asserts that “all detainees will be treated humanely and with respect for their dignity, in accordance with applicable U.S. law and policy and the law of war.”¹⁹⁴ The Directive also states that all detainees must be treated “humanely” even “*during all military operations, however characterized.*”¹⁹⁵ In light of the self-issued directives—purported adherence to the “law of war” and international humanitarian obligations required under the Geneva Conventions—there is no doubt the U.S. is required to treat detainees humanely and with respect for their dignity.

The Detainee Treatment Act of 2005 codifies U.S. policy that prevents U.S. personnel from subjecting detainees to “cruel, inhuman and degrading treatment.”¹⁹⁶ The text prohibits “cruel, inhuman and degrading treatment or punishment” to any individual “in the custody or under the physical control of the U.S. government, regardless of nationality or physical location.”¹⁹⁷ The term “cruel, inhuman, or degrading treatment” has been interpreted according to the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution as expressed in the United States’ Reservation to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.¹⁹⁸ Given the various forms of protections afforded through customary international law, it may be concluded that GTMO detainees shall be free from cruel, inhumane and degrading treatment. Despite these protections, the U.S. has repeatedly fallen short of its duty to provide such standards.

In 2006, the U.S. Supreme Court held in *Hamdan v. Rumsfeld*, a

<http://www.heritage.org/research/projects/enemy-detention/detention-policy> (last visited Oct. 17, 2014).

192. Dep’t of Def. Directive 2310.01E (Aug. 19, 2014), <http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf> [hereinafter DoD Directive].

193. *The Legal Basis of U.S. Detention Policies*, *supra* note 191, at 2.

194. DoD Directive, *supra* note 192, at 2.

195. Emphasis added. *Id.*

196. Detainee Treatment Act of 2005, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

197. *Id.*, §1003(a).

198. *Id.*, §1003(d).

petition brought by a Yemeni detainee at GTMO, that Common Article 3 of the Geneva Conventions affords minimal protections to individuals captured within the territory of a Party engaged in a conflict not between two nations.¹⁹⁹ Although the holding falls short of the enhanced protections afforded to prisoners of war, *Hamdan* clarified that minimum treatment standards of detention apply as a matter of treaty law and not merely as policy as Rumsfeld and President Bush previously maintained.²⁰⁰

Customary international law plays a critical role in the treatment and confinement conditions of detainees on Guantanamo Bay. The SMRs address what is legally appropriate for detained persons. The U.S.' practices at GTMO fall below the standards set forth by the SMRs. In 2011, President Obama stated the U.S. will treat Article 75 of Additional Protocol I of the Geneva Conventions as legally binding.²⁰¹ This proclamation ensures that GTMO detainees must be free from humiliating and degrading treatment. The best way to ensure that this promise is carried out is through amending the SMRs and retrofitting GTMO accordingly. The U.S. government also asserted that it will apply The Directive and Detainee Treatment Act of 2005 towards GTMO detainees.²⁰² Since this assertion would require humane treatment, a condition that cannot be said to occur at the camps presently, detention conditions and accommodations must be overhauled.

IV. GTMO DETAINEES' CLASSIFICATION REQUIRE MINIMUM PROTECTIONS SUFFICIENT TO BE FREE FROM CRUEL, INHUMANE AND DEGRADING TREATMENT RELATING TO THEIR CONDITIONS OF CONFINEMENT

Prior to the "War on Terror" and the Bush Administration's coined term "unlawful enemy combatants," the rules governing detention during times of conflict were easier to decipher and apply. Some argue "the Geneva Conventions do not provide answers about who may be held in a conflict with a non-state actor like al-Qaida or how long that person may be detained."²⁰³ While the U.S. maintains that the Geneva Conventions are not applicable to GTMO detainees, the U.S. "recognizes its

199. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

200. *Id.*

201. John Bellinger, *Obama's Announcements on International Law*, LAWFARE BLOG (Mar. 8, 2011, 8:33 PM), <https://www.lawfareblog.com/obamas-announcements-international-law>.

202. *The Legal Basis of U.S. Detention Policies*, *supra* note 191, at 2.

203. *The Legal Basis of U.S. Detention Policies*, *supra* note 191.

commitment to the actual text and spirit of the Geneva Conventions.”²⁰⁴

This section will attempt to alleviate the confusion regarding GTMO detainees' status. Sub-section A discusses whether the conflict between the U.S., Afghanistan, and al-Qaida, respectively, is of an international character. Sub-section B discusses the Bush Administration's decision to classify detainees as so-called “unlawful combatants,” who the Administration argued did not afford the detainees protections under the Geneva Conventions or its minimum protections; but asserted that as a matter of policy the U.S. government would keep with the spirit of the Geneva Conventions in its detention practices. Finally, this section asserts that regardless of the legal status of GTMO detainees, the minimum protections afforded to them under international humanitarian law, human rights law and customary international law apply as core principles and protections of persons regardless of legal status or categorization of detainees at GTMO. In addition, this section maintains that absent consideration of detainee classification, it would be beneficial to the U.S. to conform to customary international law detention practices to alleviate the negative reputation the U.S. has garnered from other nations regarding its current practices.

A. Is the War on Terror an International Armed Conflict?

The first legal question surrounding the status of GTMO detainees is whether an international armed conflict exists between the U.S. and the Taliban and al-Qaida respectively. Following the September 11th attacks on the Twin Towers and Pentagon, President George Bush (“President Bush”) stated the attacks meant that the U.S. was at war.²⁰⁵ It was concluded by the Bush Administration that the September 11, 2001 events were armed attacks that gave the U.S. the right to self-defense and counter against Afghanistan for harboring Osama bin Laden and al-Qaida terrorist training camps.²⁰⁶ On February 7, 2002, President Bush concluded that Common Article 3 of the Geneva Conventions did not apply to either al-Qaida or Taliban detainees since the

204. *Id.*

205. See, e.g., President George W. Bush, ‘Statement by the President in His Address to the Nation,’ (Sept. 11, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> [hereinafter Statement by the President]; President George W. Bush, ‘President urges Readiness and Patience,’ (Sept. 15, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010915-4.html>.

206. Maria Nybondas, *The Legal Situation Surrounding the Guantánamo Bay Detainees*, ASSER INST.: CENTRE FOR INT’L & EUROPEAN LAW (March 2005), http://asser.nl/default.aspx?site_id=9&level1=13337&level2=13382.

conflicts were international in scope and Common Article 3 only applies to non-international armed conflict.²⁰⁷ Based on these assertions, the conflicts with Afghanistan and al-Qaida are of an international character.

B. Classifying Detainees as “Unlawful Combatants”

Detainee classification status is crucial in determining the procedural and substantive legal rights of individuals held at U.S. facilities. On January 11, 2002, U.S. Secretary of Defense Donald Rumsfeld (“Rumsfeld”) spoke at a Department of Defense news briefing following the arrival of the first GTMO detainees.²⁰⁸ Rumsfeld stated that the individuals transported to Guantanamo Bay would not be handled as prisoners of war because they were “unlawful combatants” and “technically unlawful combatants do not have any rights under the Geneva Convention.”²⁰⁹ Rumsfeld further stated that the U.S. intended to treat the detainees in a manner that is reasonably consistent with the Geneva Conventions to the extent officials felt was appropriate.²¹⁰ On February 7, 2002, President Bush concluded that Taliban detainees were “unlawful combatants” and do not qualify as prisoners of war under Article 4 of the Third Geneva Convention.²¹¹ President Bush also stated that al-Qaida detainees do not qualify as prisoners of war and declared that the Geneva Conventions do not apply to the conflict with al-Qaida since it is not a High Contracting Party to the Geneva Conventions.²¹²

U.S. government officials determined that the Taliban acted as the Afghan government during the armed conflict, while al-Qaida, despite the Taliban’s support, was a terrorist organization.²¹³ The U.S. made this distinction after reviewing Article 4 of the Third Geneva Convention, entitling some groups to prisoner of war status when captured in an armed conflict, and Article 4(a), which dictates whether groups from non-occupied territories are entitled to prisoner of war status.²¹⁴ Article 4(a) defines prisoners of war as either members of the armed forces of a Party to the conflict, or members of militias or volunteer corps.²¹⁵ Quali-

207. Memorandum from George Bush to Vice President et al., *supra* note 4.

208. Rumsfeld News Briefing, *supra* note 29.

209. *Id.*

210. *Id.*

211. Memorandum from George Bush to Vice President et al., *supra* note 4.

212. *Id.*

213. Nybondas, *supra* note 206.

214. *Id.*

215. Third Geneva Convention, *supra* note 113.

fiction for the latter group requires the following: a commander who is responsible for subordinates; a fixed distinctive sign recognizable at a distance; openly-carried arms; and adherence with the laws and customs of war.²¹⁶ Taliban fighters failed to satisfy all the criteria for privileged combatants, and as a result, were labeled “unlawful combatants.”²¹⁷ Al-Qaida detainees were categorically denied prisoner of war status under the Geneva Conventions because they were not deemed to be a State Party to the Geneva Conventions.²¹⁸

Even if classification as “unlawful combatants” were appropriate, all GTMO detainees are nevertheless protected by minimum standards under international humanitarian and human rights laws, and customary international law.²¹⁹ Minimum standards of protection safeguard all categories of detainees, whether they are captured during an international or a non-international armed conflict.²²⁰ The standards’ broad applicability should guarantee GTMO detainees protection, including those detained indefinitely, awaiting trial, convicted, and especially those free for release and awaiting transfer.

V. THE INTERNATIONAL CRIMINAL COURT AND THE HAGUE DETENTION CENTRE AS A MODEL FOR INTERNATIONAL STANDARDS OF CONFINEMENT

Established in 2002 by the Rome Statute of the International Criminal Court (“Rome Statute”), the ICC is an intergovernmental organization separate from the United Nations.²²¹ It is the first permanent institution with the “power to exercise its jurisdiction over persons for the most serious crimes of international concern” and is “complementary to national criminal jurisdictions.”²²² The Rome Statute establishes the ICC’s functions, jurisdiction and structure.²²³

The official seat of the ICC and its Detention Centre is located at The Hague in the Netherlands.²²⁴ The ICC held the Detention Centre to

216. *Id.*

217. Rumsfeld News Briefing, *supra* note 29, at 2.

218. Memorandum from George Bush to Vice President et al., *supra* note 4, at 2.

219. Nieto-Navia, *supra* note 169.

220. Standard Minimum Rules, *supra* note 160.

221. *About the Court*, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Dec. 11, 2014).

222. Rome Statute of the International Criminal Court art. 1, 37 I.L.M. 1002, 2187 U.N.T.S. 90 (July 17, 1998) [hereinafter Rome Statute].

223. *Id.*

224. Mark Kersten, *Looking for Flatmates – Behind the Scenes at Scheveningen Prison*, JUSTICE IN CONFLICT (Dec. 15, 2014), <https://gafirlifrozen.wordpress.com/2014/12/29/justic-in->

the highest humanitarian standards, including the United Nations SMRs and the European Prison Rules,²²⁵ creating a role model for those States that “pen up their prisoners under inhumane conditions.”²²⁶ The Detention Centre made proactive steps in adhering to customary international standards in its utilization and implementation of the SMRs and the European Prison Rules regarding detention practices.²²⁷ Accordingly, to comply with customary international standards, the U.S. should look to the Detention Centre as a model for its detainees at GTMO to guarantee that minimum protections are provided.²²⁸

A. Confinement Conditions at the ICC’s Detention Centre

The ICC’s Detention Centre is located within a Dutch prison complex in Scheveningen, on the outskirts of The Hague in the Netherlands.²²⁹ The Detention Centre’s function is to “hold in safe, secure, and humane custody those persons detained under the authority of the ICC.”²³⁰ The Detention Centre also conforms to the highest international human rights standards for the confinement and treatment of detainees.²³¹ One journalist noted that the facility is a “unique experiment” in applying international standards of confinement, although this experiment was “not the main intention of the owner but more of a side-

conflict/.

225. Rome Statute, *supra* note 222; The European Prison Rules are based on the SMRs, and while not legally binding on the member States of the Council of Europe, provide “recognised standards on good principles and practices in the treatment of detainees and the management of detention facilities.”

226. Kersten, *supra* note 224, at 4.

227. *See generally id.*

228. Although the U.S. claims that because “[t]he law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities,” detention of GTMO detainees is justified for security and military necessary and is not an act of punishment. United Nations Economic and Social Council, *Situation of Detainees at Guantanamo Bay* at 12 (Feb. 27, 2006) <http://www1.umn.edu/humanrts/OathBetrayed/United%20Nations%20Working%20Group.pdf>.

The U.S. applied the law of armed conflict authority to detain, therefore, it is arguable that customary international law regarding detention of “unlawful combatants” is applicable given the lack of authority on “unlawful combatants.” *Id.*

229. *The ICC Detention Centre*, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/detention/Pages/detention.aspx (last visited Dec. 11, 2014). The basic principles of the Dutch prison system are re-socialization and rehabilitation, and accordingly, the Dutch believe that detention is sufficient punishment and further derogation is unnecessary and even harmful. *Id.*

230. *Id.*

231. *Understanding the International Criminal Court*, INT’L CRIMINAL COURT at 20, <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last visited Dec. 11, 2014).

effect.”²³²

The Detention Centre is comprised of twelve cells within the main prison complex; every detainee is assigned a single cell.²³³ Each cell measures 112 square feet, or about 8 feet wide by 14 feet long.²³⁴ A standard cell contains a bed, desk, shelving, cupboard, toilet and hand basin, television, radio, intercom system, and a computer to allow detainees to work on their cases.²³⁵ Detainees are confined to their cells from 9:00 p.m. – 7:30 a.m. and an hour during the day for a shift change; the daily schedule allows detainees to move relatively freely about the facility.²³⁶ Detainees also have access to a courtyard, gymnasium, and multimedia room and are provided recreational time for sports activities.²³⁷ Within the building, detainees have access to computer labs—in addition to in-cell computers—a library, news and television.²³⁸ Detainees have English language and pottery instruction available to them, a community garden, and they are able to use the kitchen to cook for themselves.²³⁹ The cells and accommodations are reminiscent of a college dormitory and are often referred to as “The Hague Hilton.”²⁴⁰ In 2013, the United Nations Detention Unit Commanding Officer Mikko Sarvela stated, “[W]e see this as the detainees’ home . . . We want it to be as peaceful as possible.”²⁴¹ The difference between the ICC’s approach to detainment and the U.S.’ approach is clear; the disparity between GTMO and the ICC Detention Centre is so great that it highlights the substandard conditions the U.S. subjects GTMO detainees to.²⁴²

232. Kersten, *supra* note 224.

233. Wikipedia, *International Criminal Court*, http://en.wikipedia.org/wiki/International_Criminal_Court (last visited Dec. 12, 2014).

234. Anna Holligan, *Profile: Scheveningen prison*, BBC NEWS (May 16, 2012), <http://www.bbc.com/news/world-europe-18084974>.

235. *Id.*; see *Understanding the International Criminal Court*, *supra* note 231, at 20.

236. *Id.*

237. *Understanding the International Criminal Court*, *supra* note 231, at 20.

238. *Id.*; Holligan, *supra* note 234; Wikipedia, *People detained by the International Criminal Court*, https://en.wikipedia.org/wiki/People_detained_by_the_International_Criminal_Court#Detention_centre (last visited Sept. 20, 2015).

239. Rachel Irwin, *Inside the “Hague Hilton,”* INST. FOR WAR & PEACE REPORTING (Dec. 19, 2013), <https://iwpr.net/global-voices/inside-hague-hilton>.

240. *Id.*

241. *Id.*

242. See generally *Id.*; see also *United States of America Cruel and Inhuman*, *supra* note 62, at 5.

B. Distinction Between the ICC and GTMO

The Detention Centre houses detainees during their pre-trial, trial and appellate proceedings.²⁴³ Detained persons are presumed innocent until proven guilty.²⁴⁴ The detainees do not serve their sentences at the Detention Centre because the facility is not designed for long-term imprisonment.²⁴⁵ Rather, after conviction or affirmation of the original proceedings, the detainees are transferred to a prison outside of the Netherlands, to a State that has entered into a bilateral enforcement agreement with the ICC.²⁴⁶ The bilateral agreement establishes the practice and procedures by which a sentence may be enforced.²⁴⁷ Once a State and the ICC Presidency enter a bilateral agreement, the State is placed on the list of States amenable to enforcing sentences.²⁴⁸ Countries that have declared their willingness to accept sentenced persons by the ICC include: Austria, Belgium, Colombia, Denmark, Finland, Serbia and the United Kingdom.²⁴⁹ After a detainee is convicted, the Presidency designates a State of enforcement and considers the following factors: equitable distribution, widely accepted international treaty standards governing the treatment of prisoners, the views and nationality of the sentenced person, and other relevant information.²⁵⁰ If the State accepts the designation, the transfer process commences.²⁵¹ If no State accepts designation, the ICC must inform the host State, the Netherlands, about the need for it to provide a prison facility for purposes of enforcement.²⁵²

Conversely, a vast majority of GTMO detainees, with the exception of less than a handful that have been convicted by military tribunals, will remain detained indefinitely, even those already cleared for release.²⁵³ While the distinction between GTMO and ICC detainees is important for comparative purposes, the distinction of tried or untried detainees—and the location for serving their sentences—has little effect

243. Koh, *supra* note 36, at 1286-1287.

244. *The ICC Detention Centre*, *supra* note 195.

245. See generally *Id.*; see also *United States of America Cruel and Inhuman*, *supra* note 62, at 5.

246. *Id.*

247. Koh, *supra* note 36, at 1287.

248. *Id.*

249. *Id.* at 1291.

250. Rome Statute, *supra* note 222, at art. 103(3).

251. Koh, *supra* note 36, at 1288.

252. *Id.* at 1287.

253. *The Guantánamo Docket*, *supra* note 25.

on the minimum protections that are afforded to all persons in detention or imprisonment. While individuals who have not yet been convicted are deemed innocent and thus afforded additional guarantees of protection, the principles and guidelines addressed in this article are applicable irrespective of different detention classifications.²⁵⁴

VI. REPAIRING VIOLATIONS: APPLYING CUSTOMARY INTERNATIONAL STANDARDS EXERCISED AT THE ICC TO THE GTMO DETENTION FACILITY

As discussed in Part III, the absence of parameters and procedures in international law, ensuring that individuals are not subjected to cruel, inhumane and degrading treatment, turns the focus onto customary international law. From a historical standpoint, customary international law has played a vital role in the changing practices of international humanitarian and human rights laws.²⁵⁵ In this sense, the ICC is an archetypal entity that seeks to adhere to international standards of detention.²⁵⁶

If the U.S. continues to operate the GTMO detention facility, the facility should be retrofitted to comply with customary international standards of confinement. By doing so, the U.S. government will ensure detainees' rights are not violated and that it is adhering to prevailing international norms.²⁵⁷ The U.S. should look to the ICC Detention Centre's practice of implementing the Standard Minimum Rules.²⁵⁸ Additionally, although not binding, the European Prison Rules may provide the U.S. with further guidance, as they offer a more detailed text capturing the principles behind the Standard Minimum Rules.²⁵⁹ While the availability of amenities at the Detention Centre may seem exceedingly generous, the facility demonstrates the level of care that international institutions deem appropriate;²⁶⁰ more importantly, it illuminates the vast discrepancy between the international standard and the level of care the U.S. presently provides.

If the U.S. does not retrofit GTMO to comply with international standards, GTMO detainees should be released or transferred and the facility should be shut down. The Committee against Torture called for

254. See generally *The ICC Detention Centre*, *supra* note 229, at 2.

255. See generally *Understanding the International Criminal Court*, *supra* note 231, at 1.

256. Rome Statute, *supra* note 222.

257. *The ICC Detention Centre*, *supra* note 229.

258. See generally Wikipedia, European Prison Rules, http://en.wikipedia.org/wiki/European_Prison_Rules (last visited Dec. 13, 2014).

259. *Id.*

260. *The ICC Detention Centre*, *supra* note 229.

the closure of GTMO since indefinite detention without a charge is a violation of the Convention Against Torture.²⁶¹ If the violations of international standards are not alleviated, the only proper remedy is to release or transfer detainees and close the facility.

VII. CONCLUSION

The U.S. Naval Base at Guantanamo Bay has consistently and systematically ignored international humanitarian and human rights laws that provide minimum protections for GTMO detainees.²⁶² The violations began when the U.S. categorized detainees as “unlawful combatants” and did not provide them with protections afforded by the Geneva Conventions.²⁶³ Since 2002, when GTMO began housing detainees,²⁶⁴ the U.S. government has stated that, as a matter of policy, it would conform to the spirit of the Geneva Conventions.²⁶⁵ However, coverage of the facility’s living conditions demonstrates that the U.S. has failed to keep this promise.²⁶⁶

In light of the inherent dignity of the person, general principles of international humanitarian and human rights law aim to guarantee that confinement of persons complies with minimum standards of decency including prohibitive use of cruel, inhumane and degrading treatment and punishment.²⁶⁷ While the instruments of international law discussed above address individuals who are detained from a domestic standpoint, they are still useful in addressing situations where the individual is detained from an international standpoint. The historical practice of applying customary international law where treaty-based law is lacking ensures that GTMO detainees are still protected and international norms prevail.

The ICC Detention Centre has proven to be an exemplary facility that adheres to customary norms with regard to the conditions of detention—the ICC’s position as an intergovernmental body further bolsters

261. Conclusions and recommendations of the Committee against Torture on the USA (July 25, 2006), <http://www.refworld.org/docid/453776c60.html>.

262. *No trial, transfer or release: Gitmo’s ‘indefinite detainees’ identified*, RT (June 19, 2013), <http://rt.com/usa/gitmo-indefinite-detainees-identified-845/>.

263. *Fact Sheet: Camp Echo and Camp Five*, *supra* note 96.

264. *Guantánamo Bay*, REPRIEVE, <http://www.reprive.org.uk/topic/guantanamo-bay/> (last visited Mar. 1, 2015).

265. *Fact Sheet: New Actions on Guantanamo and Detainee Policy*, *supra* note 172.

266. *United States of America Cruel and Inhuman*, *supra* note 62, at 8, 14

267. *Standard Minimum Rules*, *supra* note 177.

its influence.²⁶⁸ In order for the GTMO facility to comply with customary standards of detention, the facility requires retrofitting, and the U.S. should look to the ICC Detention Centre as a model for that process. Alternatively, if the U.S. maintains GTMO in its current state – in violation of international standards – GTMO detainees should be transferred or released, and the facility shut down.²⁶⁹

Since GTMO's inception in 2002, the United States has continuously received backlash from other countries and international bodies for its mistreatment of detainees.²⁷⁰ Even former government officials,²⁷¹ who had once worked in the Bush Administration and initially supported its operation, now want GTMO closed.²⁷² GTMO's closure or, at minimum, the implementation of appropriate living conditions and treatment, may alleviate the backlash the U.S. receives, and would aid in restoring prevailing American ideals.

268. *Understanding the International Criminal Court*, *supra* note 231, at 20.

269. *See generally* *Guantánamo Bay*, *supra* note 264.

270. *Id.*; Maria Nybondas, *The Legal Situation Surrounding the Guantánamo Bay Detainees*, ASSER INST.: CENTRE FOR INT'L & EUROPEAN LAW (March 2005), http://asser.nl/default.aspx?site_id=9&level1=13337&level2=13382.

271. John Hickman, *Selling Guantánamo: Exploding the Propaganda Surrounding America's Most Notorious Military Prison* 203 (2013).

272. *Id.*