INTRODUCTION TO THE EXPERT WITNESS AFFIDAVIT OF PROFESSOR GEORGE E. EDWARDS ON INTERNATIONAL HUMAN RIGHTS LAW, INTERNATIONAL HUMANITARIAN LAW, AND INTERNATIONAL CRIMINAL LAW

*United States of America v. David M. Hicks (U.S. War on Terror Detainee # 002)**
(U.S. Military Commission, Guantanamo Bay, Cuba) (14 November 2005)

Attached is an Expert Witness Affidavit I was requested to submit to the U.S. Military Commissions at Guantanamo Bay, Cuba in the case of *U.S.A. v. David M. Hicks*, who was an Australian held at Guantanamo Bay from January 2002 until March 2007. The Pentagon created frameworks for such Military Commissions beginning in 2002, but the early rules were deemed unconstitutional. In 2006 the rules were created that served as the basis for final proceedings against David Hicks. Early charges against him had included conspiracy, attempted murder by an "unprivileged belligerent", and aiding the enemy. In 2007 he was convicted of "material support of terrorism" (MST).

In Autumn 2004, Mr. Hicks' Pentagon-appointed defense lawyer tendered me as an Expert Witness to travel to Guantanamo Bay, Cuba to testify before the Military Commission on international law topics, including the application of international law fair trial norms to the proceedings involving Mr. Hicks. The panel in 2004 denied the defense motion to call all expert witnesses tendered to testify on international law.

The *Hicks* proceedings were stayed for about a year and all rulings, motions, etc. tendered in 2004 were vacated. The proceedings were scheduled to commence afresh on Friday, 18 November 2005, in Guantanamo Bay. Again, I was tendered as an expert witness and the Commission denied this motion as well. This Expert Witness Affidavit (14 November 2005) was submitted in lieu of my live, in-person testimony in Cuba.

The first Expert Witness Affidavit (dated 28 October 2004) I tendered was accepted by the Military Commission during pre-trial hearings held during the week of 1 November 2004, and is part of the permanent record of the Military Commission proceedings and can be found at http://www.defenselink.mil/news/commissions.html. This 14 November 2005 affidavit is my second U.S. Military Commission affidavit.

Contents of this Document

*U.S. War on Terror Prisoner # 001 was John Walker Lindh ("The American Taliban") who was captured in 2001 allegedly fighting for the Taliban.

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UNITED STATES OF AMERICA	)	
	)	EXPERT WITNESS AFFIDAVIT OF
	)	PROFESSOR GEORGE E. EDWARDS ON
v.	)	INTERNATIONAL HUMAN RIGHTS LAW,
	)	INTERNATIONAL HUMANITARIAN LAW,
	)	AND INTERNATIONAL CRIMINAL LAW
	)	
DAVID M. HICKS	)	
	)	14 NOVEMBER 2005
	)	
	)	U.S. MILITARY COMMISSIONS
	)	GUANTANAMO BAY, CUBA

Preface

a. I am Professor of Law, Founding Director of the Program in International Human Rights Law, and Founding Director/Advisor of the Master in Laws (LL.M.) Track in International Human Rights Law at Indiana University School of Law at Indianapolis. I research, write and teach in the general area of public international law, and in the specific areas of international human rights law, international humanitarian law, and international criminal law. My Curriculum Vitae has been tendered in conjunction with this Affidavit.

b. This Affidavit identifies basic rules of public international law that are relevant to the case of *United States v. David M. Hicks* and to U.S. military commissions in general. It highlights the following branches of public international law: (i) international human rights law; (ii) international humanitarian law; and (iii) international criminal law. This Affidavit explains the traditional sources of international law (treaties, customary international law, and general principles of law), the relationship among these sources, and how these sources relate to domestic United States law. This Affidavit explains how United States courts deal with international law in a manner consistent with and in compliance with international obligations assumed by the United States through operation of treaties, customary international law and general principles of law in the areas of international human rights law, international humanitarian law, and international criminal law.

c. This Military Commission is obligated to ensure that Mr. Hicks is afforded all rights and protections provided for under international human rights law, international humanitarian law, and international criminal law – the sources of which can be found in relevant treaties, customary international law, and general principles of law. Mr. Hicks is entitled to, *inter alia*, a full and fair trial under U.S. law and under

international law. George W. Bush recently emphasized the importance of a fair trial when he said: "In our system, each individual is presumed innocent and entitled to due process and a fair trial".[1]

d. International human rights law provides the relevant rules for assessing Mr. Hicks' rights in this case, including the right to a full and fair trial, the right to be free from arbitrary detention, and other basic, fundamental rights. The principal relevant international human rights law rules are enshrined in the International Covenant on Civil and Political Rights, which is a treaty that binds the United States because the U.S. ratified that treaty in 1992. Relevant international human rights law norms also include customary international law norms of human rights and general principles of international human rights law, both of which also bind the United States as a member of the international community. If the Military Commission finds that international humanitarian law is relevant in *United States v. David M. Hicks*, then rights protective norms would also include those found in relevant international humanitarian law instruments, including the four Geneva Conventions of 1949 (all four of which the United States has signed and ratified), norms that are codified in Article 75 of the Additional Protocol I to the Geneva Conventions (which the United States has signed but not ratified), and other customary international humanitarian law norms.

e. Immediately following this Preface (pages 1 – 2) is this Affidavit's Table of Contents (pages 3 – 5). The Textual Body of this Affidavit (pages 6 – 96) immediately follows the Table of Contents.

[1] *President's Remarks on the Resignation of Scooter Libby*, The South Lawn of the White House, 28 October 2005, <http://www.whitehouse.gov/news/releases/2005/10/20051028-7.html> (last visited 11 November 2005) (Statement following the indictment of Dick Cheney's former Chief of Staff I. Lewis Scooter Libby on perjury, making false statements, and obstruction of justice charges). *See also* Jeannie Shawl, *Bush says Libby presumed innocent, due fair trial*, JURIST: LEGAL NEWS & RESEARCH, Friday, 28 October 2005, (noting that Mr. Bush "stressed that Libby is presumed innocent and entitled to due process and a fair trial.") <http://jurist.law.pitt.edu/paperchase/2005/10/bush-says-libby-presumed-innocent-due.php> (last visited 11 November 2005). Dick Cheney concurs in the belief in the presumption of innocence, as he noted that "[i]n our system of government an accused person is presumed innocent until a contrary finding is made . . . after an opportunity to answer the charges and a full airing of the facts". *Vice President's Statement on Libby Resignation,* News Release Statement from the Office of the Vice President, White House Website, 28 October 2005 <http://www.whitehouse.gov/news/releases/2005/10/20051028-4.html> (last visited 11 November 2005)

Table of Contents of Expert Witness Affidavit of Professor George E. Edwards on International Human Rights Law, International Humanitarian Law, and International Criminal Law

Textual Body of the Expert Witness Affidavit of Professor George E. Edwards on International Human Rights Law, International Humanitarian Law, and International Criminal Law

A. General rules of international law

1. Public international law – generally

1.1. **Public international law.** "Public international law", which is also commonly known as "the law of nations" or simply as "international law", is the body of law that governs relationships principally between and among sovereign states as international actors. International law also governs relationships between and among sovereign states and other types of international actors, such as inter-governmental organizations and individual natural persons.

1.2. **Distinguishing international comity.** International law defines rights and obligations of international actors. International law is distinguished from "international comity", the latter being a general practice of an international actor that is not based on legal obligation, but is based on habit or general goodwill. International law, on the other hand, is based on international actors engaging in acts out of a sense of legal obligation.

1.3. **International jurisprudence, foreign jurisprudence, and foreign law**

1.3.1. "International jurisprudence" consists of judgments, rulings or other decisions of international judicial bodies, such as: the International Court of Justice (ICJ) (which is the judicial arm of the United Nations); the International Criminal Tribunal for the Former Yugoslavia (ICTY) (established by UN Security Council Resolution); the International Criminal Tribunal for Rwanda (ICTR) (established by UN Security Council Resolution); the European Court of Human Rights (ECHR) (established by multilateral treaty); the International Criminal Court (ICC) (established by multilateral treaty); the Inter-American Court of Human Rights (IACHR) (established by multilateral treaty); among others. International jurisprudence may also consist of judgments, rulings or other decisions of international quasi-judicial bodies, such as the United Nations Human Rights Committee (which is the United Nations body of experts that oversees implementation of the International Covenant on Civil and Political Rights), and the Inter-American Commission on Human Rights.

1.3.2. "Foreign jurisprudence" consists of judgments, rulings or other decisions of judicial bodies of non-U.S. nations or States. For examples, "foreign jurisprudence" would include case law of Australia, Canada, France, the United Kingdom, and other overseas jurisdictions.

1.3.3. "Foreign law" is the law of specific nations or States other than the United States. For examples, "foreign law" would include statutory and other law of Australia, Canada, France, the United Kingdom, and other overseas jurisdictions.

1.4. Subsets of public international law: International human rights law; international humanitarian law; international criminal law. Public international law has various subsets or branches that are or may be deemed to be highly relevant to this Affidavit and to the Military Commission, including: (a) international human rights law; and (b) international humanitarian law. Also relevant to some degree is another branch of international law – (c) international criminal law – which will not per se be examined in depth in this Affidavit. These three areas of international law are distinct from each other, but are also related to each other.

2. International law on the international plane and on the domestic plane

2.1. Two planes. International law operates on two distinct yet interrelated planes: (a) the international plane; and (b) the domestic plane.

2.2. International plane. International law operates on the international plane generally when sovereign States negotiate treaties, States engage in proceedings before international tribunals, and when United Nations organs operate. On the international plane, international law is a distinct legal system, separate from domestic systems. On the international plane, if a State perpetrates an international wrong (or delict) against another State, the offending State engages state responsibility to the offended State for that wrong, and the offending State incurs an obligation to remedy the delict. On the international plane, States can harm another State directly, for example, by breaching the territory of that other State. States can also harm another State indirectly, for example, by harming a citizen of that other State.

2.3. Domestic plane. International law operates on the domestic plane when sovereign States incorporate international law norms into their domestic law, and when domestic courts interpret and apply international law. On the domestic plane, international law does not operate as a distinct legal system, but operates as a branch of domestic law. An example of international law operating on the domestic plane in the context of the Military Commission is when the Military Commission considers norms of international law in its rulings.

2.4. Branch of U.S. law. In the United States, international law is a branch of U.S. domestic law. The Restatement of the Law on the Foreign Relations Law of the United States reflects "the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law". (Restatement Third, *Introduction,* p. 3). Hereinafter, the Restatement of the Law Third on the Foreign Relations Law of the United States will be referred to as the "Restatement Third" or as the "Restatement".

2.5. Restatement of the Law on the Foreign Relations Law of the United States. As a general matter, the Restatement of the Law is a product of the American Law Institute, which is a membership association consisting of judges, legal academicians, and practicing lawyers, whose members are selected based on professional standing. (Restatement of the Law Third on the Foreign Relations Law of the United States, *Notes at* p. XI). The Restatements of the Law "receive[s] recognition on the basis of the scholarly and professional care and responsibility with which they are carried out", and are

highly regarded within the legal community as pronouncing the state of the law in particular areas. *Id.* The Restatements are considered authoritative interpretations of law as it exists in the United States.

3. International law: Dualism v. Monism

3.1. Dualism. In a dualist system, international law is a separate system from domestic law, as regards subject matter and procedure. Under this system, as regards procedure, a domestic court would look only to domestic law when resolving disputes, and an international court would look only to international law to resolve disputes. As regards substantive law, international law would be used only to resolve disputes that affect relations between and among states at the international level.

3.2. Monism. In a monist system, international law is a subset of domestic law. Substantive international law is used in resolving disputes in domestic courts.

3.3. U.S. as a monist state. The United States is essentially a monist system, since "international law is part of our law" and international law is "the Supreme law of the land" (U.S. Constitution, article VI, cl. 2; *The Paquete Habana*, 175 U.S. 677, 700 (1900). Thus, international law can and should be and indeed is considered by United States courts. The doctrine of non-self-executing treaties, though rendering some individuals unable effectively to sue to recover for breaches of rights under certain treaties, does not render the United States a dualist system. (These issues will be discussed *infra*.)

B. Foreign jurisprudence, foreign legislation, and international jurisprudence: Relevance to U.S. courts and military commissions

4. Relevance to military commissions. International and foreign jurisprudence and law are relevant to the resolution of the issues in U.S. military commissions in general, and in the case of *United States v. David M. Hicks.* This is so for various reasons, including the following: (a) as mentioned, the U.S. Constitution, the U.S. Supreme Court, and the Restatement (Third) on Foreign Relations Law of the United States recognize that international law is "the Supreme law of the land" and is "part of our law", which renders binding treaty, customary international law and general principles of international law relevant to the disposition of the case of *United States. v. David M. Hicks;* (b) the U.S. Military Commission convened in 2004 to try Mr. Hicks recognized that international law "is the Supreme law of the land" and cited international and foreign law when ruling on pre-trial matters;[2] (c) even the government prosecutors in *United States v. David M. Hicks* cite as relevant international and foreign jurisprudence in their motions and briefs;[3] (d) U.S. Courts-Martial rules call for consideration of international law; (e) international and foreign jurisprudence was cited in the Nuremberg Trials; (f) United States Supreme Court opinions cite international and foreign instruments and jurisprudence (as do Supreme Court Justices in speeches, articles, etc); and (g) as will be highlighted *infra,*

[2] Though the Military Commissions rulings of 2004 were vacated on 20 September 2005 per *Military Commission Members Appointing Order No. 05-0001 of September 2005* (John D. Altenburg, J, Appointing Authority for the Military Commissions) (stating that "My December 10, 2004, Directive, staying the proceedings in four named cases, is hereby revoked for the above-styled case [of *United States v. David M. Hicks*]" (at p. 2)), citations to international and foreign law in those rulings nevertheless reflect the appropriateness of citations to international and foreign law in the extant Military Commission proceedings.

[3] *See, e.g., United States v. David M. Hicks,* Prosecution Response to Defense Motion for a Bill of Particulars, p. 2, n. 1, 4 October 2004.

the United States routinely condemns other nations for violating international law when those States engage in criminal proceedings that, for example, do "not meet international standards for fair public trials", and penalizes those nations by cutting off aid to them. The U.S., by condemning other nations for violating international human rights and humanitarian law necessarily recognizes that these bodies of international law similarly bind the U.S. as well. The following paragraphs contain examples of instances in which foreign and international law and jurisprudence are relied upon in U.S. military and civilian fora:

4.1. Foreign and international instruments and jurisprudence have been cited extensively by the Military Commission in *United States v. David M. Hicks.* For example, on 19 October 2004, John D. Altenburg, Jr., who is the Appointing Authority for the Military Commission, extensively cited foreign and international law in his decision regarding challenges for cause in the cases of *United States v. Salim Ahmed Hamdan* (Case No. 04-0004); and *United States v. David Matthew Hicks* (Case No. 04-0001). *Appointing Authority Decision on Challenges for Cause*, Decision No. 2004-001, U.S. Military Commissions, Guantanamo Bay, Cuba.[4] In a section of his decision entitled "International Standards for Challenges for Cause", Mr. Altenburg noted that:

> "International law generally provides for the right of an accused to an impartial tribunal. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) statutorily establish impartiality as a judicial requirement. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 13, U.N. Doc. S/25704, 32 ILM 1159,1195 (May 3, 1993); Statute of the International Criminal Tribunal for Rwanda, art 12, U.N. Doc. S/Res/955, U.N. SCOR 3453, 33 ILM 1598, 1607 (Nov. 8, 1994). [references to the ICTY and ICTR Rules of Procedure and Evidence omitted].
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> "Several international treaties and conventions recognize the right to an impartial tribunal. The European Convention on Human Rights and the International Covenant on Political and Civil [sic] Rights guarantee the accused a fair trial and recognize the right to an impartial tribunal. In nearly identical language, the standards in both documents require a criminal tribunal to be fair, public, independent, and competent. [citations to ECHR, art 6 and ICPR, art 16].
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> "The European Court of Human Rights has reviewed numerous cases for alleged violations of the right to an impartial tribunal or judge. In evaluating impartiality, the Court consistently emphasizes that judges and tribunals must appear to be impartial. *Piersack v. Belgium*, Series A, No. 53 (Oct. 1, 1982). [ ] The European Court of Human Rights affirmed this consideration in *Gregory v. United Kingdom*, stating that '[t]he Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public . . . *Gregory v. United Kingdom*, 25 Eur. H.R. Rep. 577, para. 43 (Feb. 25, 1997). As a result of an overriding need to maintain an appearance of impartiality, national legislation often establishes specific relationships or perceived conflicts that disqualify a judge on the basis of appearances rather than an objective finding that a judge is indeed impartial.

[4] This decision has been marked as Military Commission Review (RE) Exhibit 50 (Redacted Version), and can be found on the www.defenselink.mil web page at <http://www.defenselink.mil/news/Oct2005/d20051006vol10.pdf> (last visited on 11 November 2005)

… .

> "The Appeals Chamber for the International Criminal Tribunal for Rwanda has exhaustively analyzed the European Court of Human Rights cases, as well as cases from common law states, and developed the following standard to interpret and apply the concept of impartiality … [*citing* the ICTY case of *Prosecutor v. Furundzija*, para. 189, Case No. I IT-95-17/1-A, Judgment, (July 21, 2000).]"

4.2. Foreign and international jurisprudence have been used by the prosecution in *United States v. David M. Hicks.* The prosecutor in *United States v. David M. Hicks*, the instant case, cited foreign and international jurisprudence and legislation in support of arguments they made, and has thus recognized that international law standards are appropriately regarded in determining questions related to the rights of Mr. Hicks. For example, the prosecution extensively cited international criminal law jurisprudence, and even cited to the Statute of the International Criminal Court, which is a treaty that the United States signed (but then purported to unsign) and which the United States has expressly stated it will not ratify. In the *Prosecution Response to Defense Motion for a Bill of Particulars*, at pp. 2-3 (4 October 2004)[5], the prosecution, in a section entitled "International Criminal Courts", contended:

> "The standard [for indictments] is identical in international criminal law. For instance, in the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), rules state that an indictment must be a 'concise statement of the facts and the crime or crimes with which the accused is charged under the statute.' ICTY Article 18(4); ICTR Article 17(4). *See also Prosecutor v Tadic*, IT-94-1-PT, *Decision on Defence Motion on Form of Indictment*, 14 Nov. 1995. Applying this rule and its companion rule ICTY Article 47(c), an ICTY Trial Chamber opined:
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> > 'The indictment should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner in order to sufficiently inform the accused of the charges against which he has to defend himself.'"
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> *"Prosecutor v. Delalic et al*, IT-96-21-A, *Decision on Defence Motion on Form of Indictment,* 15 Nov. 1996 (affirming its previous decision on the same motion). The same Chamber also stated that criminal indictments should be 'very succinct, [and should] demonstrate … that the accused allegedly committed a crime.' *Delalic Indictment Decision, 2 Oct. 1996, p. 11 (quoting the Dukic Preliminary Motions Decision,* 16 Apr.1996, para. 14)."
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> "The International Criminal Court's (ICC) Rome Statute ('Rome Statute') provides a pretrial hearing procedure for confirming the charges before a special 'pre-trial chamber.' *See* Rome Statute Article 61. *See also Rome Statue* [sic] Articles 56 – 60 (explaining the role of the Pre-Trial Chamber)". At this hearing, the Prosecutor gives the accused person a copy of the charges against him, and informs that

[5] <http://www.defenselink.mil/news/Oct2004/d20041006part.pdf> (last visited 11 November 2005)

person and the pre-trial chamber of the evidence [the Prosecutor] intends for use at trial".[6]

4.2.1. Hicks' prosecution cited foreign legal system and international legal system standards regarding a fundamentally fair trial. The government in *United States v. David M. Hicks* contended, regarding the right to a fair trial:

> "The real question is whether the present procedures afford the Accused with a fundamentally fair trial, which they do. Procedures accorded an accused under the Military Commission process match fundamental aspects of both the U.S. and international systems."[7]

Further, the final paragraph of that section reads:

> "All of the rights set forth above meet the requirements of fundamental fairness recognized in both national systems and international treaties." *Id*. at p. 5

4.3. Use in U.S. Courts-Martial. The U.S. Manual for Courts-Martial directs Military Commissions towards international law, as follows:

> "The sources of military jurisdiction include the Constitution and international law. International law includes the law of war." (*Manual for Courts-Martial*, United States, Part I, Preamble, para. 1 (2000))[8]

Furthermore, the U.S. Manual for Courts-Martial provides:

> "Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial". (*Manual for Courts-Martial*, United States, Part I, Preamble, para. 2(b)(2) (2000))

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[6] This section of the Prosecution's papers cites in a footnote Rome Statute procedures related to the arrest warrant, as follows:

> "The ICC's Rome Statute also provides that the arrest warrant for a person to be summoned before the Court shall contain "[a] concise statement of the facts with are alleged to constitute the crime." See Rome Statute Article 58 §§ 2 (c), 3(c) and 7(d). This requirement essentially tracks the language and notice requirements found in US, ICTY, and ICTR law regarding indictments."

United States v. David M. Hicks, Prosecution Response to Defense Motion for a Bill of Particulars, p. 2, n. 1, 4 October 2004.

[7] *United States v. David M. Hicks*, Prosecution Response To Defense Motion To Dismiss For lack Of Jurisdiction: System Will Not Afford A Full And Fair Trial, part 5(a), page 4, 2nd paragraph (18 October 2004)) (vacated on other grounds). <http://www.defenselink.mil/news/Oct2004/d20041022full.pdf>

[8] The U.S. Manual for Courts-Martial, in the analysis section for paragraph 1 of Part 1, Preamble, notes that, *inter alia*:

> "As to sources in international law, *see e.g.*, . . . Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts 82-84, 6 U.S.T. 3316, 3382, T.I.A.S. No. 3365, 75 U.N.T.S. 287."

4.4. International law use at Nuremberg. Foreign and international jurisprudence was cited in the Nuremberg Trials and the Tokyo Trials. Mr. Justice Robert H. Jackson, who was the Chief Prosecutor at the International Military Tribunal at Nuremberg, noted in his opening statement to the Tribunal:

> "This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war." (reprinted in II TRIAL OF THE MAJOR WAR CRIMINAL BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946*, Second Day, Wednesday, 21 November 1945, Part 04*, *Morning Session,* at 99 (published at Nuremberg, 1947).

4.5. United States courts use of foreign and international law. United States courts cite foreign jurisprudence and legislation and international jurisprudence when ruling on matters related to international human rights law, international humanitarian law, international criminal law, and even on matters related to "pure" domestic law. United States courts cite foreign legislation and international and foreign jurisprudence when the courts seek to interpret treaty terms and applicability, rules of customary international law, and general principles of law.

4.5.1. U.S. Supreme Court – "international law . . . is part of our law" -- *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). The *Hilton v. Guyot* court ruled that "international law . . . is part of our law and must be ascertained by U.S. courts of justice".

> "International law, in its widest and most comprehensive sense,--including not only questions of right between nations, governed by what has been appropriately called the 'law of nations,' but also questions arising under what is usually called 'private international law,' or the 'conflict of laws,' and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation,--is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination."

4.5.2. U.S. Supreme Court – Paquete Habana – "international law is part of our law". Affirmed. In the Supreme Court case of *The Paquete Habana,* 175 U.S. 677, 700 (1900), the Supreme Court, in citing numerous international sources of law, reaffirmed that:

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

4.5.3. U.S. Supreme Court – "international law is part of our law". Affirmed. The Supreme Court, in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764-65 (2004) re-affirmed that domestic U.S. law recognizes international law (or "the law of nations"), as follows:

> "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, *e.g., Sabbatino,* 376 U.S., at 423, 84 S.Ct. 923 ('[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances'); ('International law is part of our law, and must be ascertained and administered by the courts of justice of

appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination'); *The Nereide,* 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ('T]he Court is bound by the law of nations which is a part of the law of the land'); see also *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (recognizing that 'international disputes implicating ... our relations with foreign nations' are one of the 'narrow areas' in which 'federal common law' continues to exist). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." (footnote omitted)

4.5.4. U.S. Supreme Court – international jurisprudence cited in 2004 juvenile execution case. In *Roper v. Simmons*, the Supreme Court, in holding unconstitutional the execution of minors – persons below the age of 18 when they committed their crimes – acknowledged "the overwhelming weight of international opinion against the juvenile death penalty." Justice Kennedy in his majority opinion in *Roper* noted that:

> "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U. S., at 102-103 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins, supra,* at 317, n. 21 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson*, *supra*, at 830-831, and n. 31 (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); *Enmund*, *supra*, at 796-797, n. 22 (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker*, *supra*, at 596, n. 10 (plurality opinion) ("It is ... not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue").
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> "As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468-1470 (entered into force Sept. 2, 1990); Brief for Respondent 48; Brief for European Union et al. as *Amici Curiae* 12-13; Brief for President James Earl Carter, Jr., et al. as *Amici*

Curiae 9; Brief for Former U. S. Diplomats Morton Abramowitz et al. as *Amici Curiae* 7; Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 13-14. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra*, at 13); American Convention on Human Rights: Pact of San José, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same). [bold emphasis added]

"Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49-50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty. [bold emphasis added]

"Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusuall Punishments inflicted." 1 W. & M., ch. 2, §10, in 3 Eng. Stat. at Large 441 (1770); see also *Trop*, *supra*, at 100 (plurality opinion). As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, 11 & 12 Geo. 6, ch. 58, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established. [bold emphasis added]

"It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may

> often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10-11.
>
> "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." [bold emphasis added]

4.5.5. International and foreign law cited by the U.S. Supreme Court in the 2003 Texas sodomy case. In *Lawrence v. Texas,* the Supreme Court, in ruling as unconstitutional a Texas statute that prohibited two adults of the same sex from engaging in intimate sexual relations, cited international jurisprudence. The Court noted that:

> "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries". [The Supreme Court then cited a decision of the European Court of Human Rights – *Dudgeon v. United Kingdom* (45 Eur. Ct. H.R. (1981)) – and other European Court of Human Rights cases. 529 U.S. 558, 576-577 (2003).]

4.5.6. International instruments cited by U.S. Supreme Court in the 2003 Michigan affirmative action cases. In two recent Supreme Court opinions concerning affirmative action in Michigan, two United Nations international human rights law treaties were cited and discussed, including one treaty that the United States has not yet ratified. Cited were the 1966 International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified, and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which the United States has signed but not yet ratified. *See Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J, dissenting)*; Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (Ginsburg, J., concurring)*.* Justice Ginsburg discusses her affirmative action case international law references in a recent article. *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective*, 22 Yale Law and Policy Review 329, (Spring 2004).

4.5.7. U.S. Supreme Court – overseas jurisprudence cited in the 2002 case involving executing the mentally retarded. In *Atkins v. Virginia*, 536 U.S. 304, 316, 317 n. 21 (2002) (citing European Union amicus brief), the United States Supreme Court addressed the constitutionality of executing mentally retarded criminals. In finding that such executions constituted "cruel and unusual punishment" under the Eighth Amendment to the U.S. Constitution, the Court in a six-member majority, looking at law and jurisprudence outside the United States for guidance, noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved".

4.5.8. U.S. Supreme Court – civilized standards of decency of leading members of Western European community. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988) the Supreme Court noted that: "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European

community." (487 U.S. 815, 830, n. 31) (1988) (*noting in footnote 31 that* "We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual" and *citing Trop v. Dulles,* 356 U.S. 86, 102, and n. 35, 78 S.Ct. 590, 598, and n. 35, 2 L.Ed. 630 (1958); *Coker v. Georgia,* 433 U.S., at 596, n. 10, 97 S.Ct., at 2868, n. 10; *Enmund v. Florida,* 458 U.S., at 796-797, n. 22, 102 S.Ct., at 3376-3377, n. 22.)

Furthermore, the *Thompson* Court noted that:

> "Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union. [bold emphasis added]
>
> [then, noting in footnote 34 as follows]: "All information regarding foreign death penalty laws is drawn from App. to Brief for Amnesty International as *Amicus Curiae* A-1--A-9, and from Death Penalty in Various Countries, prepared by members of the staff of the Law Library of the Library of Congress, January 22, 1988 (available in Clerk of Court's case file). See also Children and Young Persons Act 1933, 23 Geo. 5 ch. 12, § 53(1), as amended by the Murder (Abolition of Death Penalty) Act 1965, §§ 1(5), 4 (abolishing death penalty for juvenile offenders in United Kingdom), reprinted in 6 Halsbury's Statutes 55-56 (4th ed. 1985); Crimes Act, 1961, § 16, in 1 Reprinted Statutes of New Zealand 650-651 (1979). In addition, three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights . . .; Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 International Legal Material 673, 676 (1970); Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 [1955] 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (ratified by the United States)". [bold emphasis added]

4.6. U.S. Supreme Court Justice statements. U.S. Supreme Court Justices, over the years, have highlighted the relevance of foreign legislation and international and foreign jurisprudence in U.S. courts. Indeed, virtually all currently sitting Supreme Court Justices have cited foreign and/or international law and jurisprudence in an opinion. Following are examples of some of the instances in which United States Supreme Court Justices have recently cited law from outside of the United States:

4.6.1. Justice Ginsburg – American Society of International Law speech. Justice Ruth Bader Ginsburg delivered remarks at the 2005 American Society of International Law Annual Meeting. Her remarks, which were entitled "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication", address the use of international and foreign law in U.S. courts. *Keynote Address Before the Ninety-Ninth Annual Meeting of the American Society of International Law* (1 April 2005) (http://www.asil.org/events/AM05/ginsburg050401.html):

> "The new United States looked outward not only to earn the respect of other nations. In writing the Constitution, the Framers looked to other systems and to thinkers from other lands for inspiration, and they understood that the new nation would be bound by 'the Law of Nations,' today called international law. Among powers granted the U. S. Congress, the Framers enumerated in Article I the power '[t]o define and punish . . . Offences against the Law of Nations.'
>
> "John Jay, one of the authors of The Federalist Papers and the first Chief Justice of the United States, wrote in 1793 that the United States, 'by taking a place among the nations of the earth, [had] become amenable to the laws of nations.' Eleven years later, Chief Justice John Marshall cautioned that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' And in 1900, the Court famously reaffirmed in *The Paquete Habana* that
>
> > '[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice . . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.'" (*The Paquete Habana,* 175 U.S., at 700)

4.6.2. U.S. Supreme Court Justice Ruth Bader Ginsburg recently stated in a speech about comparative perspectives on constitutional adjudication:

> "[Y]our perspective on constitutional law should encompass the world. The United States was once virtually alone in exposing laws and official acts to judicial review for constitutionality. But particularly in the years following World War II, many nations installed constitutional review by courts as one safeguard against oppressive government and stirred up majorities. National, multinational, and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. My message tonight is simply this: We are the losers if we do not both share our experience with, and learn from others. (Ginsburg, Ruth Bader, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale Law and Policy Review 329, 329 (Spring 2004) (footnote omitted))."

Justice Ginsburg continued: "That message is hardly original." *Id.* She then traced multiple instances in which other U.S. Supreme Court Justices, in speeches and in Supreme Court opinions, have cited foreign and/or international jurisprudence in a comparative fashion. *Id.*

4.6.3. U.S. Supreme Court Justice Sandra Day O'Connor stated:

> "Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts... . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists [from other places] who have given thought to the same difficult issues that we face here."

(Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law,* (16 March 2002) 96 Am Society International Law Proceedings 348, 350 (2002)).

More recently, Justice O'Connor noted that:

"Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit". (Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, Int'l Jud. Observer, June 1997, at 2).

On 27 October 2004, Justice O'Connor, in a public forum, addressed the topic of the importance of international law to the law of the United States. Her presentation is reported as follows:

"Justice Sandra Day O'Connor extolled Wednesday the growing role of international law in U.S. courts, saying judges would be negligent if they disregarded its importance … ."

"O'Connor said the Supreme Court is increasingly taking cases that demand a better understanding of foreign legal systems. A recent example was last term's terror cases involving the U.S. detention of foreign-born detainees at Guantanamo Bay, Cuba, she said."

"'International law is no longer a specialty. ...It is vital if judges are to faithfully discharge their duties,' O'Connor told attendees at a ceremony dedicating Georgetown's new international law center."

"'Since September 11, 2001, we're reminded some nations don't have the rule of law or (know) that it's the key to liberty,' she said."

"Later this term, the Supreme Court will decide the constitutionality of executing juvenile killers. The case has attracted wide interest overseas, with many foreign nations filing briefs pointing to international human rights norms as a justification for outlawing the practice."

"O'Connor, who is expected to be a pivotal vote, didn't mention the case but said recognizing international law could foster more civilized societies in the United States and abroad. 'International law is a help in our search for a more peaceful world,' she said.'" *O'Connor extols role of international law*, CNN News Report on the Web, Wednesday, 27 October 2004 (http://www.cnn.com/2004/LAW/10/27/scotus.oconnor.ap/index.html)

4.6.4. U.S. Supreme Court Justice Antonin Scalia stated:

"The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty that it occupies a place not merely in our own mores but, text permitting, in our

Constitution as well". (Thompson v. Oklahoma, 487 U.S. 815, 869 n. 4 (1988) (Scalia, dissenting) (*citing Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.).

4.6.5. U.S. Supreme Court Justice Stephen Breyer stated:

> "[W]e face an increasing number of domestic legal questions that directly implicate foreign or international law.
>
> "[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the 'globalization' of human rights, a phrase that refers to the ever-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist independent judiciaries as instruments to help make that protection effective in practice. Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances… .
>
> "International institutional issues cannot be treated as if they were exotic hot house flowers, rarely of relevance to domestic courts. Those issues, when relevant, must be briefed fully with the legal relationships between our Court, and say the International Court of Justice". (Justice Breyer, *Keynote Speech Before the American Society of International Law*, 97 American Society of International Law Proceedings 265, 266, 268 (2003))

Furthermore, while Justice Breyer noted that other Justices of the Supreme Court had recently cited foreign and international law, he also noted that foreign experience is important to the work of the Supreme Court. He stated:

> "John Paul Stevens and David Souter have referred to comparative foreign experience in several important recent opinions. And I have tried to explain, both in opinions and public remarks, why I believe foreign experience is often important to our work." *Id. at 265*

Justice Breyer also has stated:

> "[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances . . . . In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own [Bill of Rights]" (*Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from certiorari denial).

4.6.6. Former U.S. Supreme Court Chief Justice Rehnquist stated:

> "For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised that kind of authority... .But now that constitutional law is solidly grounded in so many countries, it is time the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." (William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM 411, 412 (P. Kirchhof and D.P. Kommers, eds, 1993) (*also quoted in* Ginsburg, Ruth Bader, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale Law and Policy Review 329, 329-30 & n. 3 (Spring 2004)).

4.7. International and foreign jurisprudence can and should be used in *United States v. David M. Hicks*. Thus, as evidenced by the aforementioned citations to the military commission's and the prosecutor's earlier 2004 submissions in *United States v. David M. Hicks*, and the citations to other writings and rulings of jurists, legislators, and commentators, international jurisprudence and foreign jurisprudence and legislation can and should be used in the case of *United States v. David M. Hicks* in assessing the rights that Mr. Hicks possesses under U.S. and international law, in assessing the obligations that the United States has to Mr. Hicks and to the international community of states under United States and international law, in assessing remedies for Mr. Hicks for violations of his rights, and ultimately in assessing the criminal responsibility under international law for individuals who are involved in breaches of international humanitarian law and international criminal law by not affording Mr. Hicks a fair trial.

C. Sources of International Law – Generally

5. Sources of law in the domestic context. The term "sources of law" refers in part to the authority of norms or rules to bind, the origination of such rules, or the way that such rules are made. In the domestic U.S. context, sources of law would include the U.S. Constitution, federal legislation, state legislation, lawful Executive Orders, and common law precedent (cases decided by judges of high courts, such as the U.S. Supreme Court). These sources of domestic law provide the rules that govern in the domestic arena, and include rules that domestic courts generally apply in rendering judgments on cases that come before domestic courts.

6. Sources of law in the international context. Sources of law in the international context differ from sources of law in the domestic context. Three traditional sources of international law exist: (i) treaties; (ii) customary international law; and (iii) general principles of law. Thus, treaties, customary international law, and general principles of law provide the rules that govern in the international legal arena, and are the rules that domestic and international courts and tribunals apply in rendering judgments on cases that come before those courts or tribunals. Both domestic sources and international sources may be interpreted and applied on either the domestic plane or the international plane. For example, international human rights law treaties may be interpreted and applied when assessing, on the domestic plane, the internationally recognized human rights to which David M. Hicks is entitled in the proceedings before the military commissions.

7. Where traditional sources of international law are listed. The traditional sources of international law are listed in two significant documents: (a) the Restatement of the Law Third on the Foreign Relations Law of the United States; and (b) the Statute of the International Court of Justice.

8. Statute of the International Court of Justice. The Statute of the International Court of Justice is the constitutional document of the ICJ, which is an organ of the United Nations.[9]

9. Neither Restatements nor the ICJ Statute binds the military commissions. Neither the Restatement nor the Statute of the International Court of Justice[10] is binding on the Military Commissions.

10. International law sources in the Restatement Third. The list of traditional international law sources contained in Restatement Third, article 102, is identical in substance to that in article 38 of the ICJ Statute, though the order of the sources differs slightly in the two instruments. The Restatement Third list of sources follows:

> "(1) A rule of international law is one that has been accepted as such by the international community of states
>
> (a) in the form of customary law;
>
> (b) by international agreement; or
>
> (c) by derivation from general principles common to the major legal systems of the world."

11. International law sources in Article 38 of the Statute of the International Court of Justice. Article 38(1) of the Statute of the International Court of Justice lists the three traditional sources of international law as follows:

> (a) "International conventions, whether general or particular, establishing rules expressly recognized by the contesting States [e.g. treaties] (article 38(1)(a));
>
> (b) International custom, as evidence of general practice accepted as law (article 38(1)(b));
>
> (c) General principles of law recognized by civilized nations". (article 38(1)(c));

[9] Article 93(1) of the *Charter of the United Nations* provides that all Members of the United Nations are *ipso facto* parties to the *Statute of the International Court of Justice*, which is annexed to the Charter. The Charter is available at <http://www.un.org/aboutun/charter/> (last visited on 11 November 2005)

[10] It is not suggested that Article 38(1) of the ICJ Statute is controlling in the case of *United States v. David M. Hicks.* The ICJ Statute only binds states in proceedings before the International Court of Justice. However, Article 38 is oft cited as a definitive descriptive list of international law sources. *See, e.g.* Restatement Third, article 102.

12. Judicial decisions and teachings of publicists as subsidiary means. In addition to the sources of international law listed in article 38(1)(a) – (c) of the ICJ Statute, article 38(1)(d) provides for "[j]udicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." The items listed in article 38(d) are not sources of international law, but are aids to assist in determining the substantive content of the three traditional sources of law: (a) treaties; (b) customary international law; or (c) general principles of law.

13. Sources of law to be used by U.S. Military Tribunals. Tribunals of the United States, including the military commissions, when determining which international law rules apply must consider the following sources of international law to be binding: (a) relevant treaties; (b) relevant customary international law rules (including *jus cogens* rules); and (c) relevant general principles of law. These sources are binding in the areas of international human rights law, international humanitarian law, and international criminal law.

D. Treaties

14. Treaties: The first of three traditional sources of international law

14.1. International Law Source # 1: Treaties are the first of three traditional sources of international law. The other two traditional sources of international law are customary international law and general principles of law.

14.2. Vienna Convention on the Law of Treaties. The basic rules regarding treaties are codified in the Vienna Convention on the Law of Treaties. Though the United States has not yet ratified or otherwise become expressly bound by the Vienna Convention on the Law of Treaties, the U.S. complies with the substantive rules contained in that treaty because the U.S. recognizes the Vienna Convention to be "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess., at 1 (1971). The Letter of Submittal to the President by the Department of State provided that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." The United States "accepts the Vienna Convention [on the Law of Treaties] as, in general, constituting a codification of the customary international law governing international agreements." (S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971)).

14.3. Treaty defined. A "treaty" is an agreement, contractual in nature, between and among states, governed by international law and intended to be binding. (Vienna Convention on the Law of Treaties, art 1(a)) Treaties, which are referred to in the Restatement Third as "international agreements", are also known by various names, including "conventions", "covenants", "protocols", "charters", or "pacts".

14.4. Ratified treaty as binding. When a State ratifies a treaty, it becomes a "party" to that treaty, which fully evidences the State's consent to be bound legally by the treaty. (*See* Vienna Convention on the Law of Treaties, art. 1(g) (defining "party") and art. 26 (pacta sunt servanda)).The treaty thus becomes legally binding on the state under international law. (Vienna Convention on the Law of Treaties, art. 26). Section 321 of the Restatement Third provides that "[e]very international agreement in force is binding upon the parties to it and must be performed by them in good faith." This section, which follows Article 26 of the Vienna Convention, codifies the principle of *pacta sunt servanda*, "which lies at the core of the law of international agreements and is perhaps the most important principle of international

law. It includes the implication that international obligations survive restrictions imposed by domestic law." (Restatement Third, § 321, comment a)

14.5. Treaty signed but not ratified. Pursuant to the Restatement Third and the Vienna Convention on the Law of Treaties, when a state signs a treaty but does not ratify it, the state takes on the obligation not to take steps that would defeat the object and purpose of the treaty.

14.5.1. Restatement Third rule on obligations when treaty is signed but not yet ratified. This rule can be found in the Restatement Third, article 312(3), which provides:

> "Prior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement."

Comment i of Restatement Third, article 312 provides:

> "[u]nder Subsection (3), a state that has signed an agreement is obligated to refrain from acts that would defeat the object and purpose of the agreement."

14.5.2. Vienna Convention on the Law of Treaties rule on obligations when treaty is signed but not yet ratified. This rule is codified in article 18(a) of the Vienna Convention on the Law of Treaties, which provides:

> "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty".

14.5.3. The U.S. accepts terms of the Vienna Convention on the Law of Treaties as customary international law. The United States has accepted the rules contained in the Vienna Convention on the Law of Treaties as customary international law and hence binding on the U.S. (S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971)). The United States "accepts the Vienna Convention [on the Law of Treaties as] constituting a codification of the customary international law governing international agreements." *Id.*

14.6. Internal U.S. law and observance of treaties – International law "trumps" domestic law

14.6.1. Domestic law is no defense to breach of international law. The Vienna Convention on the Law of Treaties provides that States may not invoke their domestic law as a defense to complying with treaty obligations. Article 27 of the Vienna Convention on the Law of Treaties provides:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

14.6.2. Thus, the United States may not invoke its own domestic law as justification for the U.S. not to comply with it obligations under a treaty to which the U.S. has consented to be bound. *See General Comment No. 31,* paragraph 4 (citing Vienna Convention on the Law of Treaties, art. 27 for the principle that a State Party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".)

14.7. Treaties that codify customary international law or general principles of law. Treaties – particularly those in the areas of international human rights law, international humanitarian law, and international criminal law – often codify rules of customary international law or general principles of law. A state's ratification of a treaty evidences that state's consent to be bound by the provisions of the treaty, and triggers the obligation of that state to comply in good faith with the treaty terms. (Vienna Convention on the Law of Treaties, article 26). A state's consent to be bound by a treaty that codifies customary international law norms or general principles of law does not affect the state's obligations to comply with the particular customary international law norm or the general principle of law in question. A state is obligated to comply with parallel norms in both treaty form and in customary international law and general principle of law form. A failure to comply with any such norm does not relieve the state of its obligation to comply with a corresponding norm.

14.8. Parallel international norms that have separate existences as treaty norms, as customary international law norms, and as general principles of law. Parallel norms exist when a treaty includes among its terms rules that have risen to the level of customary international law or general principles of law. Treaties may either codify norms that already have risen to the level of customary international law or general principles of law, or the customary international law norms or general principles of law may rise to their respective levels after the treaty comes into force. In either event, the norms would have separate, parallel existences, and states party to the treaty would have treaty obligations to comply with the norm as it appears in the treaty, and all states would have separate (yet overlapping) legal obligations to comply with the customary international law norm and the general principle of law.

14.9. Examples of parallel norms. Examples of parallel norms are the rights contained in article 75 of the Additional Protocol I to the Geneva Conventions. The United States has full obligations to comply with these norms not as treaty norms, but as customary international law norms. (This issue is discussed further *infra*.)

14.10. International human rights law treaties signed and ratified by the U.S. (selected)

14.10.1. International Covenant on Civil and Political Rights.[11] The United States has signed and ratified the International Covenant on Civil and Political Rights (ICCPR), and is therefore legally bound to comply with that treaty.

14.10.2. United Nations Charter. The United States has signed and ratified the United Nations Charter and is therefore legally bound to comply with the terms of that treaty. Though the UN Charter is not ordinarily considered per se to be an "international human rights law treaty", and contains many types of substantive provisions, the Charter calls for the promotion and protection of human rights.

14.10.3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[12] The United States has signed and ratified the United Nations Convention Against

[11] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1) <http://www.unhchr.ch/html/menu3/b/h_cat39.htm> (visited 24 October 2005)

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "UN Torture Convention" or the "Convention Against Torture"), and is therefore legally bound to comply with the terms of that treaty.

14.11. International humanitarian law treaties signed and ratified by the US (selected)

14.11.1. Geneva Conventions of 1949. The United States has signed and ratified the following four international humanitarian law treaties, collectively known as the Geneva Conventions, and is thus legally bound to comply with all of the provisions of the Geneva Conventions. The four Geneva Conventions, the texts of which can be found in their entirety at www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions, follow:

14.11.1.1. The *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, ("First Geneva Convention");[13]

14.11.1.2. The *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*,("Second Geneva Convention");[14]

14.11.1.3. The *Geneva Convention Relative to the Treatment of Prisoners of War*; ("Third Geneva Convention");[15] and

14.11.1.4. The *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* ("Fourth Geneva Convention");[16].

14.12. International humanitarian law treaties signed but not ratified by the U.S.

14.12.1. Additional Protocols I & II to the Geneva Conventions. The United States has signed but not yet ratified the Additional Protocol I and Additional Protocol II to the Geneva Conventions of 1949, thus triggering the U.S. obligation not to defeat the object and purpose of these two treaties, as follows:

14.12.1.1. Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts;[17] and

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[13] Opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3 (visited 24 October 2005)

[14] Opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977 (visited 24 October 2005)

[15] Opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68 (visited 24 October 2005)

[16] Opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5 (visited 24 October 2005)

[17]Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (Additional Protocol I) Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

14.12.1.2. Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts. [18]

E. Customary international law

15. Customary international law: The second of three traditional sources of international law

15.1. International law source # 2: Customary international law is the second of three traditional sources of international law. The other two traditional sources of international law are treaties and general principles of law.

15.2. Customary international law defined. Customary international law is an unwritten source of international law that is based on implicit consent to be bound, differentiating it from treaty law, which binds states based on express consent to be bound. Two elements must be present for a principle or rule of customary international law to exist: (i) state practice as proof of custom; and (ii) *opinio juris vel necessitatis* (opinio juris).[19] A norm of customary international law is binding on all states, irrespective of whether the state in question has expressly consented to be bound, and irrespective of whether the state in question is or is not bound by a treaty that might happen to codify that particular rule of customary international law.[20]

15.3. State practice prong. Satisfaction of the state practice requirement calls for a threshold showing of, at minimum: (a) the duration of the practice; (b) the uniformity and consistency of the practice; (c) the generality and empirical extent of the practice; and (d) the conformity of state practice to international standards.[21]

15.4. Opinio juris prong. Opinio juris is a psychological element that requires an examination of a state's motives in engaging in a particular act or practice (which is a subjective feeling of a state that it is obligated to act in such a way because of a legal duty to do so). For the opinio juris requirement to be satisfied, a showing must be made that states engage in the practice out of a sense of legal obligation, and not because engaging in the practice is convenient or coincidental.[22]

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[18] Opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Additional Protocol II) Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

[19] *See The Paquete Habana*, 175 U.S. 677 (1900) ("where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations"; laws of nations are "of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct"). *See also Filartaga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980) (noting that the law of nations "may be ascertained by . . . the general usage and practice of nations", and finding "that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations") (citations omitted).

[20] For relevant international tribunal jurisprudence on customary international law, see the following decisions of the International Court of Justice: *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

[21] For proof of these elements, courts will look to various sources, including: international, regional, and bilateral treaties; international tribunal decisions; and the internal law of relevant states.

[22] The following elements must be satisfied for the opinio juris element to be met: (a) the rules protecting the right must be legal in nature (legality); (b) the right must relate to international and not domestic law; and (c) states must be aware of the articulated right.

15.5. Creation of customary international law norm. Once the practice of states fulfils the state practice and *opinio juris* prongs, the norm in question is deemed to be a legally binding custom, or a customary international law norm.

15.6. Parallel existence of norms as both treaty/international instrument norms and customary international law norms. For example, the norms contained in the *Universal Declaration of Human Rights* have risen to the level of customary international law, and therefore bind all nations, because state practice and opinio juris have been met. Likewise, norms contained in the Vienna Convention on the Law of Treaties have risen to the level of customary international law, and are binding on the United States in its treaty relations. Similarly, norms contained in article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), which establishes standards for a fair trial, also have risen to the level of customary international law and also bind the United States.

15.7. Restatement Third on customary international law. As the Restatement Third provides, in paragraphs a – f of article 702, customary international human rights law prohibits the most globally deplored human rights violations, such as genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination. "The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary [international] law, and some rights might achieve that status in the future." *Id* at Comment a (citing Comments j, k and l). Section 702(g) deems a state to have violated international law if that state, as a matter of state policy, practices, encourages or condones "a consistent pattern of gross violations of internationally recognized human rights". *See also* Restatement Third, article 702, note 11 (noting that human rights listed in Section 702 a-f have the quality of *jus cogens*).

15.8. *Jus cogens* as a type of customary international law. A *jus cogens* norm is a type of customary international law norm that has a higher status in that no derogations are permitted from a such a norm.[23] A *jus cogens* norm – or a peremptory norm of international law – is defined by § 102, note 6, of the Restatement Third of the Foreign Relations Law as a norm that is accepted and recognized by a 'large majority' of States, even if over dissent by 'a very small number of States'. Thus, a *jus cogens* norm represents a bare minimum of acceptable state behavior that the international community expects of all states.

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[23] The Vienna Convention on the Law of Treaties, article 53, defines *jus cogens* as follows:

> "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

(*United Nations Treaty Series*, vol. 1155, p.331). The Vienna Convention on the Law of Treaties was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the *United Nations Conference on the Law of Treaties*. The treaty entered into force on 27 January 1980, in accordance with article 84(1). <http://www.un.org/law/ilc/texts/treaties.htm>

15.9. *Jus Cogens and the Inter-American Commission on Human Rights.* The Inter-American Commission on Human Rights[24] explained that *jus cogens* norms

> "derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence". (Report No. 62/02, Case No. 12.285, *Domingues v United States* ¶ 49 [2002]).

For support of this proposition, the Inter-American Commission in *Domingues* cited the International Court of Justice case of *Barcelona Traction Case* (Second Phase), ICJ Reports (1970) 3 at 32, sep. op. Judge Ammoun (indicating that obligations of *jus cogens* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.") and the ICJ case of *East Timor Case*, ICJ Reports (1995) 90 at 102).

15.10. *Jus cogens* examples. An example of a *jus cogens* norm is the prohibition on torture or other cruel, inhuman or degrading treatment of punishment. This prohibition may not be derogated from by any nation at any time under any circumstances. (*See* Restatement Third, section 702, Reporters' Notes 11.) The status of torture or other cruel, inhuman or degrading treatment or punishment as a *jus cogens* norm was confirmed by the Inter-American Commission on Human Rights in *Domingues v United States*. (Report No. 62/02, Case No. 12.285, *Domingues v United States* ¶ 49 [2002].) Other examples of *jus cogens* norms, as listed in the Restatement Third, include genocide, slavery or slave trade, the murder or causing the disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination.

15.11. Customary international law as part of U.S. law. Customary international law has long been held to be a part of the law of the United States. *See also Filartaga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980) The U.S. Supreme Court in 1900 ruled:

> "International law, is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana*, 175 U.S. 677, 700 (1900))

15.12. *Customary International Law in the United States*. The Restatement (Third) provides that "The United States is bound by the international customary law of human rights". (Section 701, comment e). Also, it provides that "[I]nternational law and international agreements are the law of the United States." Restatement Third, § 111(1).

[24] The United States, as a Member State of the Organization of American States, is subject to complying with fundamental human rights norms implemented through the Inter-American Commission on Human Rights. The United States is bound to comply with the American Declaration on the Rights and Duties of Man, which is a basic international human rights law instrument of the OAS.

F. General principles of law

16. General principles of law as the third of three traditional sources of international law.

16.1. International law source # 3: General principles of law are the third of three traditional sources of international law. The other two traditional sources of international law are treaties and customary international.

16.2. General principles of law defined. General Principles of law are identified in article 38 (1)(c) of the ICJ Statute and section 102(1)(c) of the Restatement Third. General principles of law are essentially non-treaty, non-customary, and non-consensual sources of international law. If conventional and customary international law fail to provide an appropriate rule or principle of international law, general principles of law derived from national laws can be used to fill in lacunae. The rationale is that if a common principle exists within the domestic laws of nations, such a principle ought to be attributable to international law to fill in the gap. General principles of law are rooted in national law, and determined by conducting a comparative analysis. However, some general principles are rooted in "unperfected" international law sources, including treaties and customary international law. An unperfected source of international law would include one that never entered into force, and an unperfected custom might be one in which the opinio juris element is satisfied but the state practice element is not.[25]

16.3. When general principles of law will serve as the relevant rule in the context of international law. Most of the international law rules relevant to the case of *United States v. David M. Hicks* and relevant to the military commissions in general will be rules that derive from treaty law or customary international law in the three areas of international human rights law, international humanitarian law, and international criminal law. General principles of law will be relevant and binding if the particular norm in question cannot be found in a binding treaty, has not yet risen to the level of customary international law, but has risen to a general principle of law. Tribunals would typically ask whether a norm is a general principle of law after it is determined that treaty or customary international law requirements have not been satisfied.

16.4. General principles of law related to a fair trial. The United States is bound to comply with comprehensive treaty law and customary international law that require fair trials. For any particular international human rights law fair trial norm in question, if the Military Commission finds that treaty law or customary international law do not offer a binding rule, the rule can also be found as a general principle of law, and hence binding on all nations, including the United States. Virtually all of the international human rights law, international humanitarian law, and international criminal law rights to be afforded to *David M. Hicks* have risen at least to the level of general principles of law, and hence bind the United States which is required to afford those rights to Mr. Hicks. Among the rights that would fall into this category are the right to be free from arbitrary detention, the right to be presumed innocent, the right to security of the person, the right to a fair trial, the right to assistance of counsel, the right to a speedy trial, the right to an appeal, the right to be protected from double jeopardy, the right to protection against ex post facto laws, and a right to general fairness in criminal proceedings. *See, e.g.,* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke Journal of Comparative and International Law 235 (1993).

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[25] *See* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICHIGAN JOURNAL OF INTERNATIONAL LAW. 768, 768-769 (1990).

16.5. General principles of law that may not be directly related to a fair trial. Aside from those directly related to fair trials, general principles of law exist in other areas of international law.

G. The relationship between international law and U.S. law: The incorporation of treaties, customary international law and general principles of law into U.S. law

17. Applying U.S. law consistently with treaties, customary international law, and general principles of law.

17.1. Charming Betsy Rule. It is well-established in U.S. law that domestic U.S. law should be interpreted such that violations of a U.S. international obligation is avoided, including when the international obligation arises under a treaty, under customary international law, or under a general principle of law. *See, e.g.,* Restatement Third, § 114. This rule, which is known as the "Charming Betsy Rule", has long been applied by U.S. courts since it was articulated in 1804. *See Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country".)

17.2. Chisholm v. Georgia, 2 U.S. 419 (1793) The Supreme Court noted that:

> "[T]he United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent."

18. Treaty law in U.S. law

18.1. Treaties as supreme law of the land. Treaties are "the supreme law of the land". The U.S. Constitution provides:

> "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby". (U.S. Constitution, article VI, cl. 2)

18.2. Suing under a treaty of the United States.

18.2.1. Not all treaties of the United States are such that a person may successfully institute a cause of action in a U.S. court alleging breach of the treaty in question. A cause of action may be instituted if the treaty is self-executing. A treaty that does not permit a cause of action affirmatively to be brought in a U.S. court may be a non-self-executing treaty.

18.2.2. Even if an international human rights law treaty is non-self-executing and is thereby not justiciable in U.S. courts, the U.S. remains obligated to ensure that its domestic law provides for the substantive guarantees of the treaty, including providing remedies for non-compliance with the treaty norms. *General Comment No. 31,* which was promulgated by the United Nations Human Rights Committee, which is the treaty body charged with overseeing implementation of the ICCPR, provides in paragraph 13:

> "Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2."

18.3. International human rights law treaties as non-self-executing

18.3.1. The Senate Foreign Relations Committee recommended that the United States, upon ratifying the ICCPR, attach a "declaration" to the treaty that provides that provisions of the treaty are non-self-executing. A declaration is merely a statement addressed to other parties to the treaty as to the impact that the treaty may have domestically within the declaring State. A treaty declaration does not seek unilaterally to modify the terms of the treaty, as does a "reservation". A treaty declaration recommended by the Senate is not directed to the courts of the U.S. or to the Executive, as is a treaty "understanding".

18.3.2. A non-self-executing treaty provision is one for which an individual in the U.S. cannot rely when seeking to bring a claim in a U.S. court.

18.3.3. The U.S., in accepting its obligations under the ICCPR, noted that:

> "The rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights.
>
> ….
>
> "The overwhelming majority of the provisions of the Covenant are compatible with existing U.S. domestic law."

… .

> "In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution and laws, both state and federal. Consequently, the United States can accept the majority of the Covenant's obligations and undertakings without qualification." (S. Exec. Rep. No. 102-23, at 2-10 (1992), *reprinted in* 31 I.L.M. 645, 649-53).

18.3.4. The Restatement Third echoes:

> "The International Covenant on Civil and Political Rights requires state parties to the Covenant to respect and ensure rights generally similar to those protected by the United States Constitution. Some provisions in the Covenant parallel express constitutional provisions". (§ 701, Reporters' Notes at note 8).

19. Territorial scope of treaty application – Treaties bind throughout territory.

19.1. Vienna Convention on the Law of Treaties – territorial scope of treaties. The Vienna Convention on the Law of Treaties provides:

> "A treaty is binding upon each party in respect of its entire territory." (Vienna Convention, Art. 29).

19.2. Territorial reach of the International Covenant on Civil and Political Rights. The ICCPR provides that:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (ICCPR, art 2(1).

19.3. *General Comment No. 31* of the United Nations Human Rights Committee also addresses the topic of the territorial reach of the ICCPR as follows:

> "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." (*General Comment No. 31*, para 10)

General Comment No. 31 also notes that:

> "Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject

to their jurisdiction." (*General Comment No. 31*, para 3, citing *General Comment No. 31*, para 10)

19.4. International Court of Justice opinion on territorial reach of the ICCPR. The International Court of Justice recently concluded that a state must comply with the ICCPR even when that state acts outside of that state's own territory. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, ruling of 9 July 2004 (General List No. 131), the ICJ noted that

> "'4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace." (*Id.* At para 102, *quoting* Annex I to the Report of the Secretary-General)

The ICJ rejected Israel's arguments, and ruled that:

> "the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" (Id, para 111), and that Israel was obligated to protect human rights of persons in the occupied Palestinian Territories.

19.4.1. The ICJ in the *Legal Consequences of the Wall* case focused on the object and purpose of the ICCPR, and on the Human Rights Committee findings that the ICCPR applies where a State exercises its jurisdiction on foreign territory.[26] Furthermore, the Court found that the ICCPR's *travaux préparatoires* (essentially the "legislative history" of the treaty) confirmed the Human Rights Committee's interpretation, in that the ICCPR drafters "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." (*Id*., para 109). Thus, again, the ICJ rejected Israel's argument that the ICCPR did not apply "beyond its own territory, notably in the West Bank and Gaza" (*see* para 110), and ruled that the ICCPR applies in the Occupied Palestinian Territory. Thus, Israel was obligated to ensure that persons in the Occupied Palestinian Territories were fully afforded their rights.

19.5. The United States is obligated to comply with the ICCPR when the United States exercises jurisdiction inside or outside its own physical territory (including in Guantanamo Bay, Cuba). The United States is legally obligated to comply with the ICCPR when the United States acts both within and outside of the territory of the United States. The United States is legally obligated to comply with all provisions of the ICCPR, at all times and in all respects, as regards all of its actions involving David M. Hicks and the prosecution of Mr. Hicks in the military commissions, including actions taken by the United States and those under United States control vis-à-vis Mr. Hicks before, during, and after Mr. Hicks' prosecution in the military commissions. The United States is exercising jurisdiction in Guantanamo Bay, Cuba. *See Rasul v. Bush; al Odah v. Bush*, 124 U.S. S. Ct. 2686 (2004) (U.S.

[26] In support, the ICJ cited the following two cases involving the legality of acts by Uruguay when arrests were carried out by Uruguayan agents in Brazil or Argentina : (a) Case No. 52/79, *López Burgos* v. *Uruguay*; and (b) Case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*. The ICJ also cited Case No. 106/81, *Montero* v. *Uruguay*, which involved the confiscation of a passport by a Uruguayan consulate in Germany. (*see* para 109 of the *Legal Consequences of the Construction of the Wall* judgment)

exercising '"plenary and exclusive jurisdiction" or "exclusive jurisdiction and control" in Guantanamo; 28 U.S.C. §2241 confers on the District Court jurisdiction to hear "detainees" habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.) Furthermore, the United States may have taken rights depriving action vis-à-vis Mr. Hicks in territories other than Cuba where U.S. jurisdiction was exercised (e.g., in Afghanistan, in Washington, DC, at the Pentagon, etc.).

20. International law versus domestic U.S. law

20.1. **Domestic law cannot be invoked as a defense for breaching international law.** A basic rule of international law is that a state may not invoke its domestic law as a defense for or as justification for breaching that state's international obligations. The Vienna Convention on the Law of Treaties provides, in article 27:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

This is so in part because domestic law (in the U.S. and elsewhere) must be construed in a manner consistent with international law. And, as suggested in the *Charming Betsy* rule, in essence international law trumps domestic law.[27]

20.2. **Executive Orders do not excuse international obligations.** Thus, neither the government nor the military commissions may justify a breach of a treaty, of customary international law norm, or of a general principle of law on the ground that the United States has issued an Executive Order that may conflict with the international law norm. International law remains the supreme law of the land.

H. International instruments that are not traditional sources of international law: Soft law

21. Resolutions, declarations, standards, and principles as non-treaty international instruments.

21.1. **Promulgation of international instruments.** Inter-governmental organizations such as the United Nations promulgate various types of international instruments that reflect agreement among states on international law issues, including in the area of international humanitarian law, international human rights law, and international criminal law and procedure. If such international instruments take the form of treaties, then the instruments bind parties who consent to be bound thereto. Treaties are known as "hard law", and fully bind all states that are party to the particular treaties. If an international instrument does not take treaty form, generally it would not have the same binding force as a treaty, and would be considered "soft law", which would have moral authority that is persuasive, but not have legally binding authority.

21.2. **Soft law.** Soft law instruments might incorporate some customary international law norms, in which case states would be bound by the principles contained in the instruments not because the instruments bind (because they are soft law, and do not bind), but because the principles themselves have the force of binding law as customary international law and/or as general principles of law. In

[27] *See Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains".)

these cases, the principle in question essentially has two existences: (a) as a binding norm of customary international law; and (b) as a norm that happens to be codified in a soft law international instrument.

21.3. Principles in soft law documents may rise to customary law status or may constitute general principles of law. Many if not most of the principles contained in these instruments are binding on states, including the United States, because those principles have risen either to the level of customary international law or those principles have risen to the level of general principles of law. Furthermore, these instruments are relevant as persuasive, moral authority though they may not be binding. Soft law instruments may interpret or elaborate upon existing treaties or rules of customary international law or general principles of law, or develop new standards, particularly in emerging international law areas.

21.4. Soft law as political and moral authority. Though these instruments are not legally binding in and of themselves, they have political and moral authority that guide individuals, courts and tribunals, and governments on the applicable rules of international human rights law. *See, e.g.,* Jeffrey Addicott & Andrew Warner, *Promoting the Rule of Law and Human Rights, Military Review,* August 1994, at n. 6 ("Although the Helsinki Accords are not legally binding, they imparted political and moral authority that became a rallying cry for individuals".)

21.5. Examples of soft law instruments, some of which codify or otherwise contain customary international law norms or general principles of law. As mentioned above, some soft law international instruments codify or otherwise contain customary international law norms or general principles of law. Customary international law norms and the general principles of law contained in soft law instruments operate parallel to the soft law instruments, and bind states even if those states have not subscribed to the soft law instruments themselves. These soft law instruments may be in the area of international human rights law, international humanitarian law, or international criminal law. Following are examples of soft law international instruments, some of which codify or otherwise contain customary international law norms or general principles of law:

21.5.1. *Standard Minimum Rules for the Treatment of Prisoners*, Adopted 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. (U.N. Doc. A/CONF/611, annex 1, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1 at 35, U.N. Doc. E/5988 (1977));

21.5.2. *Basic Principles for the Treatment of Prisoners* (Adopted by United Nations General Assembly Resolution 45/111 of 14 December 1990) (http://www.unhchr.ch/html/menu3/b/h_comp35.htm);

21.5.3. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, annex, 43 U.N. GAOR, 43d Sess., Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988);

21.5.4. *Draft Body of Principles on the Right to a Fair Trial and a Remedy*, Annex II of "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and

Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, 3 June 1994 (http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument)

21.5.5. *The Code of Conduct for Law Enforcement Officials* (G.A. res. 34/169, annex 34 U.N.GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979);

21.5.6. *UN Standard Minimum Rules for the Administration of Juvenile Justice*, UN General Assembly resolution 40/33, November 29, 1985;

21.5.7. *Declaration of Minimum Humanitarian Standards*, (a/k/a/ the "*Turku Declaration*") (adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo, Finland, 30 November – 2 December 1990) (*reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995);

21.5.8. *The Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by United Nations General Assembly Resolution 37/194 of 18 December 1982;

21.5.9. *Basic Principles on the Role of Lawyers*, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to 7 Sept. 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990);

21.5.10. *Guidelines on the Role of Prosecutors*, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to 7 Sept. 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990);

21.5.11. *Basic Principles on the Independence of the Judiciary*, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 Aug. to 6 Sept. 1985, U.N. Doc. A/ CONF.121/22/Rev.1 at 59 (1985);

21.5.12. *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990;

21.5.13. *Basic Principles on the Independence of the Judiciary*, UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985;

21.5.14. *UN Rules for the Protection of Juveniles Deprived of Their Liberty*, UN General Assembly resolution 45/113, December 14, 1990;

21.5.15. *Code of Conduct for Law Enforcement Officials*, UN General Assembly resolution 34/169, December 17, 1979; Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, UN Economic and Social Council recommended resolution 1989/65, May 24, 1989;

21.5.16. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27- September 7, 1990;

I. International human rights law

22. International human rights law – defined

22.1. Definition. International human rights law, which is based in treaty, customary international law, and general principles of law, is the branch of public international law that defines norms in place to protect individuals and groups from breaches of basic dignity, respect, and humanity. These protections are to be afforded to all persons without regard for the identity of the victims or the abuse perpetrators, and irrespective of where in the world the victim or perpetrator might be located. International human rights law obligates individuals, groups and states to respect the physical and mental integrity of all persons. International human rights law must be abided by at all times in all places by all individuals, groups and states. International human rights law is fully in force during times of peace and during times of war. The existence of armed conflict is not a defense to breach of international human rights law.

22.2. Application of international human rights law to all persons, irrespective of nationality, statelessness, combat or other status. International human rights law protections are to be afforded to all humans, irrespective of who they are, their nationality, or other status. This human rights principle is firmly embedded in international law and domestic law.

22.2.1. Application of international human rights law to all persons pursuant to the ICCPR. General Comment No. 31 provides for the equal enjoyment of human rights by all humans:

> "As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." (*General Comment No. 31*, para 10)

22.3. Birth of international human rights law. Modern day international human rights law was born in the era immediately following World War II, when pre-existing human rights norms were incorporated into positive international instruments and heralded as inviolable by the international community of nations. The United Nations Charter proclaims that a principal purpose of the UN is the promotion and protection of human rights, in response to the gross human rights violations that had occurred leading up to and during the War.[28] Shortly thereafter, in 1948, the Universal Declaration of Human Rights[29]

[28] *See* UN Charter, Preamble (1945). The Preamble of the UN Charter provides, in relevant part:

(UDHR) was promulgated by the United Nations as the first major positive law international instrument that enumerated human rights belonging to all human beings, irrespective of the identities of the persons, their nationality or location, and irrespective of the identity of the alleged abuse perpetrators. The UDHR delineated a common standard of human rights and fundamental freedoms for all. Because the UDHR was issued as a "declaration" and not as a "treaty", and hence was not binding as an international instrument, the United Nations codified UDHR rights into two principle treaties, the one most relevant to the right to a fair trial being the International Covenant on Civil and Political Rights (1966).[30] The UN Charter, the UDHR, and the ICCPR are international instruments that affirm the principle that everyone is entitled to the enjoyment of human rights protections, whether in time of peace or war.[31] The rights contained in these instruments – that is, the "rules concerning the basic rights of the human person" – are *erga omnes* obligations with protection obligations flowing to individual persons who are protected via the norms in these instruments, and with obligations of a contractual nature owed by States Party to the other States Party to the instruments. (*See, e.g., General Comment No. 31*, para. 2 (recognizing ICCPR, art. 2 obligations owed to individuals as right holders and to other States as contractual Parties to the ICCPR, and with any ICCPR breaches being "considered as a reflection of legitimate community interest" and not "regarded as an unfriendly act", recognizing the interest of States Parties' legitimate interests in each others' discharge of their ICCPR obligations.)

23. International Human rights law and United States law: The Restatement Third of The Foreign Relations Law of the United States.

23.1. The Restatement Third of The Foreign Relations Law of the United States, section 701 provides that human rights protections flow from treaties, customary international law, and general principles of law, as follows:

> "We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,"

Among the stated purposes of the UN Charter are promoting and encouraging respect for human rights. For example, article 1 provides: "The purposes of the United Nations [include] [t]o achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction… ." Article 55 provides that the UN shall promote: "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction… ." Article 56 provides: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

[29] GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948). Available at <http://www.unhchr.ch/udhr/lang/eng.htm>.

[30] The other principle treaty enshrining UDHR rights is the *International Covenant on Economic, Social and Cultural Rights* (1966), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_cescr.htm>. The U.S. has signed but not yet ratified the Economic Covenant. The UDHR, the ICCPR (and its Protocols), and the Economic Covenant are commonly referred to as the *International Bill of Human Rights*.

[31] *See*, 'Fact Sheet No 13, International Humanitarian Law and Human Rights' (1991), available at <http://www.unhchr.ch/html/menu6/2/fs13.htm>.

> "A state is obligated to respect the human rights of persons subject to its jurisdiction
>
> (a) that it has undertaken to respect by international agreement;
>
> (b) that states generally are bound to respect as a matter of customary international law (§ 702); and
>
> (c) that it is required to respect under general principles of law common to the major legal systems of the world."

24. Prolonged arbitrary detention, as treaty norm and customary international law norm, bind the United States – Writing of Professor Addicott. Associate Professor of Law Jeffrey Addicott explains that the treaty norms and customary international law norms that prohibit "prolonged arbitrary detention" are "binding on all nation-states", including the United States of America. Professor Addicott writes as follows:

> "The term 'human rights' is commonly meant to include so-called first and second-generation human rights. Through treaty and customary international law, first generation human rights are binding on all nation-states. See *Restatement (Third) of the Foreign Relations Law of the United States, section 702* (1987). The Customary International Law of Human Rights lists these first generation human rights as: (1) genocide, (2) slavery or slave trade, (3) the murder, or causing the disappearance of, individuals, (4) torture or other cruel, inhumane or degrading treatment or punishment, (5) prolonged arbitrary detention, (6) systematic racial discrimination, and (7) a consistent pattern of committing gross violations of internationally recognized human rights." (Jeffrey Addicott, *Legal And Policy Implications For A New Era: The War On Terror*, 4 The Scholar: St. Mary's Law Review On Minority Issues 209 (2002), note 14).

25. Right to a fair and public trial are legally binding on the United States – Writing of Professor Addicott. Associate Professor of Law Jeffrey Addicott states that the right to a "fair and public trial" is in a category of rights that "are legally binding only on those nation-states that have obligated themselves through treaty," and within those rights that "are the functional equivalents of democratic values found in the U.S. Constitution." (Jeffrey Addicott, *Legal And Policy Implications For A New Era: The War On Terror*, 4 The Scholar: St. Mary's Law Review On Minority Issues 209 (2002), note 14. (*citing* Frank Newman & David Weissbrodt, INTERNATIONAL HUMAN RIGHTS (1991)). The rights to which Professor Addicott refers are all enshrined in the International Covenant on Civil and Political Rights, to which the United States is bound through having ratified that treaty.

Professor Addicott writes:

> "[This category of binding rights] speak[s] to political and civil freedoms such as the freedom of religion, peaceful assembly, privacy, association, fair and public trial, open participation in government, movement, etc. [These] human rights are the functional equivalents of democratic values found in the U.S. Constitution. See generally Frank Newman & David Weissbrodt, International Human Rights (1991). Jeffrey Addicott, *Legal And Policy Implications For A New Era: The War On Terror*, 4 The Scholar: St. Mary's Law Review On Minority Issues 209 (2002),

note 14. (*citing* Frank Newman & David Weissbrodt, INTERNATIONAL HUMAN RIGHTS (1991))"

26. United States promotes protection of human rights, including the prohibition against prolonged arbitrary detention – Writing of Professor Addicott. Associate Professor of Law Addicott has further contended that, as regards the promotion of human rights:

> "[The Army JAG Corps] concern exceeds the minimally accepted standards for human rights established by customary international law. International law prohibits genocide, slavery, murder or disappearance, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or any activity which demonstrates a consistent pattern of gross violation of internationally recognized human rights. The United States has traditionally promoted by treaty, declaration and action the fullest possible range of meaningful human rights. These rights include freedom of religion, freedom of association, freedoms of speech and all of those principles indicative of a truly democratic society." (Jeffrey Addicott & Andrew Warner, Promoting the Rule of Law and Human Rights, Military Review, August 1994, at 38).

27. U.S. Executive Order re-affirming compliance with international human rights law in U.S. Law – Binding nature of international human rights law treaties in the U.S.

27.1. U.S. Executive Order requiring Executive Branch (including the Military Branches), to comply with the ICCPR. In 1998, the U.S. President issued Executive Order 13,107 which directs all persons in the Executive Branch to comply with the International Covenant on Civil and Political Rights, the Convention against Torture, and the International Convention on the Elimination of All Forms of Racial Discrimination. The Executive Order provides (at 68,991) that it shall apply to "other relevant treaties concerned with protection and promotion of human rights to which the United States is now or may become a party in the future."

Furthermore, the Executive Order provides:

> "By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:
>
> "Section 1. Implementation of Human Rights Obligations.
>
> (a) *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*

> *international human rights treaties to which it is a party, including the ICCPR*, the CAT, and the CERD. [emphasis added]
>
> "(b) 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.
>
> "Section 2. Responsibility of Executive Departments and Agencies. (a) All executive departments and agencies (as defined in 5 U.S.C. 101-105, including boards and commissions, and hereinafter referred to collectively as "agency" or "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…. ."

27.2. Executive Order requiring ICCPR compliance applies to the Department of Defense, to "the military departments", and to all commissions, including the military commissions. Executive Order 13,107 applies to all civilian and military employees of the United States included in §§ 101 – 105 of Title 5 of the U.S. Code. Section 102 of 5 U.S.C. defines "the military department" as the Department of the Army, the Department of the Navy, and the Department of the Air Force. (5 U.S.C. § 102). Pursuant to 5 U.S.C. § 101, the Executive Departments of the United States include the Department of Defense. Thus, each person involved with the military commissions who is working on behalf of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or any other governmental agency (including the Department of Justice, the Department of State, etc) is bound to comply fully with the International Covenant on Civil and Political Rights, and with all other international human rights law treaties to which the United States is a party.

28. U.S. condemnation of the use of military commissions, secret military trials, torture and degrading treatment, threats during interrogation, prolonged arbitrary detention, failure to provide due process rights, and judicial proceedings that "did not meet international standards for fair public trials" in many overseas countries. The United States government has condemned practices in many other foreign States where criminal proceedings are conducted in breach of international human rights law and international humanitarian law. This U.S. condemnation is chronicled in, *inter alia*, U.S. Department of State Annual Human Rights Reports, which the State Department compiles each year to assist the U.S. in determining whether to grant military, economic or other assistance to foreign countries, the idea being that the U.S. will not (or should not) grant aid to countries that reach certain levels of breach of internationally recognized human rights.[32] These violative practices for which the U.S. condemns other countries include:

- the use of military commissions;
- the conducting of military trials in secret;
- inadequate or inappropriate channels of appeal, particularly in military tribunals;

[32] *See, e.g.,* Section 502-B(a)(1) of the Foreign Assistance Act of 1961, codified at 22 U.S.C. section 2304.

- undue command influence where military judges are appointed by the Minister of Justice and subject to military discipline and "are not as independent or as qualified as civilian judges";
- where military court verdicts are "subject to a review by other military judges and confirmation by the President";
- the infliction of torture and degrading treatment on detained persons;
- unlawful threats during interrogation;
- prolonged arbitrary detention before, during and after trial;
- denial of a speedy trial;
- inadequate access of defense counsel to government evidence against their clients;
- failure to afford defendants with fundamental due process rights; and
- judicial proceedings that "did not meet international standards for fair public trials".

28.1. By condemning other nations for violating human rights norms, the U.S. implicitly acknowledges that international human rights norms apply to U.S. domestic practice, as to hold differently would mean that the U.S. would operate under one standard for itself and another standard for other countries of the world, with the U.S. being exempt from complying with its international human rights law obligations. The following paragraphs contain excerpts of a few of the more recent State Department Annual Human Rights Reports that highlight U.S. condemnation of some of these violative practices:[33]

28.2. U.S. Condemnation of Military Commissions in Various Countries including Cuba, Sudan, Peru, Nigeria, Burundi, Egypt, Congo, and Israel:

28.2.1. U.S. condemnation of military commissions and other abuses in Cuba (2004). In the 2004 Cuba Human Rights Report, in a section entitled "Denial of Fair Public Trial", the United States condemned military tribunals in Cuba. While on the one hand, the United States is condemning Cuba for failure to "meet international standards for fair public hearing", while at the same time the U.S. is facing charges that its own Military Commissions being conducted in Guantanamo Bay, Cuba do not meet those very same "international standards for fair public trials" that the U.S. believes governs criminal proceedings that take place in Cuba. All proceedings in Cuba, whether conducted by the U.S. or Cuban authorities, must "meet international standards for fair public hearing". The U.S. condemns military commissions in Cuba for various reasons, including that:

> "The law and trial practices did not meet international standards for fair public trials."

Further, in a section entitled "Arbitrary Arrest, Detention, or Exile," the 2004 Cuba Human Rights Report notes:

> "The authorities routinely engaged in arbitrary arrest and detention . . . subjecting [detainees] to interrogations, threats, degrading treatment, and unsanitary conditions for hours or days at a time. Police frequently lacked warrants when

[33] This Affidavit only mentions a handful of the instances in which the U.S. has condemned other countries for violating international law *See, for example,* Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals*, (June 2003) (reporting on U.S. criticism of military commissions in Burma, China, Colombia, Egypt, Kyrgyzstan, Malaysia, Nigeria, Peru, Russia, Sudan and Turkey) <*http://www.hrw.org/press/2001/11/tribunals1128.htm> (last visited 10 November 2005)*

carrying out arrests or issued warrants themselves at the time of arrest… . Detainees often were not informed of the charges against them."[34]

The United States, though condemning Cuban criminal proceedings because they involve "interrogations, threats, degrading treatment . . . for hours or days at a time", has condoned similar practices against "detainees" being held in Guantanamo Bay and elsewhere.

28.2.2. U.S. condemnation of military commissions and other abuses in Cuba (2003, 2002, 2001, 2000, 1999). In a series of recent U.S. Human Rights Reports for Cuba, in a section entitled "Denial of Fair Public Trial", the United States has routinely condemned military tribunals in Cuba for various reasons, including on the grounds that "[t]he law and trial practices did not meet international standards for fair public trials." For example, see the following references from the 2003, 2002, 2001, 2000 and 1999 State Department Human Rights Reports for Cuba:

- *United States Department of State Human Rights Report for 2003* (In Cuba, "The law and trial practices did not meet international standards for fair public trials.) (http://www.state.gov/g/drl/rls/hrrpt/2003/27893.htm)

- *United States Department of State Human Rights Report for 2002* (In Cuba, "The law and trial practices did not meet international standards for fair public trials.) (http://www.state.gov/g/drl/rls/hrrpt/2002/18327.htm)

- *United States Department of State Human Rights Report for 2001* (In Cuba, "The law and trial practices do not meet international standards for fair public trials.") (http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8333.htm)

- *United States Department of State Human Rights Report for 2000* (In Cuba, "The law and trial practices do not meet international standards for fair public trials.") (http://www.state.gov/g/drl/rls/hrrpt/2000/wha/751.htm)

- *United States Department of State Human Rights Report for 1999* (In Cuba, "The law and trial practices do not meet international standards for fair public trials.") (http://www.state.gov/g/drl/rls/hrrpt/1999/382.htm)

28.2.3. U.S. condemnation of military commissions and other abuses in Sudan (2004). While noting that "Only military personnel were tried in military courts" (as compared to earlier reports in which civilians were tried before military courts" (*see, e.g., 2003 Report*)), the United States condemned military tribunals in the Sudan for various reasons, including that:

> "Military trials, which sometimes were secret and brief, did not provide procedural safeguards… .Military trials did not provide an effective appeal from a death sentence." (http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm)

This finding mimicked the 2003 Department of State Human Rights Report on Sudan, in which the United States similarly condemned military tribunals in the Sudan for various reasons, including that "The authorities did not ensure due process in . . . military courts", and that the "Military trials, which

[34] Department of State, Human Rights Reports 2004, Report on Cuba, (http://www.state.gov/g/drl/rls/hrrpt/2004/41756.htm)

sometimes were secret and brief, did not provide procedural safeguards."[35] The 2002 report similarly found that "Military trials, which sometimes were secret and brief, did not provide procedural safeguards."[36]

28.2.4. U.S. condemnation of military commissions and other abuses in Peru (2003). The United States condemned military tribunals in Peru for various reasons, including that:

> "In June 1999, the Inter-American Court of Human Rights ruled against the Government in the case of four Chileans convicted of treason by a military tribunal and sentenced to life in prison. The Court found that the military had denied the defendants due process rights and ruled that a civilian court should have had jurisdiction. In May 2001, the Supreme Council of the Military Court invalidated an earlier military court decision against providing new trials and ordered new, civilian trials for the four Chileans".[37]

28.2.5. U.S. condemnation of military commissions and other abuses in Peru (1999). The United States condemned military tribunals in Peru for various reasons, including that:

> "Proceedings in these military courts--and those for terrorism in civilian courts--do not meet internationally accepted standards of openness, fairness, and due process. Military courts hold treason trials in secret, although such secrecy is not legally required. Defense attorneys in treason trials are not permitted adequate access to the files containing the State's evidence against their clients, nor are they allowed to question police or military witnesses either before or during the trial. Some military judges have sentenced defendants without even having notified their lawyers that the trials had begun".[38]

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[35] Department of State, Human Rights Reports 2003, Report on Sudan, <http://www.state.gov/g/drl/rls/hrrpt/2003/27753.htm> (visited 11 November 2005)

[36] Department of State, Human Rights Reports 2003, Report on Sudan http://www.state.gov/g/drl/rls/hrrpt/2002/18228.htm (visited 11 November 2005)

[37] Department of State, Human Rights Reports 2003, Report on Peru, <http://www.state.gov/g/drl/rls/hrrpt/2003/27916.htm)> (visited 11 November 2005)

[38] Department of State, Human Rights Reports 1999, Report on Peru, <http://www.state.gov/g/drl/rls/hrrpt/1999/398.htm> (visited 11 November 2005)

In the case of Lori Berenson, who is a U.S. citizen who was tried in a Peruvian faceless, military court, United States Department of State's acting spokesperson Glyn Davies noted Ms. Berenson's trial and sentencing, as follows:

> "The United States deeply regrets that Ms. Berenson was not tried in an open civilian court with full rights of legal defense, in accordance with international juridical norms. Ms. Berenson may appeal her conviction in stages to two higher levels of military appeals tribunals, and we understand that her attorney is filing such an appeal. It is not clear whether a final appeal might be made to the Peruvian Supreme Court, a civilian body.
>
> "The United States remains concerned that Ms. Berenson receive due process. We have repeatedly expressed these concerns to the Government of Peru. We call upon the Peruvian Government to take the necessary steps in the appeals process to accord Ms. Berenson an open judicial proceeding in a civilian court. The United States will continue to follow this case closely."

28.2.6. U.S. condemnation of military commissions and other abuses in Nigeria (1999). The United States condemned military tribunals in Nigeria for various reasons, including that:

> "The decisions of the tribunals were exempt from judicial review."[39]

Further:

> "In May the Government repealed the State Security (Detention of Persons) Decree of 1984 (Decree 2), which had allowed prolonged arbitrary detention without charge; however, police and security forces continued to use arbitrary arrest and detention, and prolonged pretrial detention remains a problem."[40]

28.2.7. U.S. condemnation of military commissions and other abuses in Burundi (2003). The United States condemned military tribunals in Burundi for various reasons, including that:

> "Arbitrary arrest and detention, and lengthy pretrial detention were problems, and there were reports of incommunicado detention. The court system did not ensure due process or provide citizens with fair trials."[41]

28.2.8. U.S. condemnation of military commissions and other abuses in Egypt (2003). The United States condemned military tribunals in Egypt for various reasons, including that:

> "Military verdicts were subject to a review by other military judges and confirmation by the President, who in practice usually delegated the review function to a senior military officer. Defense attorneys claimed that they were not given sufficient time to prepare defenses and that judges tended to rush cases involving a large number of defendants."[42]

28.2.9. U.S. condemnation of military commissions and other abuses in Egypt (1999). The United States condemned military tribunals in Egypt for various reasons, including that:

> "However, the military courts do not ensure civilian defendants due process before an independent tribunal. While military judges are lawyers, they are also

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United States State Department Statement on Lori Berenson's Sentencing, Thursday, 11 January 1996 (Excerpt) (passage quoted in part on the website of the United Nations High Commissioner for Refugees, which in turn cites the *Human Rights Watch Annual Report for 1997: Peru* <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?tbl=RSDCOI&page=research&id=3ae6a8c18> (visited 11 November 2005)

[39] Department of State, Human Rights Reports 1999, Report on Nigeria, <http://www.state.gov/g/drl/rls/hrrpt/1999/265.htm> (visited 11 November 2005)

[40] Department of State, Human Rights Reports 1999, Report on Nigeria, <http://www.state.gov/g/drl/rls/hrrpt/1999/265.htm> (visited 11 November 2005)

[41] Department of State, Human Rights Reports 2003, Report on Burundi, <http://www.state.gov/g/drl/rls/hrrpt/2003/27715.htm> (visited 11 November 2005)

[42] Department of State, Human Rights Reports 2003, Report on Egypt, <http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm> (visited 11 November 2005)

> military officers appointed by the Minister of Defense and subject to military discipline. They are not as independent or as qualified as civilian judges in applying the civilian Penal Code. There is no appellate process for verdicts issued by military courts; instead, verdicts are subject to a review by other military judges and confirmation by the President, who in practice usually delegates the review function to a senior military officer. Defense attorneys have complained that they have not been given sufficient time to prepare defenses and that judges tend to rush cases involving a large number of defendants."[43]

28.2.10. U.S. condemnation of military commissions and other abuses in Congo (2001). The United States government condemned military tribunals in the Congo for various reasons, including that:

> "Military courts, which are headed by a military judge and apply military law inherited from Belgium, try military and civilian defendants as directed by the Government, and tried nearly all cases during the year. There is no appeals process in the military courts".[44]

28.2.11. U.S. condemnation of military commissions and other abuses in Israel and the Occupied Territories (2002). The United States condemned tribunals in Israel and the Occupied Territories for various reasons, including that:

As regards the Israeli government:

> "[p]rolonged detention, limits on due process, and infringements on privacy rights remained problems."

As regards the Palestinian Authority (PA):

> "[t]he PA courts were inefficient, lacked staff and resources, and often did not ensure fair and expeditious trials. The PA executive and security services frequently failed to carry out court decisions and otherwise inhibited judicial independence. The lack of judicial independence and the lack of rule of law in the PA lead to continuing problems of torture, extrajudicial killings, and arbitrary detention."[45]

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[43] Department of State, Human Rights Reports 1999, Report on Egypt, <http://www.state.gov/g/drl/rls/hrrpt/1999/408.htm> (visited 11 November 2005)

[44] Department of State, Human Rights Reports 2001, Report on Congo, <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8322.htm> (visited 11 November 2005)

[45] Department of State, Human Rights Reports 2002, Report on Israel and the Occupied Territories, <http://www.state.gov/g/drl/rls/hrrpt/2002/18278.htm> (visited 11 November 2005)

J. The International Covenant on Civil and Political Rights

29. United States Ratification of the ICCPR. The United States signed the International Covenant on Civil and Political Rights on 5 October 1977 and ratified that international human rights law treaty in 1992.[46] Thus, the United States is bound under international law to comply with that treaty. (*See* Vienna Convention on the Law of Treaties, arts 1(g), 26; Restatement Third of the Foreign Relations Law of the United States, section 321). Upon ratification of the ICCPR, the US became obligated fully to comply with the substantive provisions of that treaty. *See* Vienna Convention on the Law of Treaties, article 26 (obligation fully to comply with ratified treaties in good faith)

30. United Nations Human Rights Committee. Pursuant to article 40 of the ICCPR, a committee of independent experts, known as the United Nations Human Rights Committee, was established to oversee implementation of the ICCPR in the states parties and to monitor states parties' compliance with the terms of the treaty. The roles of the Human Rights Committee include issuing periodic reports on whether particular states parties are effectively implementing the treaty provisions, issuing "general comments" that generally explain how the Committee interprets terms contained in the treaty, and performing other tasks related to the promotion and protection of human rights under the ICCPR. General Comments of the Human Rights Committee are considered by states parties to the ICCPR to be authoritative statements of the Committee on interpretation of ICCPR substantive terms.

31. U.S. Member on the Human Rights Committee. The expert from the United States who currently sits on the United Nations Human Rights Committee is Professor Ruth Wedgewood. Though she was elected to the Committee upon nomination by the United States, she serves on the Committee in her personal capacity.

32. United Nations Human Rights Committee General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR

    32.1. General Comment 31 – Promulgated by the Human Rights Committee. On 26 May 2004, the United Nations Human Rights Committee promulgated *General Comment 31*, entitled "Nature of the General Legal Obligation Imposed on States Parties to the Covenant".[47] This General Comment outlines ICCPR obligations with which the United States and other States Parties must comply Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, which requires States Parties to give effect to the obligations under the Covenant in good faith. (*See General Comment No. 31, para 3).* Below are highlighted general legal obligations of the United States under the ICCPR.

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[46] *See* Homepage of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/4.htm> (visited 11 November 2005); *see also* Office of the United Nations High Commissioner for Human Rights: Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004, <http://www.unhchr.ch/pdf/report.pdf> (last visited 11 November 2005)

[47] UN Doc. No. CCPR/C/21/Rev.1/Add.13 (26 May 2004). General Comment No. 31 can be found at the following website: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument (last visited 11 November 2005). The text of all Human Rights Committee General Comments can be found at: http://www.ohchr.org/english/bodies/hrc/comments.htm (last visited 11 November 2005)

32.2. State Party Obligations under the ICCPR. The State Party obligations addressed in *General Comment 31* are principally those obligations contained in article 2 of the ICCPR, which provides as follows:

Article 2

> "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> "2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other 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 as herein recognized 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."

32.2.1. States' immediate obligations under the ICCPR; ICCPR framework for promoting and protecting human rights. *General Comment No. 31*, paragraph 5 provides that ICCPR article 2(1) has immediate effect for all States Parties as States Parties fulfill their obligation to respect and ensure the rights recognized in the ICCPR. Furthermore, *General Comment No. 31*, paragraph 5 notes that ICCPR art. 2(2) provides the overarching framework within which the rights specified in the ICCPR are to be promoted and protected. (*See also General Comment No. 31,* para 14 (noting that failure to comply with ICCPR art. 2(2) obligations "cannot be justified by reference to political, social, cultural or economic considerations within the State" as the States obligation under ICCPR art. 2(2) "is unqualified and of immediate effect."))

32.2.2. US ICCPR Obligations towards individuals as rights holders.

32.2.2.1. General Comment No. 31 provides that the U.S. as a whole -- all branches of government, in all their operations, are bound to comply with ICCPR guarantees of protecting the human rights of all without distinction. Paragraph 4 of the General Comment provides:

> "The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'."

K. Derogation from international human rights law and international humanitarian law norms

33. The Restatement Third. The Restatement Third recognizes that in some instances, a state may derogate from affording rights. But, any power of a state to derogate is limited as a state may not derogate from a *jus cogens* norm. The Restatement Third Reporters' Notes provide that:

> "Not all human rights norms are *jus cogens*, but those in clauses (a) to (f) have that quality. It has been suggested that a human rights norm cannot be deemed *jus cogens* if it is subject to derogation in time of public emergency; see, for example, Art. 4 of the Covenant on Civil and Political Rights, § 701, Reporters' Note 6. Nonderogability in emergency and *jus cogens* are different principles, responding to different concerns, and they are not necessarily congruent. In any event, the rights recognized in clauses (a) to (f) of this section are not subject to derogation in emergency under the Covenant." (Restatement Third, Section 702, Reporters' Notes, n. 11)

34. Prohibition on Prolonged Arbitrary Detention as a *jus cogens, non-derogable right.* Included among the *jus cogens*, non-derogable rights in clauses (a) to (f) of section 702 of the Restatement Third are the prohibition on prolonged arbitrary detention and the prohibition on torture or other cruel, inhuman, or degrading treatment or punishment. *See also Restatement Third, section 702, Comment n 11*.

35. Derogation under the International Covenant on Civil and Political Rights:

35.1. Article 4 of the ICCPR addresses derogation, as follows:

> "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."
>
> "2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."
>
> "3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

35.2. General Comment No. 29. On 24 July 2001, the United Nations Human Rights Committee, which oversees implementation of the ICCPR, promulgated *General Comment No. 29: States of Emergency (Article 4).*[48] This General Comment provides, in relevant part:

> "Paragraph 2: Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed… ."
>
> "Paragraph 3: … . During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."

[48] U.N. Doc. CCPR/C/21/Rev.1/Add.11 (31 August2001). General Comment Number 29 can be found at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument.

"Paragraph 6. The fact that some of the provisions of the Covenant have been listed in article 4 (para. 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation."

"Paragraph 9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. . . ."

"Paragraph 11: … . States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."

"Paragraph 16: Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant. [footnote omitted]"

"Paragraph 17. In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's

> functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency…. ."

35.3. No derogation from the right to a fair trial. As stated above, under the ICCPR, no derogation is permitted from the right to a fair trial. Pursuant to paragraph 11 of *General Comment No. 29,* "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by . . . deviating from fundamental principles of fair trial, including the presumption of innocence."

35.4. In *General Comment No. 31*, the Human Rights Committee commented on the notion on restrictions on any right provided for under the ICCPR. Paragraph 6 of *General Comment No. 31* provides, in relevant part:

> "States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."

L. International humanitarian law ("IHL" or the "Law of War" or the "Law of Armed Conflict" or "LOAC")

36. International humanitarian law ("IHL") – which is also known as the "law of armed conflict" (LOAC) or the "law of war" – is the subset of public international law that recognizes a sense of humanity in armed conflict. International humanitarian law places limits on the means and method of conducting war, and defines which individuals and under what circumstances these individuals should be protected during armed conflict.[49] International humanitarian law is a set of rules, based on treaties and customary international law, which seek to limit the gruesome effects of international and non-international armed conflict. International humanitarian law protects civilians and persons who are no longer participating in the hostilities (e.g., hors de combat or POWs), and restricts the means and methods of warfare. International humanitarian law applies only in times of armed conflict, unlike international human rights law, which applies at all times, including at times of war and peace. International humanitarian law does not deal with issues surrounding

[49] *See* 'What is International Humanitarian Law?' (2004), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNXM/$FILE/What_is_IHL.pdf?OpenElement>.

the legality of the use of force, such issues being governed by, for example, treaties such as the United Nations Charter, and customary international law sources such as the right of self-defense.

36.1. Full and fair trial under international humanitarian law. International humanitarian law provides that persons alleged to have committed offences during an armed conflict are to be fully afforded a fair trial and to be fully afforded fundamental judicial guarantees.

36.2. Roots of international humanitarian law codification. Universal codification of International humanitarian law began in the 19th century. International humanitarian law balances humanitarian concerns and military requirements of states. Much of contemporary International humanitarian law regarding protection of individuals is codified in the four Geneva Conventions of 1949, which have been supplemented by two further agreements, the Additional Protocols of 1977.[50] Many provisions of International humanitarian law are now accepted as customary international law, and are therefore binding on all states, regardless of whether they are parties to the individual treaties.

36.3. Application of international humanitarian law. International humanitarian law only applies to armed conflicts once they have begun; it does not cover isolated acts of violence. International humanitarian law distinguishes between international and non-international armed conflict, with international armed conflicts being generally those in which at least two States are involved. International humanitarian law requires compliance with many rules during international armed conflict, such rules including the four Geneva Conventions and Additional Protocol I to the Geneva Conventions. Non-international armed conflicts are dealt with by article 3 common to all Four Geneva Conventions of 1949 and Additional Protocol II of the Geneva Conventions. Common article 3 provides that persons not participating in the hostilities or who are no longer participating must be treated in all circumstances with humanity and without discrimination. Common article 3 also calls for judgments to be pronounced by regularly constituted courts that provide all judicial guarantees.

36.4. Rights under international humanitarian law. International humanitarian law protects those who do not take part in the armed conflict (e.g., civilians), and those who have ceased to take part (e.g., prisoners of war or persons hors de combat). Non-participants enjoy certain legal guarantees. For instance, it is forbidden to kill or wound an enemy who has surrendered and turned over his arms. Detailed, explicit rules govern conditions for detaining prisoners of war, and the manner in which civilians must be treated when the civilians fall under the authority of an enemy. These rules confirm rights of these civilians and duties of the captors, with rights including the right to proper and adequate food, shelter and medical attention. Furthermore, extensive legal protection must be provided to individuals who participate in hostilities but who are not considered prisoners of war. (*See* Additional Protocol I of the Geneva Conventions). Additional Protocol I provides for "fundamental guarantees" for these persons, such guarantees including the right to a fair trial.

37. Relationship between international humanitarian law and international human rights law

[50] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (Additional Protocol I); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Additional Protocol II). Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

37.1. Law of war v. law of peace. International humanitarian law has been known as the "law of war" or the "law of armed conflict". The label assigned to international human rights law as "the law of peace" is only partly correct, since international human rights law operates not only in times of peace, but also in times of war. On the other hand, international humanitarian law operates only in times of war. Individuals do not lose their international human rights law protections simply because of the existence of armed conflict. International humanitarian law governs the manner in which the means and methods of warfare are limited to protect humanity during armed conflict, ensuring that, for example, civilians are not injured, combatants who drop their arms are protected, etc. Though international human rights law generally protects individuals from states' actions that would breach the mind and body of individuals during times of peace, international human rights law also operates during times of war. In times of peace and in times of armed conflict, international human rights law operates to ensure that all persons are fully afforded human dignity. Both bodies of law – international humanitarian law and international human rights law – "aim to protect human life, prohibit torture or cruel treatment, prescribe basic rights for persons subject to a criminal justice process, prohibit discrimination, comprise provisions for the protection of women and children, regulate aspects of the right to food and health".[51]

37.2. Complementary & Converging. International humanitarian law and international human rights law are interrelated, complement each other, are not mutually exclusive in operation, and converge and overlap in content and in application. The two areas of international law fall under a common theme that is based on common principles of humanity and respect for the integrity of bodies and minds of human beings, and both involve rights and duties of individuals, states, and other entities. The sources of the two areas of law are similar -- treaty, customary international law, and general principles of law.

37.3. Assessing "the legal guarantees deemed imperative by civilized nations". When assessing "the legal guarantees deemed imperative by civilized nations", which is found in common article 3 of the Geneva Conventions (which is of course an international humanitarian law instrument), we necessarily would look to the international human rights law instruments that dictate the rules for the right to a fair trial. Similarly, when seeking to understand whether international humanitarian law related to economic rights are being breached, it is appropriate to consider the International Covenant on Economic, Social and Cultural Rights (*see, e.g., Legal Consequences of the Wall.)*

37.4. Martens Clause – The Martens Clause, which is found in the preamble of Additional Protocol II to the Geneva Conventions, confirms that the law of armed conflicts is not the final source of law regarding armed conflicts, but that international human rights law is also to be consulted when addressing issues regarding the treatment of humans during armed conflict.

37.5. Conflict between international human rights law and international humanitarian law. International jurisprudence suggests that if a conflict exists between international humanitarian law and international human rights law, then international human rights law should be looked to in the first instance. However, the relevant *lex specialis* of international humanitarian law, if an armed conflict exists, should also be considered. The Inter-American Commission on Human Rights recently ruled on the issue of the applicability of international human rights law and international humanitarian law in times of armed conflict. The ruling confirms that international human rights law and international

[51] International Committee of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences*, (2003) http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JR8L/$FILE/IHL_and_IHRL.pdf?OpenElement (visited 11 November 2005)

humanitarian law both apply during armed conflict. The Commission ruled, in 2002, as regards precautionary measures in the case of the persons imprisoned at Guantanamo:

> "[W]hile its specific mandate is to secure the observance of international human rights protections in the Hemisphere, this Commission has in the past looked to and applied definitional standards and relevant rules of international humanitarian law in interpreting the American Declaration and other Inter-American human rights instruments in situations of armed conflict."
>
> "In taking this approach, the Commission has drawn upon certain basic principles that inform the interrelationship between international human rights and humanitarian law. It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. In contrast, international humanitarian law generally does not apply in peacetime and its principal purpose is to place restraints on the conduct of warfare in order to limit or contain the damaging effects of hostilities and to protect the victims of armed conflict, including civilians and combatants who have laid down their arms or have been placed hors de combat. Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*."[52]

37.6. Human Rights Committee – *General Comment No. 31* to the ICCPR: Applicability of international human rights law and international humanitarian law In times of armed conflict. The Human Rights Committee, in *General Comment No. 31*, addressed the relationship between international human rights law and international humanitarian law during times of armed conflict. The Committee concluded that international human rights law continues to apply even in times of armed conflict. However, the Committee noted that specific rules of international humanitarian law "may be especially relevant for the purposes of the interpretation of Covenant rights". Thus, the Committee does not call for a suspension of international human rights law norms during armed conflict. The Committee provides that international humanitarian law may be consulted in the interpretation of Covenant rights. The Committee noted:

> "As implied in general comment No. 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation

[52] Inter-American Commission on Human Rights, *Pertinent Parts of Decision on Request for Precautionary Measures: Detainees At Guantanamo Bay, Cuba*, 12 March 2002. (A copy of this document is available at the following website: <www.photius.com/rogue_nations/guantanamo.html> (last visited 14 November 2005).

> of Covenant rights, both spheres of law are complementary, not mutually exclusive. (ccpr/C/21/Rev.1/Add.13, para 11)".

37.7. Non-Derogation from Fair Trial Rights. Furthermore, the Human Rights Committee permits no derogation from fair trial rights under the ICCPR in part because international humanitarian law also provides for fair trial rights. For example, the Human Rights Committee in *General Comment No. 29: States of Emergency*, paragraph 11, provides that "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . by deviating from fundamental principles of fair trial, including the presumption of innocence."

Furthermore, paragraph 16 provides that "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency… ."

37.8. *Israeli Construction of a Wall in the Occupied Palestinian Territory – ICJ Judgment.* Most recently, the International Court of Justice addressed the relationship between international human rights law and international humanitarian law during times of armed conflict. *In Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, ruling of 9 July 2004 (General List No. 131), paragraphs 105 and 106, the ICJ cited its ruling in the *Nuclear Weapons* case on the topic of the relationship between the applicability of international human rights law and international humanitarian law, as follows:

> "105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address [the relationship between international human rights law and international humanitarian law] in relation to the International Covenant on Civil and Political Rights. In those proceedings certain States had argued that "the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict" (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

> "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." (*Ibid.*, p. 240, para. 25.)
>
> 106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between

> international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

37.8.1. In *Legal Consequences of the Wall* case, the ICJ ruled "The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments". (para 137) Israel was at the same time in breach of her obligations under international human rights law and under international humanitarian law. Thus, the ICJ concluded, breaches of both areas of international law are not mutually exclusive, as States may be concurrently in breach of both areas of international law. The ICJ noted, in finding Israel in breach of the ICCPR right to liberty of movement (article 12(1)), the ICESCR (Economic Covenant) and the Children's Convention right to work, to health, to education, and to an adequate standard of living, the Fourth Geneva Convention (article 49(6)), and certain United Nations Security Council resolutions, as follows:

> "134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above." (*Legal Consequences, para* 134)

37.8.2. International human rights law application in times of armed conflict. In sum, international human rights law applies even in the face of armed conflict. States may be concurrently in breach of its obligations under international human rights law and international humanitarian law.

M. Arbitrary Detention

38. United States Arbitrary detention obligations under treaty law, customary international law, and general principles of law. Under international and domestic law, the United States is obligated to ensure that no person is subject to arbitrary detention of any sort. The U.S. possesses these obligations under treaty law, customary international law, and general principles of law in the areas of international human rights law, international humanitarian law, and international criminal law. Armed conflict is no justification for breaching any person's right to be free from arbitrary detention.

38.1. ICCPR prohibits arbitrary detention and prolonged arbitrary detention. The prohibition against prolonged arbitrary detention can be found in article 9(1) of the ICCPR, which guarantees the right to liberty and security of person, including a prohibition on arbitrary arrest or detention.

38.2. Customary international law prohibits arbitrary detention and prolonged arbitrary detention. The prohibition against arbitrary detention also arises in customary international law, as the prohibition easily satisfies the state practice and opinio juris prongs of the customary international law test.

38.3. State practice prong satisfied – arbitrary detention. Regarding state practice, the prohibition against arbitrary detention exists in the constitutions and other laws of many states (including the United States), and is in place within numerous international human rights law instruments, many of which the United States has signed only, or signed and ratified. *See, e.g.,* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke Journal of Comparative and International Law 235 (1993). Many examples of these rights can be found within the United States. For example, the right to be free from arbitrary detention is incorporated into the Fourth Amendment to the United States Constitution (prohibition of unreasonable seizures). The right to be free from arbitrary detention is incorporated into the following international instruments: ICCPR, article 9; the European Convention on Human Rights, article 5; American Convention on Human Rights, article 7(3); and the African Charter of Human and People's Rights, articles 6-7. The right to be free from arbitrary detention is also incorporated into numerous soft law international instruments.

38.4. Opinio juris prong satisfied – arbitrary detention. As regards opinio juris, states around the globe subscribe to the prohibition against arbitrary detention because of a sense of legal obligation.

38.5. United Nations Working Group on Arbitrary Detention and Military Courts. The United Nations Working Group on Arbitrary Detention has stated, regarding military courts, as follows:

> "one of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the International Covenant on Civil and Political Rights, the Working Group has none the less found by experience that virtually none of them respects the guarantees of the right to a fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant." (Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1996/40, at 26)

38.6. The United States must comply with customary international law norms codified in Article 75 of Additional Protocol I to the Geneva Conventions. Finally, as regards customary international law, the United States is bound to comply with the detention-related and other rights provided for under customary international law as codified in Article 75 of the Additional Protocol I to the Geneva Conventions.

38.7. Arbitrary detention and prolonged arbitrary detention prohibited during times of peace and times of war. The right to be free from arbitrary detention protects persons during times of peace and during times of war. That is, states are not permitted to derogate from their obligation to ensure that persons are not arbitrarily detained, even if a state of emergency exists. The Human Rights Committee in General Comment No. 29 has stated that:

> "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."[53]

N. The right to a fair trial

39. What is the right to a fair trial?

39.1. **Fair trial rights.** A fair trial prevents the unlawful and arbitrary deprivation by the State of the human rights of an individual charged with a crime (e.g. the right to liberty). The right to a fair trial is guaranteed by treaties, customary international law, and general principles of law in the areas of international human rights law, international humanitarian law, and international criminal law. Thus, right to a fair trial can be found in:

> (a) international human rights law treaties, customary international law norms of international human rights law, and general principles of international human rights law; and
>
> (b) international humanitarian law treaties, customary international law norms of international humanitarian law, and general principles of international humanitarian law; and

40. Importance of Fair Trial Rights under U.S. law and practice, generally.

40.1. **Long Tradition of Fair Trial.** The United States has long had in place a tradition of affording defendants the right to a fair trial.

40.2. **This human rights tradition carries over to US Foreign policy and practice.** The United States has long recognized its international human rights law obligations vis-à-vis its own citizens and vis-à-vis persons subject to U.S. jurisdiction. The U.S. champions itself as a leading nation in complying with international human rights law norms, and openly condemns states that violate the human rights of their own people.[54] A foreign policy goal of the U.S. is to promote human rights abroad, and to that

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[53] *General Comment No. 29, State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) (*See*, *supra*, discussing relationship between international human rights law and international humanitarian law.)

[54] Rep. Christopher H. Smith, who is the Chairman of the United States House of Representatives Committee on International Relations, Subcommittee on Africa, Global Human Rights and International Operations, addressed the topic of human rights, the United States, and foreign policy. The following statement was prepared and delivered by Mr. Smith for a hearing of the sub-committee.

> "I am pleased to convene this hearing of the Subcommittee on Africa, Global Human Rights and International Operations. The Subcommittee today is not only reviewing the State Department's 2004 Country Reports on Human Rights Practices; it is also examining the state of human rights around the world.

end, the U.S. federal legislation prohibits the granting of U.S. aid to countries that the U.S. finds in breach of international human rights law. In accordance with the United Nations Charter (which is a treaty which binds the U.S. since the U.S. ratified the treaty and is a U.N. member), Section 502-B(a)(1) of the Foreign Assistance Act of 1961 outlines U.S. policy as regards international human rights law norms and compliance. Section 502-B, which is codified at 22 U.S.C. section 2304, provides:

> "Sec. 502B. Human Rights. -- (a) (1) It is the policy of the United States, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. To this end, a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights by all countries.
>
> "(2) It is further the policy of the United States that . . . no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.
>
> "(3) In furtherance of the foregoing policy the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.
>
> "(b) The Secretary of State shall transmit to the Congress, as part of the presentation materials for security assistance programs proposed for each fiscal year a full and complete report, prepared with the assistance of the Coordinator for Human Rights and Humanitarian Affairs, with respect to practices regarding the observance of and

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> "Let me begin by making some general observations about human rights. First, the very idea of human rights presupposes that certain rights are fundamental, universal, and inalienable. They are too important to be taken away or circumscribed by governments. The right to life, religion, speech, assembly and due process are the pillars of a free, sane and compassionate society.
>
> "Second, the United States has a commitment to human rights that is unique in the history of the world. President Bush in his State of the Union speech in January reminded us that "Our founders dedicated this country to the cause of human dignity, the rights of every person, and the possibilities of every life. This conviction leads us into the world to help the afflicted, and defend the peace, and confound the designs of evil men.
>
> "Human rights are indivisible, mutually reinforcing and all inclusive. Human rights cannot be abridged on account of race, color, creed, gender, age or condition of dependency. Inclusiveness means everyone… ."

The Hearing was entitled *A Global Review of Human Rights: Examining the State Department's 2004 Annual Report*. (The hearing took place on March 17, 2005. <http://wwwc.house.gov/international_relations/109/smith031705.htm> (last visited 11 November 2005)

respect for internationally recognized human rights in each country proposed as a recipient of security assistance."

40.3. The United States insisted on fair trial provisions in the ICTY Statute, the ICTR Statute, the ICC Statute, the Statute of the Iraq Tribunal, and other similar instruments.

40.3.1. U.S. Proposal for fair trial rights in the ICTY Statute. In a letter dated 12 April 1993, Madeleine K. Albright suggested to UN Secretary General, *inter alia*, rights of the accused to be incorporated into the ICTY Statute.[55] This U.S. proposal for rights of the accused in the ICTY Statute provided that "accused persons shall be presumed innocent until proved guilty beyond a reasonable doubt in a public trial" (para. 1), and that "each accused person shall have the rights guaranteed under international law and by this Charter, including the right: (a) [t]o be informed promptly and in detail, in a language which the accused person understands, of the nature and cause of the charge against him or her; (b) [t]o be informed of the evidence supporting the accusation against him or her, and to be provided any exculpatory evidence in the possession of the Chief Prosecutor; (c) [t]o have adequate time and facilities for the preparation of a defence and communication with defence counsel; (d) [t]o be tried without undue delay; (e) [t]o be tried in his or her presence, and to defend him- or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, without payment by him or her in any such case if

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[55] *See* Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, *S/25575/, 12 April 1993,* reprinted in, V. Morris & M. Scharf, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, Volume 2, pp. 451-457, at 456. The rights of the accused article ultimately incorporated into the ICTY Statute closely resembles the aforementioned U.S. proposal. Article 21 of the ICTY Statute, which is available at <http://www.un.org/icty/legaldoc-e/index.htm> (last visited 11 November 2005), provides:

> 1. All persons shall be equal before the International Tribunal.
>
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
>
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
>
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (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 of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (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 if he cannot understand or speak the language used in the International Tribunal;
>
> (g) not to be compelled to testify against himself or to confess guilt."

he does not have sufficient means to pay for it; (f) [t]o examine, or have examined, the witnesses against the accused person and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; (g) [t]o have the free assistance of an interpreter at all phases of the proceedings against him or her if the accused person cannot understand or speak the language used in court; (h) [n]ot to be compelled to testify against him- or herself or to confess guilt and not to have his or her failure to make any statement or explanation used against him or her; and] (i) [t]o appeal the judgment and sentence of the Trial Court in accordance with article 24 of this Charter." (para 1, (a) – (i))

40.3.2. The U.S. and rights of the accused in statutes of the ICTR, the ICC,[56] and the Iraqi Tribunal. Though the United States greatly influenced the rights of the accused sections of various statutes for tribunals with jurisdiction over international crimes, this Affidavit will not detail that influence because the U.S. proposals for ICTY rights of the accused mimic U.S. proposals for rights of the accused in those other tribunal statutes.

40.4. The U.S. should insist on the right to a fair trial being afforded in the case of *U.S. v. David M. Hicks*. In the case of *United States v. David M. Hicks*, the United States should continue its long tradition of supporting the right to a full and fair trial as provided for in international law.

41. Importance of a fair trial in the military commissions

41.1. Fair trial rights – Nuremberg. Mr. Justice Robert H. Jackson, who was the Chief Prosecutor in the Nuremberg Trials that judged the major war criminals following World War II, stressed the importance of trials of this nature being full and fair. In his opening statement to the International Military Tribunal on 21 November 1945, he stated:

> "Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate . . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice." (reprinted in II TRIAL OF THE MAJOR WAR CRIMINAL BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, *Second Day, Wednesday, 21 November 1945, Part 04*, *Morning Session,* at page 101(published at Nuremberg, 1947)).

42. Fair trial rights in international human rights law and international humanitarian law

[56] Other ICC Statute articles that address the right to a fair trial include article 64(2), which provides: "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

Furthermore, article 64(8)(b) provides: At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner.

42.1. The United States is bound to comply with international human rights law and international humanitarian law. The United States is bound by two distinct yet overlapping bodies of international law that enumerate fair trial protections for David M. Hicks and the other the prisoners at Guantanamo Bay: (i) international human rights law; and (ii) international humanitarian law.

42.2. These two bodies of law -- international human rights law and international humanitarian law – are similar in that sources of each area can be found in treaties and customary international law. One significant distinction between the two areas is that international humanitarian law applies to protect the rights of individuals in situations of international and non-international armed conflict only, whereas international human rights law protects individual during both war and peacetime. International humanitarian law and international human rights law are complementary. Where the two spheres overlap, they will not be mutually exclusive. Rather, the most favorable protection available will apply.[57]

42.3. No Derogation Permitted from Fair Trial Rights Under International Human Rights Law or International Humanitarian Law. The United Nations Human Rights Committee, in *General Comment 29: States of Emergency,* Paragraph 16 noted that because the right to a fair trial is provided for in both international human rights law and international humanitarian law, there is no justification for permitting a State to derogate from obligations to provide fair trial rights to all individuals during periods of armed conflict. Paragraph 16 of *General Comment 29* provides:

> "Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant. [footnote omitted]"

43. The right to a fair trial for every human, including prisoners held at Guantanamo Bay

43.1. All humans have the right to a fair trial. All human beings, irrespective of who they are or the nature of their alleged crimes, have the right to a fair trial. The right to a fair trial on a criminal charge begins

[57] *See* Douglas Cassell & Bridget Arimond, *Violations of International Human Rights and Humanitarian Law Arising From Proposed Trials before United States Military Commissions* at 9, 15, (unpublished paper) (17 June 2004). International humanitarian law treaties confirm the applicability of the "more favorable provision" rule which benefits the accused. *Id.* For example, Additional Protocol I, article 75, provides that trials should be conducted "in accordance with the applicable rules of international law" and that "no provision of [article 75] may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law", including protection resulting from another treaty. In the case of *United States v. David M. Hicks,* the "applicable rules of international law" referred to in Article 75 would direct the tribunal to the rules of international human rights law. Thus, Mr. Hicks should be afforded a full and fair trial in line with international human rights law.

to run at the date that State activities 'substantially affect the situation of the person concerned'.[58] Irrespective of how the accused David M. Hicks might be classified, he retains the right to a fair trial under international human rights law, international humanitarian law, international criminal law, general U.S. law, and the law of the military commissions.

43.2. Fair trial under the ICCPR[59] and under the customary international law codified in Additional Protocol I of the Geneva Conventions. The principal international law sources that serve as benchmarks for a fair trial are:

(a) the ICCPR; and

(b) customary international law codified in article 75 of Additional Protocol I.

43.3. The right to a fair trial found in U.S. Military Manuals[60]

43.3.1. U.S. Field Manual (1956). This U.S. Field Manual's fair trial provision is verbatim Common Article 3 of the Geneva Conventions, and Geneva Convention III, Articles 102 and 108.

43.3.1.1. Section 502 of the U.S. Field Manual provides that "willfully depriving a prisoner of war or a protected person of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions.

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[58] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1993), at 244.

[59] The United Nations Human Rights Committee, which is the treaty body that oversees implementation of the ICCPR, has noted that the fair trial provisions of ICCPR, article 14 apply to all trials in all courts, whether the courts are ordinary or special. *See* paragraph 4 of Human Rights Committee General Comment 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument> (also noting that "*the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.")

[60] Some of this Affidavit's citations to U.S. Military Manuals were found in CUSTOMARY INTERNATIONAL HUMANITARIAN LAW – VOLUME II: PRACTICE (PART 2) (eds. Jean-Marie Henckaerts & Louise Doswald-Beck) (Cambridge University Press (2005)) (hereinafter "ICRC CUSTOMARY INTERNATIONAL LAW STUDY.) Indeed, the ICRC CUSTOMARY INTERNATIONAL LAW STUDY cites Military Manuals not only of the U.S., but also Military Manuals of many other countries on the topic of the right to a fair trial. For example, the ICRC CUSTOMARY INTERNATIONAL LAW STUDY notes that the right to a fair trial is provided for in the Military Manuals of many countries, and that some of these Military Manuals provide for punishment of individuals who deny others of their right to a fair trial. Such Military Manuals include: Argentina's Law of War Manual; Australia's Commanders' Guide; Belgium's Law of War Manual; Benin's Military Manual; Burkina Faso's Disciplinary Regulations; Cameroon's Disciplinary Regulations; Canada's LOAC Manual; Colombia's Basic Military Manual; Colombia's Instructors' Manual; Colombia's Soldiers' Manual; Colombia's Circular on Fundamental Rules of IHL; Congo's Disciplinary Regulations; Ecuador's Naval Manual; El Salvador's Human Rights Charter of the Armed Forces; El Salvador's Soldiers' Manual; France's Disciplinary Regulations; France's LOAC Summary Note; Frances's LOAC Teaching Note; France's LOAC Manual; Germany's Military Manual; Indonesia's Directive on Human Rights in Trikora; Italy's IHL Manual; Kenya's LOAC Manual; South Korea's Military Regulation 187; Madagascar's Military Manual; Mali's Army Regulations; Morocco's Disciplinary Regulations; the Military Manual of the Netherlands; New Zealand's Military Manual; Nicaragua's Military Manual; Nigeria's Manual on the Laws of War; Peru's Human Rights Charter of the Security Forces; Peru's Human Rights Charter of the Armed Forces; Russia's Military Manual; Senegal's Disciplinary Regulations; Senegal's IHL Manual; South Africa's LOAC Manual; Spain's LOAC Manual; Sweden's Military Manual; Sweden's IHL Manual; Switzerland's Basic Military Manual; Togo's Military Manual; the UK Military Manual; the UK LOAC Manual (*see* ICRC CUSTOMARY INTERNATIONAL LAW STUDY, *paras*. 2836-2887, pages 2369-2376) (*quoting* Military Manuals of numerous countries). Quotes from the following are found in the ICRC CUSTOMARY INTERNATIONAL LAW STUDY: U.S. Field Manual; the US Air Force Pamphlet; the US Air Force Commander's Handbook; the US Soldier's Manual; the U.S. Instructor's Guide; and the U.S. Naval Handbook. (*see paras*. 2882-2887, pages 2375-2376*)*

43.3.1.2. Section 504(1) of the U.S. Field Manual provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes') . . . killing without trial spies or other persons who have committed hostile acts".

43.3.2. US Air Force Pamphlet (1976).

43.3.2.1. Section 13-8 of the US Air Force Pamphlet notes that Geneva Convention III "provides specific safeguards and guarantees of fair judicial proceedings".

43.3.2.2. Section 14-2 of the U.S. Air Force Pamphlet provides that "protected persons in occupied territory who are detained for spying or sabotage . . . are guaranteed the right to a fair trial."

43.3.2.3. Section 15-3(c)(10)-(11) of the U.S. Air Force Pamphlet provides that "willfully killing without trial persons in custody who have committed hostile act" and "deliberate deprivation of fair trial rights to any protected persons" are acts involving individual criminal responsibility".

43.3.3. The US Air Force Commander's Handbook (1980)

43.3.3.1. The U.S. Air Force Commander's Handbook provides that "a prisoner of war must be tried by the same courts as try members of the armed forces of the detaining power, and must be given the same procedural rights as members of the state's armed forces". (section 4-2(c))

43.3.3.2. The U.S. Air Force Commander's Handbook provides that "even terrorists, spies, and illegal partisans have the right to be tried and cannot be summarily executed." (Section 4-2(e))

43.3.3.3. Further, the U.S. Air Force Commander's Handbook provides that war crimes trials "must meet certain minimum standards of fairness and due process, now set out in detail in the 1949 Geneva Conventions" and that the "failure to accord captured personnel the right to a fair trial is itself a serious violation of the law of armed conflict". (Sections8-3(a) and (b))

43.3.4. The US Soldier's Manual (1984)

43.3.4.1. The US Soldier's Manual bans sentencing protected persons without a proper trial. (pp. 5 & 20)

43.3.5. The U.S. Instructor's Guide (1985)

43.3.5.1. The U.S. Instructor's Guide provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . killing, without proper legal trial, spies or other captured persons who have committed hostile acts". (pp. 13 & 14)

43.3.6. The U.S. Naval Handbook (1995)

43.3.6.1. The U.S. Naval Handbook states that "the following acts are representative war crimes . . . denial of a fair trial" in cases of prisoners of war and civilian inhabitants of an occupied territory. (Section 6.2.5(1) and (2))

43.3.6.2. The U.S. Naval Handbook states that the "failure to provide a fair trial for the alleged commission of a war crime is itself a war crime". (Section 6.2.5(2) and (3))

43.3.6.3. The U.S. Naval Handbook states that "individuals captured as spies or as illegal combatants . . . may not be summarily executed" and that they "have the right to be fairly tried for violations of the law of armed conflict." (Section 11.7)

43.4. The United States is bound by the international human rights law fair trial norms contained in the ICCPR because the US signed and ratified that treaty. The United States is bound by the international human rights fair trial law norms contained in article 75 of Additional Protocol I to the Geneva Conventions because those norms have risen to the level of customary international law and bind all nations.

43.5. Fair trial rights in times of peace and in times of war. The ICCPR would generally apply to the right to a fair trial in times of peace, but would also be relevant in times of armed conflict. The customary international law rules codified in article 75 of the Additional Protocol I would apply in times of armed conflict.

43.6. Right to a fair trial found in International Tribunal Statutes, including the ICTY & ICTR

43.6.1. The *ICTY Statute* provides for the right to a fair trial.

43.6.1.1. The *ICTY Statute* provides that willful deprivation of a prisoner of war or a civilian of the rights of fair and regular trial is criminalized. (Article 2(f))

43.6.1.2. The *ICTY Statute* provides that "the Trial Chambers shall ensure that a trial is fair". (Article 20(1))

43.6.1.3. The *ICTY Statute* provides that "in the determination of charges against him, the accused shall be entitled to a fair and public hearing". (Article 21(2))

43.6.2. The *ICTR Statute* provides, as regards the right to a fair trial:

43.6.2.1. The *ICTR Statute* provides that the ICTR can prosecute violations of common Article 3 of the Geneva Conventions, including "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". (article 4(g))

43.6.2.2. The *ICTR Statute* provides that "[t]he Trial Chambers shall ensure that a trial is fair". (Article 19(1))

43.6.2.3. The *ICTR Statute* provides that "in the determination of charges against him or her, the accused shall be entitled to a fair and public hearing". (Article 20(2))

43.7. Right to a fair trial found in other international instruments, including the ***Lieber Code of 1863***,[61] the ***International Military Tribunal for the Far East (Tokyo Charter)***,[62] the ***Universal Declaration of Human Rights,***[63] the ***American Declaration on the Rights and Duties of Man***,[64] and the ***Nuremberg Principles of 1950***[65].

43.7.1. The Lieber Code of 1863, article 148 provides that "[t]he law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry".

43.7.2. The IMT Tokyo Charter provides for fair trial rights for the accused and lists procedures to be followed "in order to insure a fair trail for the accused". (article 9)

43.7.3. The Universal Declaration of Human Rights provides that "everyone is entitled in full equality to a fair and public hearing". (article 10)

43.7.4. American Declaration on the Rights and Duties of Man, in a section entitled "right to a fair trial", provides that "every person may resort to the courts to ensure respect for his legal rights". (Article 18)

43.7.5. The Nuremberg Principles provides that "any person charged with a crime under international law has the right to a fair trial on the facts and law". (adopted by the International Law Commission in 1950) (article V).

44. The International Covenant on Civil and Political Rights (ICCPR) and the Right to a Fair Trial

44.1. The ICCPR binds the United States. As mentioned above, the ICCPR legally binds the United States because the United States ratified this treaty in 1992. (*See* Restatement of Foreign Relations Law Third, Vienna Convention on the Law of Treaties, arts 1(g), 26; etc.)

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[61] Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863. http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument (last visited 10 November 2005)

[62] Charter of the International Military Tribunal for the Far East, <http://www.yale.edu/lawweb/avalon/imtfech.htm> (last visited 10 November 2005)

[63] <http://www.unhchr.ch/udhr/lang/eng.htm> (last visited 10 November 2005)

[64] < http://www.cidh.org/Basicos/basic2.htm> (last visited 10 November 2005)

[65] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal http://www.un.org/law/ilc/texts/nurnberg.htm (last visited 10 November 2005). The text of this international instrument was adopted by the Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.

44.2. Executive Order re-affirming U.S. obligations to comply with ICCPR. As mentioned above, the United States has re-affirmed its commitment to comply with its obligations to respect the rights of individuals under the International Covenant on Civil and Political Rights. The Executive Order of 1998 provided that "[i]t 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 international human rights treaties to which it is a party, including the ICCPR". The Executive Order continues that it "[a]ll executive departments and agencies [including military commissions] 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".

44.3. ICCPR fair trial rights – Generally. The ICCPR extensively details the right to a fair trial, covering protections from pre-arrest to trial to appeal and beyond. Though many ICCPR fair trial rights are found in article 14, other ICCPR articles provide for rights that are also relevant to a fair trial. Among these other articles are article 9 (which provides for rights related to arrest, detention, and liberty and security of the person in general), article 10 (which provides for treating detained persons with humanity and with respect for the inherent dignity of the human person), article 15 (which prohibits, *inter alia*, ex post facto criminal laws), among others. In short, the ICCPR provides for the rights of the accused at all stages of proceedings against him, with these rights including the right to a fair trial.

44.4. Specifically, as regards the right to a fair trial, the ICCPR, article 14(1) provides that: "in the determination of any criminal charge . . . or . .. 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."

44.5. Article 14(3) of the ICCPR then lists the minimum level of rights that are guaranteed to all persons who are charged with a criminal offence, where those rights are guaranteed to those persons "in full equality".

44.6. The language in ICCPR article 14 that serves to protect the rights of the accused is mimicked in language in other international human rights law treaties. That these international human rights norms are contained in so many international human rights law instruments support the theory that fair trial norms have risen to the level of customary international law, and are thus binding on the United States irrespective of the binding or non-binding nature of these or other international instruments. Several of the international agreements that expressly codify the right to a fair trial follow:

44.6.1. The *European Convention on Human Rights* in article 6(1) provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[66]

44.6.2. The *European Union Charter of Fundamental Rights* in article 47 provides that "everyone is entitled to a fair and public hearing within a reasonable period of time by an independent and impartial tribunal previously established by law".

[66] European Convention on Human Rights, article 6(3) lists the set of minimum rights guaranteed to all persons charged with a criminal offence.

44.6.3. The *American Convention on Human Rights* in article 8(1) provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.[67]

44.6.4. The *African [Banjul] Charter on Human and Peoples' Rights*[68] in article 7 provides that "[e]very individual shall have the right to have his cause heard".

44.6.5. The *Convention on the Rights of the Child* in article 40(2)(b)(iii) provides that "every child alleged as or accused of having infringed the penal law has at least the following guarantees:…(iii) to have the matter determined without delay by a competent . . . authority or judicial body in a fair hearing according to law."

44.7. ICCPR rights as fair trial rights under the ICTY. The ICTY has recognized the ICCPR as establishing minimal procedural guarantees for a fair trial. *See* ICTY Trial Chamber Decision, *Prosecutor v. Momcilo Krajisnik,* Decision on Motion Challenging Jurisdiction, para. 15(ii) (22 September 2000) (*quoting Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 41) (noting that a fair trial is one that "meets the requirements for procedural fairness; in particular, it affords the accused the full guarantees of a fair trial set out in Article 14 of the ICCPR").

44.8. ICCPR fair trial rights – Enumerated. The ICCPR provides that all States Parties to the ICCPR (including the U.S.) are obligated to afford every person suspected of or accused of a crime, in proceedings in that State's territory or under the jurisdictional control of that State, fundamental, basic human rights, some of which rights are known in the U.S. as "due process rights" and which include:

44.8.1. the right to liberty and security of person, including a prohibition on arbitrary arrest or detention (ICCPR, art 9(1));[69]

44.8.2. the right to be informed of reasons for his arrest and detention (ICCPR, art 9(2));[70]

44.8.3. the right to be brought promptly before a court (ICCPR, art 9(3) & (4));[71]

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[67] American Convention on Human Rights, article 8(2) lists the set of minimum rights guaranteed to all persons "with full equality".

[68] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986. < http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf> (last visited 11 November 2005).

[69] The right to liberty and security of person, including a prohibition on arbitrary arrest or detention is also provided for in the following international instruments: UDHR, articles 3, 9; European Convention, article 5(1); African Charter, article 6; American Convention, Article 7(1)-(3); and the ICC Statute, article 55(1)(d).

[70] The right to be informed of reasons for his arrest and detention is also provided for in the following international instruments: European Convention, Article 5(2); American Convention, Article 7(4); Body of Principles on Detention or Imprisonment, Principle 10; 1992 Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and Peoples' Rights, para. 2(b); ICTY Statute Article 21(4)(a); ICTR Statute, Article 20(4)(a).

[71] The right to be brought promptly before a court is also provided for in the following international instruments: European Convention, article 5(3); American Convention, article 7(5); African Commission Resolution, Paragraph 2(C); and ICC Statute, Article 59(2). *See* Body of Principles on Detention or Imprisonment, Principles 11, 38; and Declaration on the Protection of all Persons from Enforced Disappearance, UN General Assembly resolution 47/133, December 18, 1992, article 10(1).

44.8.4. the right to proceedings to determine the lawfulness of detention (ICCPR, art 9(4));[72]

44.8.5. a prohibition on torture or cruel, inhuman or degrading treatment or punishment during detention (ICCPR, arts 7, 9(1); 10(1));[73]

44.8.6. the right to be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, arts 7, 9(1); 10(1));[74]

44.8.7. the right to equality before the courts and tribunals (ICCPR, art 14(1));[75]

44.8.8. the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (ICCPR, art 14(1));[76]

44.8.9. the right to a be presumed innocent until proved guilty according to law (ICCPR, art 14(2));[77]

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[72] The right to proceedings to determine the lawfulness of detention is also provided for in the following international instruments: European Convention, article 5(4); American Convention, article 7(6); and Body of Principles on Detention or Imprisonment, Principle 32.

[73] The right to be free from torture or cruel, inhuman or degrading treatment or punishment during detention is also provided for in the following international instruments: UDHR, Article 5; Body of Principles on Detention or Imprisonment, Principle 6 ("No person under any form of detention or imprisonment shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.") *See also* Code of Conduct for Law Enforcement Officials, Article 5 ("No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.")

[74] The right to be treated with humanity and with respect for the inherent dignity of the human person is also provided for in the following international instruments: American Convention, Article 5; African Charter, Articles 4-5; Basic Principles for the Treatment of Prisoners, Principle 1; and Body of Principles on Detention or Imprisonment, Principle 1.

[75] The right of all persons to equality before the courts and tribunals is also provided for in many different international instruments. This right has been interpreted to mean that without impermissible discrimination, all persons must be granted the right of equal access to courts and tribunals.

[76] The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is also provided for in the following international instruments: UDHR, Article 10; Principles on the Independence of the Judiciary, Principle 2 ("The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."); American Convention, Article 8(1); and European Convention, Article 6(1). *See Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120; *Fey v. Austria*, 24 February 1993, 255 Ser. A 13, para. 34; *Collins v. Jamaica*, (240/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 236 para. 8.4; See also American Convention, article 27(2) (the right to a competent, independent, impartial judiciary, may not be suspended even in states of emergency); *Inter*-American Court, Advisory Opinion OC-8/87, 30 January 1987, *Habeas Corpus in Emergency Situations*; Inter-American Court, Advisory Opinion OC-9/87, 6 October 1987, *Judicial Guarantees in States of Emergency*, OAS/Ser.L/V/III.19 doc.13, 1988; Article 67(1) of the ICC Statute (guaranteeing a fair hearing conducted impartially).

[77] The right to be presumed innocent is found in the following international instruments: UDHR, article 11 ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."); American Convention, article 8(2) ("Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law".); European Convention, article 6(2) ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"); Article 48(1) of the EU Charter of Fundamental Rights ("everyone who has been charged shall be presumed innocent until proven guilty according to law"); Additional Protocol I, article 75(4)(d) ("Anyone charged with an offence is presumed innocent until proved guilt according to law"); ICC Statute,

44.8.10. the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (ICCPR, art 14(3)(a));[78]

44.8.11. the right to have adequate time and facilities for the preparation of his defense (ICCPR, art 14(3)(b));[79]

44.8.12. the right to communicate with counsel of his own choosing (ICCPR, art 14(3)(b));[80]

44.8.13. the right to be tried without undue delay (ICCPR, art 14(3)(c));[81]

44.8.14. the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; the right to be informed, if he does not have legal assistance, of this right; and the right to have legal assistance assigned to him, in any

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article 66(1) ("Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.); article 21(3) of the ICTY Statute ("The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute"); ICTR Statute, article 20(3) ("The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute"); Cairo Declaration on Human Rights in Islam, article 19(e) (1990) ("A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence"); Principle 36(1) of the Body of Principles on Detention or Imprisonment; African Charter, Article 7(1)(b); and African Commission Resolution, Paragraph 2(D).

[78] The right to be informed promptly of the charges in a language that the accused understands is also provided for in the following international instruments: European Convention, Article 5(2); American Convention, Article 7(4); Body of Principles on Detention or Imprisonment, Principle 10; 1992 Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and Peoples' Rights, para. 2(B) (http: //www1.umn.edu/humanrts/africa/achpr11resrecourse.html).

[79] The right to have adequate time and facilities for the preparation of his defense is also provided for in the following international instruments: European Convention, Article 6(3)(b); American Convention, Article 8(2)(c); African Commission Resolution, Article 2(e)(1); ICC Statute, Article 67(1)(b); ICTY Statute, Article 21(4)(b); and ICTR Statute, Article 20(4)(b). *See also Report on the Mission of the Special Rapporteur [on the Independence of Judges and Lawyers, Dato Param Cumaraswamy] to the United Kingdom of Great Britain and Northern Ireland*, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 46. <http://daccessdds.un.org/doc/UNDOC/GEN/G98/107/16/PDF/G9810716.pdf?OpenElement> (last visited 11 November 2005)

The term "facilities" is defined to include, *inter alia,* that the accused and counsel for the accused must be granted access to appropriate information, documents, files, etc that are necessary to prepare a defense and that the accused is entitled to be provided with physical facilities that will permit confidential communication with counsel for the accused. *See General Comment 13*, para 9; Basic Principles on Lawyers, Principles 8, 21. As regards this right, the accused must be permitted to communicate with counsel of his own choosing for the preparation of a defense.

[80] The right to communicate with counsel of his own choosing is also provided for in the following international instruments: Body of Principles on Detention or Imprisonment, Principles 15, 16; African Commission Resolution, Article 2(E)(1); American Convention, Article 8(2)(d); European Convention, Article 6(3)(c). The Human Rights Committee has stated that "all persons who are arrested must immediately have access to counsel." (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, 5 May 1997, para 27). *See also Report on the Mission of the Special Rapporteur [on the Independence of Judges and Lawyers, Dato Param Cumaraswamy] to the United Kingdom of Great Britain and Northern Ireland*, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 47.

[81] The right to be tried without undue delay is also provided for in the following international instruments: ICTY Statute, Article 21(4)(c); ICTR Statute, Article 20(4)(c); Body of Principles on Detention or Imprisonment, Article 38; African Commission Resolution, Article 2(e)(ii); ICC Statute, Article 67(1)(c). The right to be tried without undue delay has been interpreted in the jurisprudence of many international bodies, including international criminal tribunals and treaty bodies of the United Nations.

case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it (ICCPR, art 14(3)(d));[82]

44.8.15. the right to examine, or have examined, the witnesses against him (ICCPR, art 14(3)(e));[83]

44.8.16. the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (ICCPR, art 14(3)(e));[84]

44.8.17. the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court (ICCPR, art 14(3)(f));[85]

44.8.18. the right not to be compelled to testify against himself or to confess guilt (ICCPR, art 14(3)(g));[86]

44.8.19. the right to review of a conviction and sentence by a higher tribunal according to law (ICCPR, art 14(5));[87] and

44.8.20. a prohibition on retroactive application of criminal laws (ICCPR, art 15(2)).[88]

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[82] The right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; the right to be informed, if he does not have legal assistance, of this right; and the right to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it is also provided for in the following international instruments: American Convention, Articles 8(2)(d), 8(2)(e); European Convention, Article 6(3)(c); ICC Statute, Article 67(1)(d); ICTY Statute, Article 21(4)(d).

[83] The right to examine, or have examined, the witnesses against him was guaranteed in various international instruments, including the IMT Charter (Nuremberg) which provided (in article 16(e)) that "A Defendant shall have the right . . . to cross-examine any witness called by the Prosecution". This right is also guaranteed in many other international instruments, including the following: European Convention, article 6(3)(d) (right "to examine or have examined witnesses against him"); American Convention, art 8(2)(f) (accused guaranteed "the right of the defense to examine witnesses present in the court"); Additional Protocol 1 of the Geneva Conventions, art 75(4)(g) ("Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him"); ICC Statute, art 67(1)(e) (accused is entitled "to examine, or have examined, the witnesses against him or her"); Statute of the Special Court for Sierra Leone, article 17(4)(e) (accused has the right "in full equality . . . to examine, or have examined, the witnesses against him or her"); ICTY Statute, article 21(4)(e) (right "to examine, or have examined, the witnesses against him"); ICTR Statute, article 20(4)(e) (accused shall have the right "to examine, or have examined, the witnesses against him or her"). *See also* 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind, Article 11(1)(f); IMT Charter of Tokyo, article 9(d); Convention on the Rights of the Child, article 40(2)(b)(iv); and African Commission Resolution, Paragraph 2(e)(iii).

[84] The right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him is also provided for in the following international instruments: ICTY Statute, Article 21(4)(e); ICTR Statute, Article 20(4)(e).

[85] The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court is also provided for in the following international instruments: European Convention, Article 6(3)(e); American Convention, Article 8(2)(a); African Commission Resolution, Paragraph 2(E)(4); ICC Statute, Article 67(1)(f); ICTY Statute, Article 21(4)(f); and ICTR Statute, Article 20(4)(f).

[86] The right not to be compelled to testify against himself or to confess guilt is also provided for in the following international instruments: American Convention, Articles 8(2)(g) and 8(3); ICC Statute, Articles 55(1)(a) (pre-trial) and 67(1)(g); ICTY Statute, Article 21(4)(g); and ICTR Statute, Article 20(4)(g).

[87] The right to review of a conviction and sentence by a higher tribunal according to law is also provided for in the following international instruments: American Convention, Article 8(2)(h); and African Commission Resolution, para 3.

44.9. ICCPR rights as minimum guarantees. ICCPR rights are minimum guarantees to be afforded to all persons. The right to a fair trial is a substantive right that requires more than lip service. It requires that the government take positive action to ensure that each accused is accorded a fair trial . For fair trial rights to be provided fully, the principle of "equality of arms" must be respected. Equality of arms demands that both the defense and the prosecution be treated such that they have procedurally equal positions during all phases of all criminal proceedings. Examples of violations of equality of arms might include not allowing defendants to obtain witnesses under the same conditions as the prosecutor, denying the defense adequate facilities or adequate time to prepare a defense, excluding the accused from a portion of the trial but not excluding the prosecutor, etc.

44.10. Human Rights Committee – fair trial rights non-derogable. The Human Rights Committee, the expert body set up by the ICCPR to monitor that treaty's implementation, notes that the right to a fair trial is non-derogable, even during states of emergency. The Human Rights Committee stated "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency." (*General Comment No. 29*: "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.")

44.11. No reservation or attempted derogation on ICCPR fair trial rights. The United States did not attach a reservation to the fair trial rights embodied in the ICCPR when it ratified that treaty. There is no evidence that the United States has sought officially to derogate from ICCPR fair trial rights pursuant to the treaty.

44.12. U.S. obligation to ensure a fair trial for David M. Hicks. The United States is fully obligated to ensure that David M. Hicks receives a full and fair trial pursuant to the ICCPR.

44.13. Fair trial rights under the ICCPR, article 14 and under other areas of international law. Though a particularly relevant statement of the right to a fair trial is found in article 14 of the ICCPR, related rights are found throughout the ICCPR. During an armed conflict, the right to a fair trial is guaranteed by international humanitarian law as well as by international human rights law.

45. Customary international law norms codified in article 75 of Additional Protocol I.

45.1. Relevance of Additional Protocol I to *United States v. David M. Hicks.* If the Military Commission finds the existence of an armed conflict, and that international humanitarian law is relevant to the disposition of *United States v. David M. Hicks*, then the fair trial provisions of Additional Protocol I of the Geneva Conventions would apply because of the nature of the armed conflict and occupation involving Afghanistan.

45.2. Additional Protocol I, Article 1(3). Article 1(3) of Additional Protocol I provides that it "shall apply in the situations referred to in Article 2 common to" the Geneva Conventions. Common Article 2 provides that the Geneva Conventions "shall apply to all cases of declared war or of any other armed conflict

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[88] The right to be free from retroactive application of criminal laws is also provided for in the following international instruments: Article 11(2); European Convention, Article 7(1); American Convention, Article 9; African Charter, Article 7(2); and ICC Statute, Article 22(1).

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… .The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". Thus, article 75 of Additional Protocol I would have applied or would apply with respect to Afghanistan, either on the basis of the existence of an armed conflict, or due to partial occupation.[89]

45.3. U.S. obligations based on signing Protocol I. Because the United States signed the Additional Protocol I of the Geneva Conventions, the U.S. is bound not to take steps to defeat the object or purpose of that treaty. (*See* Vienna Convention on the Law of Treaties, Art. 18; *Restatement Third on Foreign Relations Law*, Section 312(3)) Full obligations affirmatively to comply with all Protocol I provisions as treaty law would only arise upon U.S. ratification of Protocol I. Protocol I, which applies in international armed conflicts, expands the categories of persons protected by the Geneva Conventions, and contains rules on the conduct of hostilities as they relate to civilians (proportionality, indiscriminate attacks against civilians and civilian objects, etc.).

45.4. Protocol 1 closes any vacuum in humanitarian law protection. Protocol 1 of the Geneva Conventions makes clear that any person who participates in an armed conflict is entitled to a minimum level of humanitarian law protection. Article 44 of Additional Protocol 1 provides, in relevant part:

> 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
>
> 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
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> 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) During each military engagement, and
>
> (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

[89] The provisions contained in Additional Protocol I are considered to be customary international law. Thus, to become bound by the norms contained in Article 75 of Additional Protocol I, neither the United States nor Afghanistan needs to have ratified that Protocol.

> 4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed."

45.4.1. Thus, for example, if a person who lawfully participates in an armed conflict does not qualify for prisoner of war status, that person is not void of all protection as no person falls outside a minimal level of protection of international humanitarian law. In the case of a person who "loses" prisoner of war status, that person shall have the equivalent level of protection.

45.4.2. If the U.S. Special Forces in Afghanistan lose prisoner of war status because they failed to wear uniforms to distinguish themselves from local civilians, those U.S. Special Forces, if captured by the Taliban or other hostile force though they would be lawfully denied prisoner of war status would be entitled to the equivalent level of international humanitarian law protection contained in Additional Protocol 1, article 75.

45.4.3. Likewise, if David Hicks is said to fall outside of prisoner of war status because he did not wear a uniform and distinguish himself from local civilians, he would still be entitled to the equivalent international humanitarian law protections contained in article 75 of Additional Protocol 1. Article 75 is available for all persons who participate in an armed conflict who are not entitled to prisoner of war status. Irrespective of David Hicks' status, he is entitled to the protections afforded by virtue of Article 75 of Additional Protocol I to the Geneva Conventions.

45.4.4. Martens Clause. These standards of customary law are sometimes referred to as "common standards of humanity" or the "Martens clause" (which was first mentioned in the Hague Conventions of 1907), and are intended to maintain certain principles of humanity and the dictates of the public conscience. The preamble of Additional Protocol II of 1977 Geneva Conventions contains the "Martens clause" and reads, *inter alia*:

> "Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience".

45.5. Protocol I, Article 75 provisions as customary international law. Because the fair trial norms codified in Article 75 of Additional Protocol I of the Geneva Conventions have risen to the level of customary international law, these Article 75 fair trial norms bind the United States even though the United States has not yet ratified Additional Protocol I. It should be noted that Article 75 of Additional Protocol I was adopted by the Diplomatic Conference by consensus.[90]

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[90] *See Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: Article 75 – Fundamental Guarantees*, para. 3017, 3019 (references to compromises that permitted the Diplomatic Conference to adopt Article 75 by consensus), <http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument> (last checked 11 November 2005); s*ee also* CDDH, *Official Records,* Vol. VI, CDDH/SR.43, 27 May 1977, p. 250 (*cited in* ICRC CUSTOMARY INTERNATIONAL LAW STUDY, Part 2, page 2364)

45.6. United States military officials conclude that article 75 of Additional Protocol I to Geneva Conventions has risen to the status of customary international law. In a 1986 memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD, several high-ranking military officers concluded that article 75, entitled "Fundamental guarantees", has risen to the level of customary international law. They noted that "[w]e view the following provisions as already part of customary international law", and then listed numerous Protocol provisions, including "Fundamental guarantees: Article 75". Military officials who signed the memorandum are (i) W. Hays Parks, Chief, International Law Branch, DAJA-IA; (ii) LCDR Michael F. Lohr, JAGC, USN; NJAG, Code 10; (iii) Dennis Yoder, Lt. Colonel, USAF, AF/JACI; and (iv) William Anderson, HQ, USMA/JAR. Others who participated in the preparation of the memo included (i) Lt. Col. Burrus M. Carnahan, USAF; and (ii) CDR John C. W. Bennet, JAGC, USN. (*Memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD,* responding to 26 March 1986 memorandum from Mr. McNeill asking "our views on which articles of the Protocol are currently recognized as customary international law").

45.7. Other military personnel, international law experts, and military manual drafters conclude that article 75 of Additional Protocol I to Geneva Conventions has risen to the status of customary international law. Other U.S. Government legal experts, leading human rights and humanitarian law experts, and military manuals of the United States have noted that the norms contained in article 75 of Additional Protocol I reflect customary international law.[91] In addition, the U.S. Army Judge Advocate General's School, International and Operational Law Department's *Operational Law Handbook* recognizes that the U.S. considers that norms contained in Protocol I, article 75 have risen to customary international law.[92] Again, customary international law norms bind all states without requiring that states expressly consent to be bound to the norms.

45.8. Additional Protocol I, article 45. Article 45 of Additional Protocol I concerns protection of persons who have taken part in hostilities. Article 45(3) provides that:

> "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth [Geneva] Convention shall have the right at all times to protection of Article 75 of this Protocol".

Thus, any person who may have taken part in the hostilities in Afghanistan and was captured by U.S. forces is entitled to the rights provided for in article 75.

45.9. Article 3, Additional Protocol I. Finally, article 3 of Additional Protocol I provides that persons whose final release, repatriation or re-establishment has not taken place by the general close of military

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[91] Douglas Cassell & Bridget Arimond, *Violations of International Human Rights and Humanitarian Law Arising From Proposed Trials before United States Military Commissions* 13, n. 85 and text accompanying note (unpublished paper) (17 June 2004) (*citing* T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989), *citing* Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the US Decision Not to Ratify* (1987) 81 *American Society of International Law Proceedings* 26, 37. Also cited in Cassel & Arimond, n. 85 are: *The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law* (1987) 2 *American University Journal of International Law and Policy*, 415, 427; and David Scheffer, 'Remarks' (2002) 96 *American Society of International Law Proceedings*, 404, 406.

[92] Available at <http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf>. Cassel and Arimond note that editions of the manual more recent than 1997 do not repeat the proposition that article 75 norms have risen to the level of customary international law. *See* Douglas Cassell & Bridget Arimond, *Violations of International Human Rights and Humanitarian Law Arising From Proposed Trials before United States Military Commissions* 13 (unpublished paper) (17 June 2004). But, the authors observe that the more recent editions do not retract the notion. *Id.*

operations or by termination of the occupation shall continue to benefit from the relevant provisions of Additional Protocol I and the Geneva Conventions until their final release, repatriation or re-establishment. Article 75 therefore attaches to, and is applicable to, individuals detained by U.S. forces, in whatever territory detained (making the Protocol apply extraterritorially to the conflict), even if general military operations have closed and even if occupation has not been terminated.

45.10. Article 75, Additional Protocol I – Fair trial rights parallel ICCPR. Additional Protocol I, Article 75 provides for extensive rights protections that parallel ICCPR safeguards and include:

45.10.1. the right to be treated humanely in all circumstances (article 75 (1));

45.10.2. an absolute prohibition of, at any time and in any place whatsoever, whether committed by civilian or by military agents, violence to the life, health, or physical or mental well-being of persons (article 75(2)(a) - (e));

45.10.3. a prohibition of torture of all kinds, whether physical or mental (article 75(2)(a)(ii));

45.10.4. a prohibition of corporal punishment (article 75(2)(a)(iii));

45.10.5. a prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault (article 75(2)(b));

45.10.6. a prohibition of collective punishments (article 75(2)(d));

45.10.7. a prohibition of threats to commit torture, outrages upon personal dignity, in particular humiliating and degrading treatment and any form of indecent assault, and other prohibited behavior (article 75(2)(e));

45.10.8. the right to be informed promptly of the reasons why the persons were arrested, detained or interned for actions related to the armed conflict, and to be informed of the particulars of any offence alleged (article 75(3));

45.10.9. the right to be brought before an impartial and regularly constituted court, respecting the generally recognized principles of regular judicial procedure (article 75(4));

45.10.10. the right that the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him (article 75(4)(a));

45.10.11. the right that the procedure shall afford for an accused before and during trial all necessary rights and means of defence (article 75(4)(a));

45.10.12. the right to be presumed innocent until proved guilty according to law (article 75(4)(d));

45.10.13. a prohibition on the retroactive application of criminal law (article 75(4)(c));

45.10.14. the right to be tried in his presence (article 75(4)(e));

45.10.15. the right 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 (article 75(4)(g));

45.10.16. a prohibition on compelling a person to testify against himself or to confess guilt (article 75(4)(f));

45.10.17. the right of anyone prosecuted for an offence to have the judgment pronounced publicly (article 75(4)(i)); and

45.10.18. the right to be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised (article 75(4)(j)).

45.11. Article 75, Additional Protocol I – Fair trial rights parallel Common Article 3 of the Geneva Conventions "judicial guarantees . . . recognized as indispensable by civilized peoples". Article 3 which is common to the four Geneva Conventions provides for fair trial rights in cases of non-international armed conflict.

45.11.1. Common Article 3 provides that each Party involved in a non-international armed conflict "shall be bound to apply, as a minimum" provisions of the Geneva Conventions that provide for the right to a fair trial. Common Article 3 provides that "the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to" persons not taking active part in the hostilities:

> "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".[93]

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[93] Common Article 3 of the Geneva Conventions of 1949 provides in full:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all cases be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth of wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The Commentary to Common Article 3 provides:

45.11.2. Meaning of "judicial guarantees." "Judicial guarantees which are recognized as indispensable by civilized peoples" include fair trial rights. The ICTY addressed this issue in *Prosecutor v. Tadic,* where in reference to the rights provided in common article 3, the ICTY recognized that "the rules contained in common Article 3 constitute a 'minimum yardstick' applicable in both international and non-international armed conflicts" and that "[t]he fact that common Article 3 is part of customary international law was definitively decided by the International Court of Justice in the *Nicaragua* case". (*Prosecutor v. Tadic*, Decision on the Defense Motion on Jurisdiction (1995) para. 67 (*citing Nicaragua v. U.S.,* 1986 I.C.J. 4 (Merits Judgement of 27 June 1986), <http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>) (last visited October 10, 2005).

The *Tadic* tribunal went on to note that as early as 1958, the international community found that common Article 3:

> "merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals."

Id. (quoting *Commentary on the Geneva Conventions of 12 August 1949: [No.] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 36*. (Pictet ed, 1958))

45.11.2.1. To further support this claim, the ICTY Trial Chamber in *Tadic* stated that

> "A more recent commentator notes that '. . . the norms stated in Article 3(1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law also applicable to non-international armed conflicts.' (Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 35 (1991).) The customary status of common Article 3 is further supported by statements made by representatives to the Security Council following the adoption of resolution 827 adopting the Statute of the International Tribunal. The United States representative explicitly stated that she considered Article 3 of the Statute to include common Article 3 of the 1949

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[s]entences and executions without previous trial are too open to error. "Summary justice" may be effective on account of the fear it arouses, but it adds too many innocent victims to all the other innocent victims of the conflict. *All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors.* The Convention has rightly proclaimed that it is essential to do this even in time of civil war or international war. We must be very clear about one point: it is only "summary" justice which is prohibited. The State retains its full right to prosecute, sentence and punish according to the law. (Commentary, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, http://www.icrc.org/IHL.nsf/0/230cd134a931bd55c12563cd00422e11?OpenDocument (last visited October 10, 2005) (emphasis added)).

> Geneva Conventions, and representatives from the United Kingdom and France made similar statements". *Id.* (quoting UN Doc. S/PV.3217 (25 May 1993), paras. 11, 15 and 19) (statement by Ambassador Madeline Albright during the UN Security Council Meeting at which the ICTY was approved by unanimous vote).

45.12. Inter-American Commission on Human Rights comment on "judicial guarantees" as due process rights. In *Egocheaga v Peru*, (1 BHRC 229 (1996)) the Inter-American Commission on Human Rights noted, as regards the term "judicial guarantees," that "[t]he Inter-American Court of Human Rights has observed [that Article 8 of the American Convention] recognizes the so-called 'due legal process', which encompasses the conditions to be met in order to ensure adequate defense of those whose rights and obligations are under judicial consideration. *Id.* (*quoting* (Inter-Am Ct of HR Judicial Guarantees in States of Emergency (Article 27(2), 25 and 8 of the American Convention on Human Rights), Consultative Opinion 0-C9/87 of October 6, 1987, Series A No 9, paras 27, 28).

45.13. The ICC Elements of Crimes (2000) define "denying a fair trial" by referring to the Geneva Conventions (particularly III & IV), for example, while noting that understanding "sentencing or execution without due process" requires assessing independence and impartiality and "all other judicial guarantees generally recognized as indispensable under international law" (as in common article 3).[94]

45.14. Turku Declaration on Judicial Guarantees. Article 9 of the Declaration of Minimum Humanitarian Standards (a/k/a the "Turku Declaration") provides that:

> "No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations".[95]

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[94] *See* para 2834 of the ICRC CUSTOMARY INTERNATIONAL LAW STUDY, p. 2368

[95] Article 9 then lists out the following judicial guarantees "in particular":

> a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her, shall provide for a trial within a reasonable time, and shall afford the accused before and during his or her trial all necessary rights and means of defence;
>
> b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> c) anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> d) anyone charged with an offence shall have the right to be tried in his or her presence;
>
> e) no one shall be compelled to testify against himself or herself or to confess guilt;
>
> f) no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure;
>
> g) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed.

The Turku Declaration was adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo, Finland, 30 November – 2 December 1990. It is reprinted in the *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, U.N. Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).

45.15. Obligations of the United States to ensure a full and fair trial for Mr. Hicks. The U.S. is fully obligated to ensure that David M. Hicks receives a full and fair trial pursuant to the customary international law norms codified in Article 75 of the Additional Protocol I to the Geneva Conventions.

O. Remedies for breach – general – avenues for recourse

46. Remedies available under international law and domestic law for violations of the internationally recognized human rights and humanitarian rights of David M. Hicks. The remedies available for individual victims of breaches of international human rights law and international humanitarian law are many. In seeking to identify appropriate remedies that should be available for breaches of Mr. Hicks' rights under international human rights law and international humanitarian law, it is appropriate to consider the following: (a) the ICCPR; (b) the Restatement Third; and (c) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*[96] (hereinafter "Basic Principles on Remedies and Reparation for Victims"). Furthermore, under a theory of state responsibility, the general rules of which are codified in the *International Law Commission Draft Rules of State Responsibility*, the responsibility of the United States is engaged by its breach of treaty and customary law in the case of *United States v. David M. Hicks.*

46.1. ICCPR Remedies.

46.1.1. ICCPR, article 2 remedies. The ICCPR expressly provides for remedies for persons whose human rights are violated. Because the United States is a party to the ICCPR, the United States has a responsibility to ensure that David M. Hicks has a remedy available for him for any breach by the United States of any of his internationally recognized human rights as contained in the ICCPR. As regards remedies, article 2(3) of the ICCPR provides:

> "3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized 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."

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[96] (E/CN.4/2000/62) (18 January 2000). The *Basic Principles on Remedies and Reparation for Victims* are available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/42bd1bd544910ae3802568a20060e21f?Opendocument> (last visited 11 November 2005)

46.1.2. *General Comment No. 31 remedies.* *General Comment No. 31* provides, as regards remedies, as follows:

> "15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.
>
> "16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.
>
> "17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.
>
> "18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those

violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

"Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

"19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations. "

46.2. Remedies under Section 703 of the Restatement Third. The Restatement Third, section 703, provides for remedies for when a state breaches its international human rights law obligations. Section 703 provides:

"(1) A state party to an international human rights agreement has, as against any other state party violating the agreement, the remedies generally available for violation of an international agreement, as well as any special remedies provided by the agreement.

(2) Any state may pursue international remedies against any other state for a violation of the customary international law of human rights (§ 702).

(3) An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements."

46.3. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.[97] Relevant portions of the Basic Principles an Guidelines on Remedies for Victims include:

> "Article 4 Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations."
>
> "Article 8 A person is 'a victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A 'victim' may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm."
>
> "Article 9 A person's status as 'a victim' should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted."
>
> "Article 11 Remedies for violations of international human rights and humanitarian law include the victim's right to:
>
> (a) Access justice;
>
> (b) Reparation for harm suffered; and
>
> (c) Access the factual information concerning the violations."
>
> "Article 21 In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition."
>
> "Article 22 Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property."
>
> "Article 23 Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

[97] <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/42bd1bd544910ae3802568a20060e21f?Opendocument> (last visited 11 November 2005)

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities, including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity; and

(e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services."

"Article 24 Rehabilitation should include medical and psychological care as well as legal and social services."

"Article 25 Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;

(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;

(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(f) Judicial or administrative sanctions against persons responsible for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;

(i) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting persons in the legal, media and other related professions and human rights defenders;

(v) Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials;

(vi) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;

(vii) Creating mechanisms for monitoring conflict resolution and preventive intervention.

46.4. Remedies under State Responsibility – the International Law Commission Draft Rules on State Responsibility

46.4.1. ILC Draft Rules of State Responsibility. Pursuant to the ILC Draft Rules of State Responsibility, when a state engages in an internationally wrongful act, state responsibility is triggered and the offending state owes amends to the offended state. *See ILC Draft Rules of State Responsibility*. *See, e.g., Legal Consequences of the Wall case*. (discussed *infra*).

46.4.1.1. Israel's State Responsibility upon breaching international law with the Wall. Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above). *(Para 149)*

46.4.1.2. Israel's state responsibility obligation to end the violation. Under paragraph 150 of the ICJ judgment, Israel has an obligation to end its violation of international law flowing from the construction of the Wall.

> Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation. (*Citing Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82). [Furthermore, the ICJ ruled that:]

> Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. . . . Cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem." (para 151)

46.4.1.3. Israel's obligation to repeal legislation and regulatory acts. The ICJ ruling provides that: "All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below."

46.4.1.4. Israel's reparation obligations. Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court recalled that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 41.)

46.4.1.5. Restitution – Israel's obligation to return the land, orchards, olive groves and other immovable property. Paragraph 153 of the judgment provides that:

> "Israel is under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction."

46.4.1.6. State Responsibility Obligation of other states not to recognize illegal situation resulting from construction of the Wall. Paragraph 159 of the ICJ Judgment provides:

> "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."

47. Specific remedies that might be available. Specific remedies available in *United States v. David M. Hicks* could include dismissal of the charges against Mr. Hicks, compensation, exclusion of evidence from use against him at trial, and restoration of his liberty. Furthermore, criminal investigations and prosecutions should be commenced against any individuals who are responsible for the perpetration of international human rights law, international humanitarian law, or international criminal law violations, including individuals criminally and otherwise responsible for failure to ensure that Mr. Hicks receives a full and fair trial under international human rights law, international humanitarian law, international criminal law, U.S. domestic law, and all other relevant law. Remedies should be made available for Mr. Hicks (and on behalf of the international community) against all perpetrators, whether they are members of the Military Commission staff or are other government or civilian personnel. These remedies include criminal investigation and prosecution for individuals who are responsible for international law breaches.

48. The United States and the military commissions have violated and continue to violate the rights of David M. Hicks under international human rights law, international humanitarian law right, international criminal law, and other relevant law. The United States and the military commissions have not ensured that David M. Hicks has received all of the rights to which he is entitled under international human rights law, international humanitarian law right, and international criminal law. Thus, the United States and the military commissions have violated the rights of David M. Hicks. These violations arise under the ICCPR, under the customary international law of human rights, and under general principles of international human rights law. Furthermore, these violations arise under international humanitarian law, international criminal law, and other relevant law.

49. Rights under the ICCPR violated. The United States and the military commissions have violated and continue to violate rights of David M. Hicks under the ICCPR, including the following rights:

    49.1. the right to liberty and security of person, including a prohibition on arbitrary arrest or detention (ICCPR, art 9(1));

    49.2. the right to be informed of reasons for his arrest and detention (ICCPR, art 9(2));

    49.3. the right to proceedings to determine the lawfulness of detention (ICCPR, art 9(4));

49.4. the prohibition on torture or cruel, inhuman or degrading treatment or punishment during detention, and the right be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, arts 7, 9(1); 10(1));

49.5. the right to equality before the courts and tribunals, and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (ICCPR, art 14(1));

49.6. the right to a be presumed innocent until proved guilty according to law (ICCPR, art 14(2));

49.7. the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (ICCPR, art 14(3)(a));

49.8. the right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing (ICCPR, art 14(3)(b));

49.9. the right to be tried without undue delay (ICCPR, art 14(3)(c));

49.10. the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; the right to be informed, if he does not have legal assistance, of this right; and the right to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it (ICCPR, art 14(3)(d));

49.11. the right 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 (ICCPR, art 14(3)(e));

49.12. the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court (ICCPR, art 14(3)(f));

49.13. the right not to be compelled to testify against himself or to confess guilt (ICCPR, art 14(3)(g));

49.14. the right to review of a conviction and sentence by a higher tribunal according to law (ICCPR, art 14(5)); and

49.15. prohibition on retroactive application of criminal laws (ICCPR, art 15(1)).

50. Rights under customary international human rights law and general principles of international human rights law violated. The United States and the military commissions have violated and continue to violate the following rights of David M. Hicks under the customary international law of human rights and the general principles of law of human rights: the right to a fair trial, the right to be free from arbitrary detention, and other rights.

51. U.S. and military commissions breach rights of David M. Hicks under international humanitarian law. If the tribunal concludes that international humanitarian law is relevant to this case, then the United States and the military commissions have breached the rights of David M. Hicks under international humanitarian law under, for example, the customary international humanitarian law norms codified in Article 75 of the Additional Protocol 1 to the Geneva Conventions. Mr. Hicks is owed a remedy by and through the United States and the military commissions for rights violations under international humanitarian law, including for violations of rights codified in article 75 the Additional Protocol I, including:

51.1. the right to be treated humanely in all circumstances (article 75 (1));

51.2. an absolute prohibition of, at any time and in any place whatsoever, whether committed by civilian or by military agents, violence to the life, health, or physical or mental well-being of persons (article 75(2)(a) - (e));

51.3. a prohibition of torture of all kinds, whether physical or mental (article 75(2)(a)(ii));

51.4. a prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault (article 75(2)(b));

51.5. a prohibition of collective punishments (article 75(2)(a)(d));

51.6. a prohibition of threats to commit torture, outrages upon personal dignity, in particular humiliating and degrading treatment and any form of indecent assault, and other prohibited behavior (article 75(2)(e));

51.7. the right to be informed promptly of the reasons why the persons were arrested, detained or interned for actions related to the armed conflict, and to be informed of the particulars of any offence alleged (article 75(3));

51.8. the right to be brought before an impartial and regularly constituted court, respecting the generally recognized principles of regular judicial procedure (article 75(4));

51.9. the right that the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him (article 75(4)(a));

51.10. the right that the procedure shall afford for an accused before and during trial all necessary rights and means of defence (article 75(4)(a));

51.11. the right to be presumed innocent until proved guilty according to law (article 75(4)(d));

51.12. the right to be tried in his presence (article 75(4)(e));

51.13. the right 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 (article 75(4)(g));

51.14. a prohibition on compelling a person to testify against himself or to confess guilt (article 75(4)(f));

51.15. the right of anyone prosecuted for an offence to have the judgment pronounced publicly (article 75(4)(i)); and

51.16. the right to be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised (article 75(4)(j)).

52. Violation of Geneva Conventions by denying the right to a fair trial. Failure to afford the right to a fair trial violates international humanitarian law under the Geneva Conventions.

52.1. Geneva Convention IV, article 71(1) provides that "[n]o sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial".

52.2. Geneva Convention IV, article 5 provides that an individual protected person suspected of or engaged in activities hostile to the security of the State in the territory of a party to the conflict or an individual protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the occupying power

> "shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention".

52.3. Additional Protocol I of the Geneva Conventions, article 75(4) provides that:

> "No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure [and then proceeding to list a set of fair trial provisions]".

53. Rights under international humanitarian law and international criminal law are criminally punishable as Grave Breaches of the Geneva Conventions. Under international humanitarian law, failure to afford a prisoner a fair trial gives rise to individual criminal culpability of those who conduct or assist in conducting the unfair trials and can amount to grave breaches of the Geneva Conventions (and violations of the laws or customs of war). In short, denying the right to a fair trial in *United States v. David M. Hicks* can subject individuals associated with the trial to war crimes charges under treaty law or under customary law. Individuals are criminally liable for deprivation of a fair trial if those individuals aid or abet denial of a fair trial, conspire to deny a fair trial, or act in complicity to deny a fair trial. Relevant Grave Breach provisions from the Geneva Conventions are mentioned in the following paragraphs:

54. Denial of a Fair Trial is a Grave Breach of the Geneva Conventions. The Geneva Conventions provide that if a person fails to afford the right to a fair trial, that person has committed a grave breach of the Geneva Conventions. For example,

54.1. Geneva Convention III, article 130, provides:

> "Grave breaches [of this Convention] shall be those involving any of the following acts, if committed against persons or property protected by the

present Convention: . . . willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention".

54.2. Geneva Convention IV, article 147 provides:

> "Grave breaches [of this Convention] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: . . . willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention".

54.3. Additional Protocol I of the Geneva Conventions, article 85(4)(e) provides that it is a Breach of the

> "In addition to the grave breaches defined in the preceding paragraphs and in the [Geneva] Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol . . .
>
> (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial".

55. International criminal law treaties and unfair trials. Various international criminal law treaties call for criminally punishing those responsible for the denial of the right to a fair trial, as follows:

55.1. Under the Rome Statute of the ICC, article 8(2)(a)(vi): War crimes in an international armed conflict include grave breaches of the Geneva Conventions of 12 August 1949, "namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: … . (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial".

55.2. Rome Statute, article 8(2)(c)(iv): War crimes in an armed conflict not of an international character, include "serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: … (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable". (emphasis in original)

56. Denial of the right to a fair trial is punishable as a war crime under U.S. Military law[98]. The right to a fair trial is provided for in U.S. Military Manuals, and is punishable therein.[99]

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[98] Furthermore, the national courts of the following countries have in place legislation that punishes (as war crimes, breaches of the Geneva Conventions, etc) military personnel (and in some cases civilians) who deprive persons of their right to a fair trial in the context of an armed conflict: Argentina, Armenia, Australia, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Burundi, Cambodia, Canada, Colombia, Congo, Cook Islands, Croatia, Cyprus, El Salvador, Estonia, Ethiopia, Georgia, Hungary, India, Ireland, Italy, Jordan, Kenya, Lithuania, Luxembourg, Malawi, Malaysia, Mali, Mauritius, Moldova, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Papua New Guinea, Poland, Romania, Seychelles, Singapore, Slovenia, Spain, Sri Lanka, Tajikistan, Thailand, Trinidad and Tobago, Uganda, United Kingdom, Vanuatu, Yugoslavia (FRY), and Zimbabwe. (*See* ICRC CUSTOMARY INTERNATIONAL LAW STUDY, *paras.* 2888 – 2956; pages 2376-2384).

56.1. The U.S. Field Manual (1956)

56.1.1. The U.S. Field Manual provides that "willfully depriving a prisoner of war or a protected person of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions (Section 502)

56.1.2. The U.S. Field Manual provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes') . . . killing without trial spies or other persons who have committed hostile acts (Section 504(1))

56.2. US Air Force Pamphlet (Section 13-8) (1976)

56.2.1. US Air Force Pamphlet, section 15-3(c)(10)-(11) provides that "willfully killing without trial persons in custody who have committed hostile act" and "deliberate deprivation of fair trial rights to any protected persons" are acts involving individual criminal responsibility".

56.3. The U.S. Air Force Commander's Handbook (1980)

56.3.1. The U.S. Air Force Commander's Handbook provides that the "failure to accord captured personnel the right to a fair trial is itself a serious violation of the law of armed conflict". (Sections 8-3(a) and (b))

56.4. The U.S. Soldier's Manual (1984)

56.4.1. The U.S. Soldier's Manual (1984) bans sentencing protected persons without a proper trial. (pp. 5 & 20)

56.5. The U.S. Instructor's Guide (1985)

56.5.1. The U.S. Instructor's Guide provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . killing, without proper legal trial, spies or other captured persons who have committed hostile acts". (pp 13 & 14)

56.6. The U.S. Naval Handbook (1995)

56.6.1. The U.S. Naval Handbook provides that "the following acts are representative war crimes . . . denial of a fair trial" in cases of prisoners of war and civilian inhabitants of an occupied territory". (Section 6.2.5(2) and (3))

56.6.2. The U.S. Naval Handbook provides that the "failure to provide a fair trial for the alleged commission of a war crime is itself a war crime". (Section 6.2.5(1) and (2))

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[99] These U.S. Military Manuals were cited in the ICRC CUSTOMARY INTERNATIONAL LAW STUDY. *See* ICRC CUSTOMARY INTERNATIONAL LAW STUDY, *paras.* 2882 – 2884, 2886-2887; pages 2375-2376

57. War crimes trials on charges of depriving U.S. military personnel of the right to a fair trial. Military courts have charged, tried and convicted individuals for denying U.S. military personnel the right to a fair trial, as follows:

57.1. *Sawada Case – Trial of Lieutenant General Shigeru Sawada and Three Others. (U.S. Military Commission, Shanghai, Judgment of 15 April 1946).* The Japanese defendants in the *Sawada* case[100] had been charged with "knowingly, unlawfully and willfully" denying prisoner of war (POW) status to eight United States military personnel, and trying and sentencing the U.S. servicemen, and executing some of them, in violation of the laws of war. The United States Military Commission at Shanghai determined that the Japanese Military Commission proceedings involved "false and fraudulent charges". Also, it was found that the commanding officer of the Japanese Prison had mistreated the U.S. servicemen in that commanding officer had, *inter alia*, "forcibly detained all eight in solitary confinement and otherwise unlawfully treated them". The Japanese defendants who were convicted were sentenced to terms of hard labor.

57.2. Isayama *Case – Trial of Lieutenant General Harukei Isayama and Seven Others. (U.S. Military Commission, Shanghai, Judgment of 25 July 1946).* Several members of a Japanese Military Tribunal were tried by U.S. Military Commission on charges that the accused Japanese had violated the laws and customs of war in that the accused did "permit, authorize and direct an illegal, unfair, unwarranted and false trial [of U.S. POWs] upon false and fraudulent evidence and without affording said prisoners of war a fair hearing".[101] The U.S. Military Commission convicted all of the Japanese defendants on all counts, after finding that, *inter alia*, the U.S. military personnel who were tried, convicted and executed, were not permitted at trial to obtain evidence or to call witnesses on their own behalf. Two of the Japanese defendants were sentenced to death; three were sentenced to life imprisonment; and four were sentenced to terms of years of 40, 30, 30 and 20 years, respectively. The two death sentences were commuted to life imprisonment.

57.3. *Altstoetter case (The Justice Trial)* (U.S. Military Tribunal at Nuremberg). The U.S. Military Commission in the case of *Josef Altstoetter, et al (The Justice Case)*,[102] convicted the accused jurists and others pursuant to proceedings under Control Council Law No. 10. The accused had been charged with, *inter alia,* crimes against humanity associated with convening "special courts" that denied persons of "all semblance of judicial process" (*Altstoetter, et al Indictment*, at paras 21 & 22). Paragraph 31 of the Altstoetter Indictment charged that those crimes against humanity violated various laws, including "international conventions, . . . the laws and customs of war, [and] the general principles of criminal law as derived from the criminal laws of all civilized nations". Regarding the extraordinary irregular courts and the "unfair" trials, the Tribunal found that:

> "[T]he trials of the accused . . . did not approach a semblance of fair trial or justice. The accused . . . were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many

[100] *Trial of Lieutenant General Shigeru Sawada and Three Others,* 5 LRTWC 1 (U.S. Military Commission, Shanghai, 15 April 1946), *noted in* DOCUMENTS ON PRISONERS OF WAR, Volume 60, Doc. 78, p. 330 (ed. Howard S. Levie, Naval War College Press, 1979)

[101] *Trial of Lieutenant General Harukei Isayama and Seven Others*, 5 LRTWC 60 (U.S. Military Commission, Shanghai, 25 July 1946), *noted in* DOCUMENTS ON PRISONERS OF WAR, Volume 60, Doc. 82, p. 345 (ed. Howard S. Levie, Naval War College Press, 1979)

[102] *Case of Josef Altstoetter, et. al*, TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, Volume III, p. 954 (U.S. Government Printing Office, Washington, 1951)

> instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses on their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from the beginning to end were secret and no public record was allowed to be made of them."

58. Other Criminal Prosecutions for Denial of the Right to a Fair Trial – Crimes Against Humanity – Iraq Special Tribunal.

    58.1. Other instances in which individuals have been charged with criminal responsibility for denying persons a full and fair trial include the case of *Prosecutor v. Judge Awad Hamad al-Bandar*, which is currently pending before the Iraqi Special Court[103] in Baghdad, Iraq. Judge Awad, who is a co-defendant of former Iraqi President Saddam Hussein, is the former head of the Iraqi Revolutionary Court. Judge Awad is charged with the crime against humanity of depriving civilian individuals of their right to a fair trial under law. Judge Awad is charged with conducting secret trials during which more than 100 Shiites from Dujail were sentenced to death and executed. Judge Awad faces the death penalty.

59. Rights under international criminal law violated. The United States and the Military Commissions at Guantanamo Bay have violated and continue to violate the rights of David M. Hicks under international human rights law, international humanitarian law, and international criminal law. Mr. Hicks is owed a remedy by and through the United States and the military commissions for rights violations under international law.

P. Conclusion

60. The United States is legally obligated to afford David M. Hicks and the other Guantanamo Bay prisoners their internationally recognized right to a fair trial, their right not to be arbitrarily detained, and all other rights due under binding international human rights law treaties (including the ICCPR), under binding customary international human rights law, and under binding general principles of international human rights law. Furthermore, should the military commissions determine that international humanitarian law is relevant, the United States is legally obligated to afford David M. Hicks and the other Guantanamo Bay prisoners fair trial and other rights, customary and elsewhere, under binding international humanitarian law as codified in Article 75 of Additional Protocol I of the Geneva Conventions and otherwise. In addition, the United States and the military commissions are legally obligated to provide David M. Hicks with all of his rights under international criminal law, under United States law, and under all other relevant law.

61. The United States, acting through the military commissions and/or otherwise, must ensure that David M. Hicks and the other Guantanamo Bay, Cuba prisoners are fully afforded all of the rights owed to them, and

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[103] *See* Solomon Moore, *Saddam Trial Counsel Slain*, THE BIRMINGHAM NEWS (reporting story from the LOS ANGELES TIMES), 22 October 2005 <http://www.al.com/news/birminghamnews/wire.ssf?/base/news/112997273693040.xml&coll=2> (last visited 11 November 2005).

owed to the international community, under international human rights law, international humanitarian law, international criminal law, United States law, and all other relevant law.

62. The United States and the military commissions have breached the rights of David M. Hicks under international human rights law, international humanitarian law, international criminal law, United States law, and other relevant law. The United States and the military commissions owe David M. Hicks, the other Guantanamo Bay prisoners, and the international community a remedy for these breaches of law.

Signed: _____

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