

Human Rights Violations at Guantánamo Bay: How the United States Has Avoided Enforcement of International Norms

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Guantánamo Bay has become a symbol of the United States' approach to the War on Terror. The detention center is globally known for the human rights violations committed there; yet, the international community has failed to take actions to successfully close the facility through either the use of pressure on the U.S. government or by utilizing enforcement mechanisms against the United States as it would any other nation committing proportional human rights violations. The United States' actions at Guantánamo Bay violate its obligations under the Third Geneva Convention, the International Covenant for Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), and customary international law.¹ Violations of international law at Guantánamo include illegal and indefinite detention, torture, inhumane conditions, unfair trials (military commissions), and many more.² These human rights violations, however, remain unpunished or remedied.³

Part I of this Note discusses the background behind the detention facility at Guantánamo, its role in the War on Terror, and the facility's current state. Part II outlines the international laws by which the United States must abide, with descriptions of the treaties and covenants to which the nation is a party, and what the United States argues its human rights obligations are under international law. Part III describes the alleged human rights violations that occurred at the facility and how the U.S. government construes these violations. Part IV discusses the issues the international community has faced in attempting to enforce human

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1. *See infra* Part II and III.

2. *See infra* Part III.

3. *See infra* Part IV.

rights norms at Guantánamo, including how the international community has responded to the violations, and how successful these responses were in creating change. Finally, Part V proposes how the international community should proceed with the enforcement of human rights norms at Guantánamo. It is clear to the international community that there were, and continue to be, violations of human rights norms at Guantánamo Bay, but there has been little success in provoking change because of the lack of enforcement mechanisms in international human rights law.

I. GUANTÁNAMO'S HISTORY AND THE WAR ON TERROR

After the terrorist attacks on the World Trade Center on September 11, 2001, Guantánamo Bay became renowned as the place where the U.S. military sent captured suspected terrorists. The Bush Administration declared a War on Terror and promised the country that the terrorists associated with the attack would be eradicated.⁴ The targeted terrorist group that claimed responsibility for the attack was al Qaeda, and the initial U.S. military response in Afghanistan resulted in the capture of suspected terrorists, including those presumably involved in the September 11 attacks.⁵

Guantánamo Bay's history is a complicated one. The facility, located in Cuba, was opened for its current purpose in 2001—shortly after the United States began its military operation in Afghanistan.⁶ The first detainees were brought to the facility on January 11, 2002, and were classified as enemy combatants.⁷ Guantánamo Bay detainees are mainly nationals of countries involved in the War on Terror, or nations thought to be harboring terrorists—most of which are Middle Eastern countries.⁸ These detainees were captured on foreign soil, not charged with any particular crime, brought to Guantánamo, detained indefinitely without trial, and denied access to counsel.⁹ On November 13, 2001, President Bush issued a military order officially permitting these actions; the order “author[ized] the detention and trial by military commission of any current or former member of the al-Qaeda organization, as well as anyone who

4. The War on Terror was never an official war as there was no declaration of war by Congress. See President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>; see also Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 249 (2003).

5. See Fitzpatrick, *supra* note 4, at 249.

6. See Richard J. Wilson, *United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole,”* 10-SPG HUM. RTS. 2, 2 (2003).

7. HUMAN RIGHTS FIRST, GUANTÁNAMO BY THE NUMBERS: APRIL 9, 2014 (2013), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf>.

8. Wilson, *supra* note 6, at 2.

9. See Fitzpatrick, *supra* note 4, at 250; see also Wilson, *supra* note 6, at 2.

aids or abets its work or harbors its members.”¹⁰ The War on Terror has no scheduled end date; thus, this “ongoing threat” is virtually indefinite, even after the United States withdraws completely from Iraq and Afghanistan.¹¹

The total number of detainees incarcerated at Guantánamo since 2001 is approximately 780 people.¹² In fact,

over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo either by returning them to their home country or by releasing or transferring them to a third country.¹³

As of January 2015, there are still 127 detainees at the Guantánamo facility,¹⁴ and there were 242 detainees at the beginning of the Obama Presidency.¹⁵ As recently as October 7, 2013, there were 164 detainees held at the facility—of those who remain, eighty-four were cleared for transfer over four years ago when the Obama Administration conducted a review of each case.¹⁶

A. The Bush Administration

When the War on Terror began, the nation and Congress were generally supportive; therefore, the Bush Administration and the Executive Branch were given great latitude to proceed in any manner desired. Although President Bush acknowledged that Taliban detainees are “covered by” the Geneva Conventions, his Administration denied that detainees are entitled to prisoner of war status; instead, they are considered enemy combatants and are entitled to fewer rights than prisoners of war.¹⁷ In addition, the Administration denied that American officials had obliga-

10. Wilson, *supra* note 6, at 2.

11. See Fitzpatrick, *supra* note 4, at 244.

12. HUMAN RIGHTS FIRST, *supra* note 7.

13. Exec. Order No. 13,492, 3 C.F.R. 203 (2010).

14. Helene Cooper, *Obama Nears Goal for Guantánamo with Faster Pace of Releases*, N.Y. TIMES (Jan. 5, 2015), http://www.nytimes.com/2015/01/06/us/obama-nears-goal-for-guantanamo-with-faster-pace-of-releases.html?_r=0.

15. HUMAN RIGHTS FIRST, *supra* note 7.

16. David Jackson, *Groups Urge Obama to Close Guantánamo Bay Prison*, USA TODAY (Oct. 7, 2013), <http://www.usatoday.com/story/theoval/2013/10/07/obama-guantanamo-bay-prison-cuba-aclu/2935385/>.

17. See *id.*

tions under the Geneva Conventions when operating abroad and later used this reasoning to justify its policy on interrogation techniques.¹⁸

The interrogation of Guantánamo detainees began on January 23, 2002.¹⁹ Although the interrogations were conducted in a manner that was later determined to be in violation of international standards and norms, interrogations continued long after the improper conduct was revealed.²⁰ In addition, the U.S. military and the Bush Administration admitted to the use of interrogation techniques that international bodies had condemned as torture or cruel and inhumane treatment.²¹ As more information about the conditions at Guantánamo Bay became public, both the U.S. public and the international community grew increasingly concerned about the policies governing the facility.²² Guantánamo diminished the United States' reputation as an advocate for human rights and became a target for criticism from allies and enemies alike.²³ In the years since, further allegations of human rights violations have come to the forefront, and there have been calls to close the facility by allies, human rights organizations, the United Nations, and even President Obama during his 2008 presidential campaign.²⁴

On February 7, 2002, President Bush signed a memorandum written by then-White House Counsel Alberto Gonzales that asserted the Geneva Conventions would not be applicable to either al Qaeda or Taliban detainees because "the relevant conflicts are international in scope and Common Article 3 applies only to 'armed conflict not of an international character.'"²⁵ This memorandum became the basis for institutionalizing torture as an interrogation method against detainees of the War on Terror.²⁶ In fact, another memorandum from the Justice Department to Alberto Gonzales on August 1, 2002 concluded, "[T]o constitute torture[,] . . . the intensity of the pain inflicted 'must rise to . . . the level that would ordinarily be associated with a sufficiently serious physical condi-

18. Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?ref=charliesavage>.

19. Wilson, *supra* note 6, at 2.

20. *Id.*

21. *Id.* at 3.

22. See generally Jackson, *supra* note 16.

23. See generally *Guantánamo, Bagram and Illegal U.S. Detentions*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo> (last visited Apr. 4, 2014).

24. Senator Barack Obama, Speech at Woodrow Wilson International Center (Aug. 1, 2007), available at <http://www.cfr.org/elections/obamas-speech-woodrow-wilson-center/p13974>.

25. George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 430 (2007).

26. See *id.* at 432.

tion or injury such as death, organ failure, or serious impairment of body functions.”²⁷ Thus, the Justice Department essentially informed the White House how it might avoid prosecution, rather than advising how to comply with domestic and international law.

Despite memorandums that showed otherwise, President Bush declared in an interview with Matt Lauer that the United States does not torture detainees, stating, “Whatever we have done is legal. That’s what I am saying. It’s in the law. We had lawyers look at it and say, ‘Mr. President, this is lawful.’ That’s all I can tell you.”²⁸ Similarly, members of the Bush Administration, who testified before Congress during their confirmation hearings, refused to characterize the enhanced interrogation techniques (including waterboarding and forced nudity) as torture, claiming the tactics were consistent with U.S. obligations under international law.²⁹ Waterboarding is a technique in which water is poured over a restrained prisoner’s mouth and nose to simulate drowning,³⁰ and it has been the subject of intense criticism at home and abroad.³¹ According to Central Intelligence Agency (C.I.A.) officials, waterboarding was used on only three suspects and has not been used since 2003.³² Yet in 2006, at the urging of the Bush Administration, Congress continued to allow the C.I.A. to use other interrogation methods, although for the most part the exact methods remain classified.³³

In 2008, President Bush vetoed part of the Intelligence Authorization Bill, which would have limited U.S. interrogation techniques to those methods listed in the Army Field Manual³⁴ and would have prohibited the C.I.A. from using enhanced interrogation methods, including waterboarding.³⁵ Throughout the remainder of his presidency, President Bush “unflinchingly defended an interrogation program that has prompted critics to accuse him not only of authorizing torture previously but

27. *Id.* at 438 (quoting Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 213 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

28. *Matt Lauer Interviews Bush About 9/11* (NBC television broadcast Sept. 11, 2006), available at <http://www.nbcnews.com/video/nbc-news/14781377>.

29. See Annas, *supra* note 25, at 435.

30. Scott Shane, *U.S. House Votes to Prohibit Waterboarding*, N.Y. TIMES (Nov. 14, 2007), <http://www.nytimes.com/2007/12/14/world/americas/14iht-cia.4.8751421.html>.

31. Steven Lee Meyers, *Bush Vetoes Bill That Would Limit Interrogations*, N.Y. TIMES (Mar. 8, 2008), <http://www.nytimes.com/2008/03/09/world/americas/09iht-policy.4.10847885.html>.

32. Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES (Jan. 22, 2009), <http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html>.

33. *Id.*

34. Shane, *supra* note 30.

35. Meyers, *supra* note 31.

also of refusing to ban it in the future.”³⁶ The President’s policies were the subject of great debate, and when information crept into the public, the Administration faced a huge backlash.

B. The Early Obama Administration Years

During his presidential campaign, then-Senator Obama promised to close the facility at Guantánamo Bay. He openly expressed his concerns about the policies in effect at the facility; he reiterated this sentiment throughout his campaign and vowed, “As President, I will close Guantánamo, reject the Military Commissions Act, and adhere to the Geneva Conventions. Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists.”³⁷ President Obama suggested that he would prefer prosecution of the detainees in federal courts, as opposed to the military commissions that were currently conducting trials for detainees.³⁸ Once in office, the Obama Administration openly supported the President’s stance that neither torture nor the detention center practices were legal. Admiral Dennis C. Blair, at his confirmation hearing for Director of National Intelligence, stated that “[a]ny program of detention and interrogation must comply with the Geneva Conventions, the Conventions on Torture, and the Constitution,” and that there “must be clear standards for humane treatment that apply to all agencies of [the] U.S. Government, including the Intelligence Community.”³⁹

Accordingly, one of President Obama’s first major acts as President was to issue two executive orders, both intending to close Guantánamo as soon as possible. In an effort to comply with CAT and the Geneva Conventions, Executive Order 13491 was issued to stop interrogation techniques (like waterboarding), declaring:

Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual) . . . Interrogation techniques, approaches, and treatments described in

36. *Id.*

37. Obama, *supra* note 24.

38. Mazzetti & Glaberson, *supra* note 32.

39. *Id.*

the Manual shall be implemented strictly in accord with the principles, processes, conditions, and limitations the Manual prescribes.⁴⁰

The same day, Executive Order 13492 was issued; it stated that because of significant concerns raised by international and domestic communities about the facility at Guantánamo Bay, prompt determinations of how to deal with and dispose of the remaining detainees and how to ensure closure of the facility were necessary.⁴¹ Notably, the Order also stated that the disposition of the detainees should precede the closure of the facility.⁴² Unfortunately, this process has proven much more difficult for the Obama Administration than originally thought; six years later, the problems continue, the detainees are still detained, and the facility remains open.⁴³ In addition, in 2013, Human Rights First declared that there were thirty-three detainees that the Obama Administration designated for indefinite detention without charges or a trial in violation of international law.⁴⁴

Soon after the Executive Orders were issued, President Obama gave a speech on the closure of Guantánamo Bay and detailed how the Executive Branch intended to deal with the remaining detainees.⁴⁵ President Obama divided the detainees into five categories based on their particular status and circumstances: (1) detainees who have violated American criminal laws and can be tried in federal court—courts provided for by the United States Constitution; (2) detainees who have violated the laws of war, and are “therefore best tried through military commissions”; (3) detainees that the court has ordered must be released in order to abide by the rule of law as opposed to reasons having to do with the closure; (4) detainees who the Administration has determined can be transferred safely to another country—about 50 detainees; and (5) the detainees who cannot yet be prosecuted, but “pose a clear danger to the American people[,] . . . who, in effect, remain at war with the United States,” and who will not be released because it would endanger the American people.⁴⁶ This fifth category presents the most difficult legal issue for the Obama Administration—the indefinite confinement of detainees without the filing of formal charges.

40. Exec. Order No. 13,491, 3 C.F.R. 199 (2009).

41. Exec. Order No. 13,492, 3 C.F.R. 203 (2010).

42. *Id.*

43. *See generally*, HUMAN RIGHTS FIRST, *supra* note 7.

44. *Id.*

45. President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

46. *Id.*

C. The Current Situation at Guantánamo Bay

The current state of Guantánamo is a messy one. Congress has imposed strict restrictions on the repatriation of detainees to countries with troubled security conditions.⁴⁷ In January 2013, the Obama Administration reassigned the State Department official charged with negotiating transfers and did not replace him, leaving a gap in the support team working on the situation.⁴⁸ The facility remains open and under great criticism, as there are still detainees that have not yet had their status determined—others have been cleared to go back to other countries, but have yet to be released.⁴⁹

Detainee conditions at Guantánamo have continued to deteriorate. For approximately six months in 2013, the majority of the detainees at Guantánamo staged a mass hunger strike that drew widespread attention from the Obama Administration, the American public, and the international community.⁵⁰ At the hunger strike's peak, "106 of the 166 prisoners at the time were listed as participants by the military's official count."⁵¹ This was not the first hunger strike at Guantánamo—in 2005, there was a mass hunger strike and 131 detainees refused to eat.⁵² In response, the military force-fed the protesting detainees.⁵³ The issues that sparked the hunger strike are unclear, but both detainee lawyers and military officials agree that the underlying cause of the strike was likely the "growing despair of the inmates over whether they would ever go home alive."⁵⁴

The Obama Administration has faced growing criticism for its failure to close the facility at Guantánamo Bay. Although some detainees have slowly been sent back to other countries, there are still over one hundred people detained at the facility.⁵⁵ The President mentioned Guan-

47. See David Nakamura, *Obama Administration to Transfer Two Guantánamo Bay Detainees*, WASH. POST (July 26, 2013), http://www.washingtonpost.com/world/national-security/obama-administration-to-transfer-two-guantanamo-bay-detainees/2013/07/26/86a671a6-f62b-11e2-aa2e-4088616498b4_story.html.

48. Charlie Savage, *Guantánamo Hunger Strike is Largely Over, U.S. Says*, N.Y. TIMES (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/us/guantanamo-hunger-strike-largely-over-us-says.html>.

49. See ACLU, GUANTÁNAMO BY THE NUMBERS [INFOGRAPHIC], available at <https://www.aclu.org/national-security/guantanamo-numbers> (last visited Mar. 27, 2015).

50. *Id.*

51. *Id.*

52. Annas, *supra* note 25, at 445.

53. Savage, *supra* note 48.

54. *Id.*

55. See Luis Martinez, *Hagel Says White House Disagreed with His Slow Pace of Releases of Guantánamo Detainees*, ABC NEWS (Jan. 30, 2015), <http://abcnews.go.com/Politics/hagel-white-house-disagreed-slow-pace-releases-guantanamo/story?id=28619822>.

tánamo only once in his January 2014 State of the Union Address, and he pinned the lack of closure on Congress when he stated:

[W]ith the Afghan war ending, this needs to be the year Congress lifts the remaining restrictions on detainee transfers and we close the prison at Guantanamo Bay—because we counter terrorism not just through intelligence and military action, but by remaining true to our constitutional ideals, and setting an example for the rest of the world.⁵⁶

Thus, the facility remains in a state of limbo, as do the detainees.

Finally, in late 2014, the U.S. Senate Intelligence Committee issued a report on the C.I.A.'s controversial treatment of Guantánamo Bay detainees.⁵⁷ The report highlighted the problematic and illegal use of torture by the C.I.A. and established that most of the information gained through interrogation techniques was not of significant value or was unreliable.⁵⁸ The report brought the spotlight back to Guantánamo Bay and, consequently, forced the Obama Administration to once again begin the transfer of prisoners—despite the potentially unsafe conditions detainees may face upon return to their home countries.⁵⁹

II. HUMAN RIGHTS TREATIES AND COVENANTS BY WHICH THE UNITED STATES MUST ABIDE

The relevant international laws the United States must abide by include the ICCPR, CAT, the Geneva Conventions (primarily the Third Convention—Treatment of Prisoners of War), and customary international law.⁶⁰ In addition, the prohibition of torture has *jus cogens*⁶¹ status; the United States is stringently held to that standard as well. International Human Rights Law outlines obligations that member states are bound to respect; when a state becomes a party to one of these international treaties, it must “assume obligations and duties under international law to respect, to protect and to fulfil [sic] human rights.”⁶² In addition, after a

56. President Barack Obama, President Barack Obama's State of the Union Address (Jan. 28, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

57. Scott Shane, *Report Portrays a Broken C.I.A. Devoted to a Failed Approach*, N.Y. TIMES (Dec. 9, 2014), <http://www.nytimes.com/2014/12/10/world/senate-torture-report-shows-cia-infighting-over-interrogation-program.html>.

58. *See id.*

59. For example, prisoners sent to Yemen. *See* Cooper, *supra* note 14.

60. U.N. Comm'n on Human Rights, Situation of Detainees at Guantanamo Bay, 7–8, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

61. *Jus cogens* is defined by the Oxford English Dictionary as the “principle[s] of international law which cannot be set aside by agreement or acquiescence.” OXFORD ENGLISH DICTIONARY (2015).

62. *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/>

state has ratified an international human rights treaty, the state government must put in place “domestic measures and legislation compatible with their treaty obligations and duties”; thus, the domestic legal system provides the main legal protections for these rights.⁶³

One important note, however, is that ratification of human rights treaties may be done with an understanding, which is a determination by the domestic government that limits the entirety of the treaty from coming into effect in the United States.⁶⁴ In fact, the United States has never ratified a human rights treaty with a “clean” ratification—meaning “one devoid of qualifying reservations, understandings, and declarations.”⁶⁵ As a result, the United States is not always a party to the same human rights standards as the rest of the member states.

A. U.S. Obligations Under the Treaties

The ICCPR became law in the United States in 1992; it is a legally binding treaty, and each signatory must agree to adopt domestic legislation that gives effect to the ICCPR.⁶⁶ The treaty aims to protect the right to life, peaceful assembly, and “prohibits, inter alia, torture, slavery, and retroactive criminal legislation.”⁶⁷ Article 2 of ICCPR states,

[E]ach State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR] without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁸

When the United States ratified the ICCPR, it stated:

[T]his Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that the state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that

en/documents/udhr/hr_law.shtml (last visited Feb. 25, 2015).

63. *Id.*

64. See Kathryn D. DeMarco, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523, 557 (2012).

65. *Id.* at 555–56.

66. Brian L. Porto, Annotation, *Construction and Application of International Covenant on Civil and Political Rights*, 11 A.L.R. FED. 2D 751 (2006).

67. *Id.*

68. Comm’n on Human Rights, *supra* note 60, at 8.

the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Convention.⁶⁹

Notably, there is no allowable derogation from the provision prohibiting cruel, inhuman, or degrading treatment or punishment.⁷⁰ Additionally, the ICCPR “applies to government conduct in general, not just during armed conflicts, and would so apply to law enforcement and military actions loosely grouped under the [W]ar on [T]error heading.”⁷¹

A similar agreement was reached when the United States ratified CAT in 1994;⁷² the agreements for CAT and the ICCPR were clearly meant to limit the reach of the treaties and complicate the implementation of domestic policy to ensure the rights provided by the treaty.⁷³ Additionally, when the United States ratified CAT, it limited the definition of torture provided by CAT, establishing that

no act inflicting severe mental pain could constitute torture unless the mental suffering was “specifically intended to inflict severe physical or mental pain”; the pain was “prolonged”; and the mental harm resulted from certain specified conditions including the “administration . . . [of] procedures calculated to disrupt profoundly the senses”⁷⁴

Thus, mental suffering would not constitute torture unless it is intended to inflict severe pain and the harm is prolonged.⁷⁵ Similarly, the United States limited the definition of “cruel, inhuman or degrading treatment or punishment” contained in CAT Article 16 through a reservation that the United States would be “bound by Article 16 ‘only insofar as the term . . . means the cruel and unusual punishment prohibited’ by the Constitution,” not as it has been defined under the much more inclusive international law.⁷⁶ Despite the United States’ limited definition of torture, CAT protects everyone—it depends neither on the affiliation of those it protects nor the mutual assent of other states.⁷⁷

69. See U.S. SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 102-23, at 18 (2d Sess. 1992), available at <http://www.state.gov/documents/organization/235639.pdf> [hereinafter ICCPR].

70. Richard D. Rosen, *America’s Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, 5 GEO. J.L. & PUB. POL’Y 113, 135 (2007).

71. John T. Parry, “Just for Fun”: *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT’L SECURITY L. & POL’Y 253, 265 (2005).

72. Rosen, *supra* note 70, at 135.

73. See DeMarco, *supra* note 64, at 557.

74. *Id.* at 558.

75. *Id.*

76. *Id.*

77. Rosen, *supra* note 70, at 135.

The United States also has obligations under the Geneva Conventions—particularly Common Article 3, which applies to prisoners of war.⁷⁸ Common Article 3 was created as a response to international concern about prisoner treatment during World War II and the need for expanded international humanitarian law;⁷⁹ it prohibits “cruel treatment and torture,” in addition to “humiliating and degrading treatment.”⁸⁰ In addition, under the Geneva Conventions, torture constitutes a “grave breach” and is “punishable under the War Crimes Act.”⁸¹

In 2006, the U.S. Supreme Court held that, as a matter of both international and domestic law, the Geneva Conventions have full force and effect in Guantánamo Bay.⁸² The Court further ruled that Common Article 3 “applies to all prisoners in U.S. military custody”; it also requires that all prisoners be “‘treated humanely’ and explicitly prohibits ‘cruel treatment and torture’ as well as ‘outrages upon personal dignity, in particular humiliating and degrading treatment.’”⁸³ However, the Bush Administration asserted that the Geneva Conventions do not apply because the detainees violated the laws of war, thus they are considered enemy combatants, not prisoners of war.⁸⁴

One problem with the application of the Geneva Conventions at Guantánamo is that the War on Terror is not an “international armed conflict cognizable under Common Article 2 of the Geneva Conventions . . . nor even under the expanded definition of Article 1(4) of Additional Protocol I of 1977.”⁸⁵ The United States was criticized for claiming an “instant custom” and developing its own international law in the context of war and terrorism without clear rules or defined protections for its foreign enemies that are non-state actors.⁸⁶ The result is that the U.S. government has identified detainees as enemy combatants—a classification that is without context. Yet,

[M]any of the protective provisions of the Geneva Conventions have become embodied in customary international law—and with regard to such norms as the prohibition against torture—constitute *jus cogens*. Therefore, claims that some persons, such as “unlawful

78. *Geneva Conventions*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/human-rights/geneva-conventions/p8778> (last visited Mar. 20, 2015).

79. See Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 17 (1984).

80. See Annas, *supra* note 25, at 431.

81. Rosen, *supra* note 70, at 134.

82. Annas, *supra* note 25, at 457.

83. *Id.* (quoting Common Article 3).

84. See *infra* Part III.A; Tung Yin, “*Anything but Bush?*”: *The Obama Administration and Guantánamo Bay*, 34 HARV. J.L. & PUB. POL’Y 453, 479 (2011).

85. See *infra*, Part II.B; Fitzpatrick, *supra* note 4, at 249.

86. See *id.*

combatants,” fall through the cracks of international law and receive absolutely no human rights protections at all are specious.⁸⁷

Finally, the prohibition of torture and other cruel, inhuman, or degrading treatment also enjoys *jus cogens* status in international law, making it customary international law applicable to all persons.⁸⁸

B. Extraterritorial Application of Treaties

The United States is an outlier in its interpretation of the extraterritorial application of human rights treaties. The judicial consensus abroad is that nations must apply human rights treaties extraterritorially if the government exercises effective control over the territory. Recently, both the Supreme Court of Canada and the Supreme Court of the United Kingdom agreed that human rights treaty obligations apply extraterritorially when the government exercises “effective control” of the territory.⁸⁹ Canada’s Supreme Court held that Canada violated the principle of extraterritorial application because its participation in the illegal actions at “Guantánamo Bay clearly violated Canada’s binding international obligations.”⁹⁰ Similarly, the Supreme Court of the United Kingdom held that a nation has obligations under human rights treaties wherever its government has “effective control” over the territories outside of its borders.⁹¹

Additionally, most international bodies have consistently enforced human rights treaties extraterritorially where the government exerts control over detainees.⁹² For example, the Inter-American Commission on Human Rights (IACHR) contends that human rights treaties apply “wherever governments have ‘authority and control’ over individuals or their specific situations.”⁹³ The IACHR interpretation focuses more on affected individuals than the territory, emphasizing “the overriding significance of the principles of necessity, proportionality, humanity and non-discrimination in all circumstances in which states purport to place limitations on the fundamental rights and freedoms of persons under their authority and control.”⁹⁴ Finally, the International Court of Justice (ICJ)

87. Rosen, *supra* note 68, at 137.

88. *Id.* at 135.

89. See Oona A. Hathway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389, 396 (2011).

90. *Id.* at 399.

91. *Id.* at 396.

92. *Id.* at 405.

93. *Id.*

94. Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 ¶ 374 (2002), available at <http://www.cidh.org/terrorism/eng/toc.htm>.

has “concluded that it is unquestionably the case that such treaties are not limited to a country’s territorial borders.”⁹⁵

Further, the United Nations Human Rights Committee—the organization tasked with interpreting and enforcing the ICCPR⁹⁶—clarified 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.”⁹⁷ The Human Rights Committee’s expansive definition of the “effective control” standard⁹⁸ makes it clear that, under this approach, the paramount focus is on state responsibility rather than presence or territory.⁹⁹ Similarly, the Committee Against Torture—the organization tasked with the interpretation and enforcement of CAT—agrees with the Human Rights Committee that the “extraterritorial reach of a state’s human rights treaty obligations turns on the ‘state’s exercise of control over either persons or places.”¹⁰⁰ The Committee Against Torture thus applies an “effective control” standard for the extraterritorial application of CAT.¹⁰¹

Unfortunately, U.S. courts have not directly confronted whether extraterritorial application of either the ICCPR or CAT applies to U.S. government actions abroad.¹⁰² However, the Executive Branch “has at times suggested that the United States’ commitments under these human rights agreements do not apply when the United States acts overseas.”¹⁰³ The United States does not acknowledge Guantánamo Bay as U.S. soil.¹⁰⁴ However, even though the Guantánamo facility is located on the island of Cuba, the Cuban government does not control it. Therefore, the facility and the detainees are under the power and effective control of the U.S. government. Most nations and human rights organizations, with the exception of the United States, would agree that under these circumstances,

95. Hathway et al., *supra* note 89, at 405.

96. *Id.* at 390.

97. U.N. Comm’n on Human Rights, *supra* note 60, at 6.

98. *Munaf v. Romania*, U.N. Human Rights Comm. 96th Sess., July 13–31, 2009, U.N. Doc. CCPR/C/96/D/1539/2006 (Aug. 21, 2009), available at <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=4acf500d2>.

99. Hathway et al., *supra* note 89, at 419–20.

100. *Id.* at 417.

101. *Id.*

102. *Id.* at 393.

103. *Id.*; see also Permanent Representative of the U.S. to the U.N. and Other International Organizations in Geneva, Letter dated Jan. 31, 2006 from the Permanent Representative of the U.S. to the Office of the High Commissioner for Human Rights, U.N. Doc. E/CN.4/2006/120 (Jan. 31, 2006) (“The United States has made clear its position that . . . the International Covenant on Civil and Political Rights, by its express terms, applies only to ‘individuals within its territory and subject to its jurisdiction.’”).

104. See *supra* Part I.

the United States has a duty to protect the human rights of all detainees within the bounds of the treaties to which it is a party.¹⁰⁵

C. Derogations from Treaties

The ICCPR has listed several exceptional circumstances where states are permitted to limit or derogate from certain rights contained in the Covenant.¹⁰⁶ Under these exceptions, the state must have officially proclaimed a state of emergency, and any limitations must be essential to the situation, must not be discriminatory, and must be consistent with the state's other international obligations.¹⁰⁷ Interestingly, the United States did not declare any official derogations in its ratification of the ICCPR.¹⁰⁸

However, even in a state of war or emergency, not all rights can be limited. Rights that may not be derogated from include: "the right to life (art. 6), the prohibition of torture or cruel, inhuman or degrading treatment or punishment (art. 7), the recognition of everyone as a person before the law (art. 16), and freedom of thought, conscience and religion (art. 18)."¹⁰⁹ The Human Rights Committee has also established that rights such as habeas corpus and minimum fair trial rights must be respected even in the most extreme circumstances.¹¹⁰ In addition, under the ICCPR there is an absolute prohibition on the use of "torture [and] cruel, inhuman or degrading treatment or punishment."¹¹¹ Furthermore, the Human Rights Committee stated that "cruel, inhuman or degrading" treatment should be interpreted to the widest extent possible in an effort to protect against abuses.¹¹² Subsequently, the European Court of Human Rights agreed and expanded its interpretation of inhumane treatment to include at least "such treatment as that which deliberately causes severe suffering, mental or physical"¹¹³

III. HUMAN RIGHTS VIOLATIONS AT GUANTÁNAMO BAY

At this point, the world is well aware of the human rights violations that have occurred, and continue to occur, at Guantánamo Bay.¹¹⁴ These violations continue for many reasons, the most important of which is re-

105. U.N. Comm'n on Human Rights, *supra* note 60, at 6.

106. *Id.*

107. *Id.*

108. See ICCPR, *supra* note 69.

109. *Id.* at 7.

110. *Id.*

111. International Covenant on Civil and Political Rights art. 7, G.A. Res. 2200 (XXI)A, U.N. Doc. A/RES/2200 (XXI)A (Dec. 16, 1966).

112. DeMarco, *supra* note 64, at 550.

113. *Id.* at 551 (quoting *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 489 (1989)).

114. See AMNESTY INT'L, *supra* note 23.

lated to how the United States interprets its human rights obligations under international agreements to which it is a party. Unfortunately, the violations at Guantánamo Bay are not few and far between; this topic has been reported on extensively, as it is unusual for the United States, one of the largest proponents of human rights doctrines, to commit the very violations it condemns in other areas of the world.

In 2012, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment identified the violations he suspected were ongoing at Guantánamo Bay.¹¹⁵ The UN Special Rapporteur further noted that the UN Convention Against Torture defines torture as a crime committed by state officials, and intent is an important prerequisite of torture.¹¹⁶ The UN Special Rapporteur stated that the level of pain that must be inflicted to constitute torture is “not as high as President Bush and his advisors describe, it is not excruciating pain similar to organ failure or death. It is somewhere in between.”¹¹⁷ Thus, the interrogation techniques used at Guantánamo, as well as many other methods of extracting confessions, can be considered torture according to this definition—especially waterboarding.¹¹⁸ Interrogation tactics that constitute ill-treatment or torture include stress positions, sensory deprivation, prolonged isolation, the use of twenty-hour interrogations, hooding during transportation and interrogation, stripping, forcible shaving, and “using detainees [sic] individual phobias (such as fear of dogs) to induce stress.”¹¹⁹ Similarly, although psychological methods used against detainees—what the U.S. government has called “enhanced interrogation techniques”—leave no physical trace, these methods still qualify as mental harm under the UN Special Rapporteur’s definition of torture.¹²⁰

The UN Special Rapporteur also wrote a report on the conditions and human rights violations at Guantánamo. However, the report was based on ex-detainees’ testimony, not live interviews with current detainees, because the Bush Administration would not allow the UN Special Rapporteur to speak to detainees privately.¹²¹ The Rapporteur did not agree to this condition, so he was unable to visit the facility in preparation for the report.¹²² Although the UN Special Rapporteur was the first

115. See generally Manfred Nowak, *Torture: Perspective from UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment*, 7 NAT’L TAIWAN U. L. REV. 466 (2012).

116. *Id.* at 469.

117. *Id.*

118. *Id.* at 496.

119. AMNESTY INT’L, *supra* note 23.

120. See Nowak, *supra* note 116, at 470.

121. *Id.* at 478.

122. *Id.*

independent body to demand closure of the Guantánamo Bay facility based on the Rapporteur's findings of human rights violations, nothing happened as a result of the announcement.¹²³

A. Detainee Classification as Enemy Combatants vs. Prisoners of War

Detention is a security and military necessity because it prevents the enemy from once again attacking the United States;¹²⁴ therefore, the U.S. government's position is that "[t]he law of war allows the [United States] . . . to hold enemy combatants without charges or access to counsel for the duration of hostilities"¹²⁵ The United States does not classify Guantánamo detainees as prisoners of war because their internment would then be regulated by the Third Geneva Convention, nor are detainees classified as "enemy aliens" subject to internment under the Fourth Geneva Convention.¹²⁶ By classifying detainees as "enemy combatants," the United States has justified its stance that prisoners may be held indefinitely; the UN is in agreement that an individual may be detained for the remainder of hostilities to prevent them from taking up arms against the state.¹²⁷ The UN, however, considers the indefinite detention of Guantánamo detainees without being charged or offered access to counsel for the duration of current hostilities (the War on Terror) "a radical departure from established principles of human rights law," and noted the important difference between those detainees captured in the course of an armed conflict versus those captured under circumstances that do not amount to an armed conflict.¹²⁸ The UN—as opposed to the United States—has determined that the War on Terror does not constitute an armed conflict under international humanitarian law.¹²⁹ Thus, the United States' classification of the War on Terror as an armed conflict has undermined crucial parts of international humanitarian law as well as international human rights law.¹³⁰

Therefore, the United States' human rights policy is in conflict with its responsibilities under international law. Although there may be a legal basis in international humanitarian law to detain individuals in time of

123. *Id.*

124. *Id.* The goal is to prevent the enemy from mounting another attack against the United States.

125. U.N. Comm'n on Human Rights, *supra* note 60, at 8.

126. Fitzpatrick, *supra* note 4, at 250.

127. U.N. Comm'n on Human Rights, *supra* note 60, at 8.

128. *Id.* at 9.

129. *See id.*

130. *See* Fitzpatrick, *supra* note 4, at 251.

war, the UN does not consider the War on Terror an armed conflict;¹³¹ additionally, there is no end in sight to this conflict. The United States has responded to claims of human rights violations stating simply that the law of armed conflict allows the United States to hold the detainees until the end of hostilities.¹³²

B. The Infliction of Cruel, Inhuman, and Degrading Treatment on Detainees

The “severe, prolonged and harmful health and mental health problems” that result from detainees being held indefinitely, without knowledge of if or when they will be released, can constitute cruel, inhuman, and degrading treatment.¹³³ A 2008 study that evaluated the effects of detention on former detainees from Abu Ghraib and Guantánamo “found that uncertainty was one of the most stressful factors among detainees ultimately released without ever having been charged.”¹³⁴

The most recent human rights violation at Guantánamo was the force-feeding of competent detainees on a hunger strike, as referenced in Part I. Forced feeding can constitute a violation of the absolute prohibition against torture and cruel, inhuman, and degrading treatment under the ICCPR.¹³⁵ Support for this notion comes from a number of medical associations, such as the World Medical Association, which declared:

Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician.¹³⁶

Further, the World Medical Association’s 1991 Declaration states, “Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment.”¹³⁷ Additionally,

131. The UN sees terrorism as a separate category of sorts. *See generally* U.N. GAOR, 60th Sess., U.N. Doc. A/60/825 (Apr. 27, 2006).

132. U.N. Comm’n on Human Rights, *supra* note 60, at 8.

133. THE CTR. FOR VICTIMS OF TORTURE, THE UNITED STATES’ COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS WITH RESPECT TO THE CONTINUED DETENTION WITHOUT CHARGE OR TRIAL OF PRISONERS FOR AN UNDEFINED DURATION AT THE GUANTÁNAMO BAY DETENTION FACILITY 2 (2008), available at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/18_page_255-261_guantanamo_ctr_for_victims_of_torture.pdf.

134. *Id.*

135. *Id.* at 3–4.

136. *Id.* at 3.

137. *Id.*

many other national and international medical and humanitarian organizations have condemned the forced feeding of detainees.¹³⁸

The U.S. Supreme Court has been more willing to condemn the torture and human rights violations at Guantánamo than the Executive Branch. For instance, in *Rasul v. Bush*,¹³⁹ the Court ruled that federal courts have jurisdiction over detainees at Guantánamo; therefore, detainees are allowed to file petitions seeking habeas corpus and challenge the legality of their detention in court.¹⁴⁰ Similarly, in *Hamdi v. Rumsfeld*, the Court ruled that a U.S. citizen held at Guantánamo and captured on the “battlefield” has a constitutional right to a fair trial to challenge his status as an enemy combatant.¹⁴¹ The Court, in dicta, “cited provisions of the Geneva Convention III (relative to the prisoners of war) as authoritative on the ‘law of war.’”¹⁴² Another example is *Hamdan v. Rumsfeld*,¹⁴³ where the Court held that Article 3, common to all four Geneva Conventions, applied to Guantánamo detainees.¹⁴⁴

Despite the Supreme Court championing for human rights, Congress passed the Military Commissions Act (MCA) in 2006 as a response to the decision in *Hamdan*.¹⁴⁵ The MCA “stripped federal courts of the right to hear habeas corpus cases by or on behalf of any Guantánamo detainees.”¹⁴⁶ The Act “explicitly provided administration officials and those who followed their advice on torture with immunity from prosecution under the War Crimes Act by granting the President the authority ‘to interpret the meaning and application of the Geneva Conventions.’”¹⁴⁷ In addition, the Act redefined torture and other breaches of Common Article 3 and applied the new definitions retroactively to cover the period up to the passage of the War Crimes Act.¹⁴⁸ This was an effort by Congress to shrink when and where the Geneva Conventions and other international law would apply. The Court, however, attempted to strike back in

138. *Id.* at 4. These organizations include: the American Medical Association, the Inter-American Commission on Human Rights, the UN Rapporteur on Torture, the UN Rapporteur on Human Rights and Counter-Terrorism, the UN Working Group on Arbitrary Detention, and the UN Rapporteur on Health. *Id.*

139. *Rasul v. Bush*, 542 U.S. 466 (2004).

140. AMNESTY INT’L, *supra* note 23.

141. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2006).

142. Annas, *supra* note 25, at 443.

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

144. *Id.* See also Annas, *supra* note 25, at 458; AMNESTY INT’L, *supra* note 23.

145. See The United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948–950 (2006)).

146. AMNESTY INT’L, *supra* note 23.

147. Annas, *supra* note 25, at 460.

148. *Id.*

Boumediene v. Bush,¹⁴⁹ holding that Guantánamo detainees are entitled to habeas corpus relief under the U.S. Constitution.¹⁵⁰

The Obama Administration acknowledged that while human rights had been violated at Guantánamo in the past, these violations no longer exist.¹⁵¹ However, the continued indefinite detention of detainees, the recent issues surrounding the hunger strike, and the Administration's failure to close the facility, hold the perpetrators of the violations accountable, or provide reparations for those whose human rights have been violated are serious, ongoing human rights issues.

IV. ATTEMPTS AT ENFORCEMENT OF HUMAN RIGHTS NORMS AT GUANTÁNAMO BAY BY THE INTERNATIONAL COMMUNITY

A. The United Nations' Efforts

The violations at Guantánamo provoked—albeit unsuccessful—investigations by UN officials.¹⁵² At the twelfth annual meeting of the Special Rapporteurs, a statement was issued regarding the Special Rapporteurs' earlier request to visit Guantánamo to investigate alleged human rights violations.¹⁵³ According to the statement, the U.S. government still had not invited the Human Rights Commission to visit those “arrested, detained or tried on grounds of alleged terrorism or other violations in Iraq, Afghanistan, or the Guantanamo Bay naval base.”¹⁵⁴ The statement further read:

The request for a visit was made following the negative response to the request by the Working Group on Arbitrary Detention in January 2002 to visit Guantanamo Bay and the United States and the lack of a response to the joint request made by the Special Rapporteurs on torture and health in January 2004 to visit Guantanamo Bay. Such requests were based on information, from reliable sources, of serious allegations of torture, cruel, inhuman and degrading treatment of detainees, arbitrary detention, violations of their right to health and their due process rights. Many of these allegations have come to light through declassified Government documents.

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

150. AMNESTY INT'L, *supra* note 23.

151. *See* Nowak, *supra* note 116, at 496.

152. *See* Press Release, Office of the High Comm'r for Human Rights, U.N. Experts Address Concerns Regarding Guantánamo Bay Detainees, U.N. Press Release HR/4860 (June 23, 2005), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6508&LangID=E.

153. *See id.*

154. *Id.*

The purpose of the visit would be to examine objectively the allegations first-hand and ascertain whether international human rights standards that are applicable in these particular circumstances are being upheld with respect to those detained persons.¹⁵⁵

The Human Rights Commission did not receive a definitive answer despite repeated requests and, thus, came to the conclusion that the United States was unwilling to cooperate with the UN human rights groups regarding the treatment of detainees and other human rights violations.¹⁵⁶ This investigation attempt, and subsequent statement, was made in 2005—nearly a decade ago—yet no significant progress has been made because the United States has not invited the Human Rights Commission to visit the facility.

The UN Commission on Human Rights did attempt to both investigate the human rights violations at Guantánamo and force the United States to comply with its obligations. For instance, on February 16, 2006, the UN Commission on Human Rights mandated that five independent human rights experts issue a report calling on the United States to close the Guantánamo detention center and “should either expeditiously bring all Guantánamo Bay detainees to trial, in compliance with articles 9, paragraph 3, and 14 of ICCPR, or release them without further delay.”¹⁵⁷ The report reaffirmed that the War on Terror was not an armed conflict and that the United States had failed to notify the UN of any official derogations from ratified treaties.¹⁵⁸ The report further noted that

Guantánamo detainees are entitled to challenge the legality of their detention before a judicial body in accordance with Article 9 of ICCPR and to obtain release if detention is found to lack a proper legal basis. This current right is currently being detained and the continuing detention of all persons held at Guantánamo amounts to arbitrary detention in violation of Article 9.¹⁵⁹

The report also expressed great distress at the U.S. government’s efforts to reform and redefine words like “torture,” and concluded that despite these efforts, the detention conditions amounted to inhumane treatment.¹⁶⁰ Additionally, the techniques used by the Department of Defense were in violation of Article 7 of the ICCPR.¹⁶¹ The report made several

155. *Id.*

156. *See id.*

157. U.N. Comm’n on Human Rights, *supra* note 60, at 25.

158. Bruce Zagaris, *U.N. Human Rights Report Increases Pressure on U.S. Detainee Policy*, 22 INT’L ENFORCEMENT L. REP. 147 (2006).

159. *Id.*

160. *Id.*

161. *Id.*

recommendations: that expeditious trials be held for detainees or detainees be released; that the U.S. government ensure each detainee is able to make a complaint regarding his treatment; that all allegations of torture and other violations be investigated by an independent party; and that “all persons found to have perpetrated, ordered, tolerated or condoned such practices, up to the highest level of military and political command, [be] brought to justice.”¹⁶²

Following the September 11 attacks, the UN Security Council, as well as the General Assembly, acknowledged the importance of fighting terrorism, but also called for “all States [to] ensure that any measure[s] taken to combat terrorism comply with all their obligations under international law, in particular international human rights . . . law.”¹⁶³ Accordingly, in 2001, the Security Council adopted Resolution 1373, “requiring all States to take a wide range of legislative, procedural, economic, and other measures to prevent, prohibit and criminalize terrorist acts.”¹⁶⁴

However, the UN is limited in its enforcement of human rights violations by permanent members of the Security Council because every permanent member has veto power.¹⁶⁵ For example, it is well known that there are many alleged human rights violations in China and the Russian Federation, yet no UN action has successfully enforced human rights norms in those nations because they are both permanent members of the UN and possess veto power.¹⁶⁶ Similarly, because the United States also retains veto power over any action by the UN, any enforcement of human rights norms on U.S. soil will likely never be permitted.

B. The Inter-American Commission on Human Rights' Efforts

The IACHR is an autonomous body of the Organization of American States (OAS), which derives its power from the American Convention on Human Rights and the OAS Charter.¹⁶⁷ The IACHR is arguably the most proactive international organization in its pursuit of enforcement of human rights norms at Guantánamo.¹⁶⁸ The organization ex-

162. *Id.*

163. U.N. Comm'n on Human Rights, *supra* note 60, at 5 (internal quotation marks omitted).

164. *Id.*

165. *Current Members*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/members/> (last visited Apr. 9, 2014). Permanent members include China, France, the Russian Federation, the United Kingdom, and the United States.

166. See generally Steve Holland, *Senior Obama Adviser Criticizes Human Rights Abuses in China, Russia*, REUTERS (Dec. 4, 2013, 6:20 PM), <http://www.reuters.com/article/2013/12/04/usa-rights-obama-idUSBRE9B31A820131204>.

167. *IACHR Expresses Deep Concern over New Revelations About Guantánamo*, ORG. AM. STATES (Apr. 29, 2011), http://www.oas.org/en/iachr/media_center/PReleases/2011/037.asp [hereinafter *Deep Concern over New Revelations*].

168. *Id.*

pressed its deep concern when information about the detainees' conditions became known. IACHR's efforts included calling for both the closure of the facility and for "reports of torture and other cruel, inhuman, or degrading treatment to be investigated."¹⁶⁹

On March 12, 2002, only two months after the United States began holding detainees at Guantánamo, IACHR implemented precautionary measures for detainees and asked the U.S. government to "adopt the necessary urgent measures so that a competent court could determine the legal status" of Guantánamo detainees.¹⁷⁰ The IACHR's decision was based on findings that

doubts exist[] as to the legal status of the detainees, including the question of whether and to what extent the Third Geneva Convention or other provisions of international humanitarian law applied to some or all of the detainees and what implications this may have for their international human rights protections, and that absent clarification of the legal status of the detainees, the Commission considered that the rights and protections to which they may be entitled under international or domestic law could not be said to be the subject of effective legal protection by the State.¹⁷¹

Thus, precautionary measures were deemed necessary to ensure that the detainees' legal status would be determined and that the detainees would be afforded requisite legal protections.¹⁷² However, the United States claimed that the IACHR did not have the appropriate jurisdiction to adopt the precautionary measures.¹⁷³ Additionally, the U.S. government has not provided any subsequent information to the IACHR demonstrating that the United States was in compliance with these precautionary measures.¹⁷⁴ These precautionary measures were expanded on October 28, 2005, when the IACHR asked the United States to conduct an impartial and thorough investigation into all "instances of torture and other cruel, inhuman, or degrading treatment, and to prosecute and punish those responsible."¹⁷⁵ Again, the United States failed to respond.

Further, the IACHR passed Resolution No. 2/06 on July 28, 2006, which urged the United States to close the Guantánamo detention facility without delay, "transfer the detainees in full compliance with interna-

169. *Id.*

170. *Id.*

171. *Precautionary Measures Regarding Guantánamo*, ORG. AM. STATES, <http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp> (last visited Apr. 5, 2014) [hereinafter *Precautionary Measures Regarding Guantánamo*].

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

tional humanitarian law and international human rights law, and to take the necessary measures to ensure detainees a fair and transparent judicial process before a competent, independent, and impartial decision-maker.”¹⁷⁶ In 2007, the IACHR also requested a visit to Guantánamo to observe detention conditions.¹⁷⁷ However, the United States agreed only under the caveat that the Commission would not communicate with detainees; the Commission declined the invitation.¹⁷⁸ The IACHR continues to call for the facility’s immediate closure and urges the United States to investigate and prosecute any human rights violations.¹⁷⁹

In July 2013, the IACHR expanded its precautionary measures once again given the “ongoing risk of irreparable harm to the rights of detainees . . . aggravated with the passage of time”¹⁸⁰ The IACHR concluded it was necessary to close the facility immediately in light of the “prolonged and indefinite detention, and allegations of widespread abuse and mistreatment, including unnecessary and humiliating searches, the force feeding of detainees who have chose[n] to participate in a hunger strike, and the increasing segregation and isolation of detainees.”¹⁸¹ Clearly, the IACHR has concluded that the U.S. government is in violation of international humanitarian law despite the United States’ labeling of Guantánamo detainees as unlawful combatants.¹⁸²

C. Level of Success of Enforcement Efforts

The various efforts to enforce human rights norms at the Guantánamo facility have been largely unsuccessful. The United States has seemingly exercised its hegemony once again, and more corrosively than ever, in the international human rights regime.¹⁸³ Recently, it appears as though “repressive governments have been emboldened to pursue their own business as usual, with less fear of critical scrutiny by UN Charter-based bodies.”¹⁸⁴ Indefinite detention at Guantánamo, as well as other human rights violations, has shown the international community the ambiguities and the institutional deficiencies within the human rights regime.¹⁸⁵

176. *Deep Concern over New Revelations*, *supra* note 167.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Precautionary Measures Regarding Guantánamo*, *supra* note 171.

181. *Id.*

182. See Wilson, *supra* note 6, at 41.

183. See Fitzpatrick, *supra* note 4, at 242.

184. *Id.*

185. *Id.* at 243.

Unfortunately, the human rights treaty bodies have no real power to enforce norms because they have no mechanisms to force compliance.¹⁸⁶ The UN is really no different; although the Human Rights Committee creates reports detailing state human rights violations, the Committee can only *encourage* states to amend their practices and conform to international human rights obligations.¹⁸⁷ Similarly, the treaty bodies “proceed slowly and with inadequate resources, and no effective procedural mechanisms have been established to deal systematically with derogations.”¹⁸⁸ For instance, the United States suffered no consequences when it simply ignored IACHR’s recommendations on how to comply with its human rights obligations at Guantánamo. Thus, the treaty body’s slow progress and lack of enforcement mechanisms has essentially left the U.S. court system with the responsibility of dealing with the international human rights law violations and the future of the detainees at Guantánamo.

The UN is also unable to enforce its recommendations upon the United States; it can only continue to bring its recommendations to the attention of the U.S. public. For example, the UN Office of the High Commissioner on Human Rights (OHCHR) issued another report in November 2014,¹⁸⁹ which reiterated statements made in prior reports and condemned how the United States continues to deal with detainees at the Guantánamo facility.¹⁹⁰ The report shows that there has not been much impact or change from preceding reports.¹⁹¹ Further, the report called on the United States to prosecute individuals who tortured detainees, confirming that the UN and the international community have no recourse to enforce prosecution for violations of the Convention.¹⁹² Finally, the report provided no suggested enforcement recommendations.¹⁹³

Additionally, international nongovernmental organizations (NGOs), including Amnesty International, Human Rights First, and the Center for Constitutional Rights, have attempted to pressure the United States into enforcing human rights norms at Guantánamo by publishing information

186. *See id.* at 262.

187. *See id.* at 263.

188. *Id.*

189. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding Observations on the Third to Fifth Periodic Reports of the United States of America*, U.N. Doc. CAT/C/USA/CO/3-5 (Nov. 20, 2014), available at <http://www.state.gov/documents/organization/234772.pdf>.

190. *See generally id.*

191. *See generally id.*

192. *See id.* at 6.

193. *See generally id.*

on the situation.¹⁹⁴ Unfortunately, these calls for closure have no real effect on U.S. policy as NGOs are unable to enforce human rights norms. Hypothetically, while the UN could send peacekeeping forces around the world to remedy human rights violations, NGOs do not have the ability to take such action. Thus, although their fight brings attention to human rights violations—and their ability to lobby governments can sometimes prove effective—overall, the unfortunate reality is that NGOs do not have the power to enforce norms, and violations continue without consequences.

Furthermore, until the U.S. government recognizes extraterritorial application of international treaties, human rights violations will remain unrecognized. Because these violations did not technically occur on American soil, the international community is unable to force the U.S. government to comply with the treaties. Additionally, despite the small successes of both the Obama and Bush Administrations in releasing some of the detainees, the international community is unable to use common techniques to force compliance. For example, the use of sanctions, such as those imposed on Syria and Iran, would be ineffective because the country that typically has the most impact when imposing sanctions, the United States, would be on the receiving end of the sanctions; obviously, the United States will not support sanctions against itself. Therefore, the situation at Guantánamo has made it abundantly clear that the United States' hegemony in international affairs has stunted the international community's ability to counter United States violations of human rights norms.

Finally, under the Rome Statute, which entered into force in 2002, some terrorist acts may be tried before the International Criminal Court (ICC).¹⁹⁵ However, creation of the ICC triggered aggressive action by the United States, which attempted to exempt its politicians and soldiers from the statute's jurisdiction.¹⁹⁶ This behavior reflects a problematic issue of American foreign policy: United States' resistance to constraints on military and political action on the global stage.

Clearly, the mechanisms for enforcing human rights norms have not been effective against the United States; Guantánamo remains open despite President Obama's promise to close it, and there have been no consequences for the United States' human rights violations at the facility.

194. See, e.g., AMNESTY INT'L, *supra* note 23; HUMAN RIGHTS FIRST, *supra* note 7; CENTER FOR CONSTITUTIONAL RIGHTS, *Our Issues: Illegal Detentions and Guantánamo*, <http://ccrjustice.org/illegal-detentions-and-guantanamo> (last visited Mar. 27, 2015).

195. See Rome Statute of the International Criminal Court, July 1, 2002, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

196. Fitzpatrick, *supra* note 4, at 261.

This is a signal that an adjustment to current enforcement mechanisms is necessary for international human rights law to have a global influence.

V. WHERE TO GO FROM HERE: SUGGESTIONS ON HOW THE UNITED STATES AND THE INTERNATIONAL COMMUNITY SHOULD PROCEED WITH ENFORCEMENT OF THE HUMAN RIGHTS NORMS AT GUANTÁNAMO BAY

The United States must take necessary steps to comply with its obligations under international human rights law. The first step towards the enforcement of human rights norms at Guantánamo would be to immediately close the facility. As noted above, President Obama supports the facility's closure, but there are issues that complicate the release of detainees. At a bare minimum, the closure of the facility "would not be inconsistent with continuing detention of suspected al Qaeda fighters as enemy combatants. Human detention for purely preventative incapacitation, with appropriate due process standards to verify the combatant status of each detainee"¹⁹⁷ would create a compromise that would make closure of the facility more amenable to both the Obama Administration and members of the American public opposed to the illegal detention of detainees at Guantánamo. In addition, detainees that have been classified by the Obama Administration as ready for release should be transferred to other nations immediately. The remaining detainees should be transferred to either a military or federal facility, have legitimate charges brought against them, and be provided with legal counsel if the government will not provide for their release.

The UN and the international community should continue to pressure the United States to remedy its mistakes. In addition, other nations must put financial considerations aside and impose sanctions on the United States until either the facility is closed or human rights violations are addressed. The problem comes down to the international legal system as a whole; not only is the international legal system a slow-moving behemoth, but power is also held very tightly by a select few on the Security Council, which hinders the UN from productively sanctioning members. A mass overhaul of the entire system may be necessary. Although that would take a great deal of time, the situation at Guantánamo has illuminated weaknesses within the international legal system, and those weaknesses need to be fixed to protect others from future human rights violations. In reality, over ten years have passed since the first illegal detentions at Guantánamo, and enforcement by the treaty bodies have clearly been ineffective in protecting the rights afforded under them. The only way international legal bodies can attempt to enforce international

197. Yin, *supra* note 84, at 476.

law is through condition reports and recommendations for change. Yet, there is no enforcement mechanism to push forward the implementation of these recommendations. International law bodies must have some way to influence the world's most powerful nations so that these nations are not above the law.

In the past, the international community has encouraged human rights violators to offer reparations in an effort to mend past wrongs. Working with the same detainees who were tortured could be good for the United States. However, it is likely the vast majority of the U.S. population would be against this idea, and this Note does not propose this as a viable option, although it is worth considering in situations where the violators and victims are in different countries.

The reality is that, because the UN is unable to overcome the United States' power in the Security Council, the international community—specifically, U.S. allies—must continuously apply pressure to close the facility at Guantánamo Bay, charge and try detainees, or transfer remaining detainees. International NGOs must use more force when lobbying Congress to promote change in current policy. Furthermore, the State Department should consider publishing a report on its own human rights standards as opposed to merely analyzing other nations'. Currently, the State Department issues annual Country Reports on Human Rights Practices “on all countries receiving assistance and all United Nations member states to the U.S. Congress in accordance with the Foreign Assistance Act of 1961 and the Trade Act of 1974.”¹⁹⁸ Yet, the United States does not hold itself to the same standard when dealing with its own international law and human rights violations.

More specifically, under CAT, states have an obligation to punish perpetrators of torture; however, states are not directly obligated to do so under general international law.¹⁹⁹ One way to resolve violations would be to hold those who approved and committed the violations accountable by charging them with crimes commensurate to their violations and trying them in court, whether by the U.S. government or before the ICJ. These wrongs can also be corrected through international tribunal courts such as the International Criminal Tribunal for the Former Yugoslavia (ICTY). At the ICTY, high-level officials who encouraged and approved of human rights violations were indicted for violations of international law.²⁰⁰ Although the UN has called on the United States to prosecute in-

198. *Human Rights Reports*, U.S. DEP'T ST., <http://www.state.gov/j/drl/rls/hrrpt/> (last visited Apr. 9, 2014).

199. Nowak, *supra* note 116, at 494.

200. *See The Cases*, U.N. ICTY, <http://www.icty.org/action/cases/4> (last visited Feb. 25, 2015).

dividuals who tortured detainees, there is no incentive for the United States to do so. To encourage the prosecution of human rights violators, consequences for governments must be tied to the failure to investigate crimes. Too often, human rights violators face no consequences; yet, such consequences are a critical deterrent for future human rights violations.

Further, domestic law is increasingly important in the enforcement of human rights mechanisms. Some of the violations committed at Guantánamo could be partially rectified if detainees were properly charged and tried within the United States. This proposal has sparked some backlash, as many states' congressional representatives are opposed to housing terrorists within their prisons.²⁰¹ However, the United States must be flexible to remedy the current situation because, after all, it put itself in this position. Finally, although the Senate has made it even more difficult to adjust U.S. policy and allow detainees to be tried or released abroad,²⁰² hopefully the Senate's recent report will be impactful and will provoke some serious change domestically. As the international community is unable to promptly remedy the issue, the American people must push Congress and the Obama Administration to fairly remedy the violations that have occurred and determine the detainees' fate once and for all.

VI. CONCLUSION

In conclusion, the United States violated, and continues to violate, international law with its detention facility at Guantánamo. The facility and events that occurred there are in conflict with CAT, ICCPR, the Geneva Conventions, and customary international law. While the world, including the American public and our President, has expressed its outrage regarding the well-known human rights violations, the facility remains open, and the United States continues to illegally hold detainees. The violations enumerated in Part III of this Article placed a spotlight on the issue of enforcement norms in international law; however, no matter what steps the international community took, the facility remained open. The situation has shown the international community that changes to current enforcement mechanisms must be made so the enforcement of human rights norms can occur, especially when the enforcement is against a

201. See Missy Ryan & Adam Goldman, *U.S. Prepares to Accelerate Detainee Transfers from Guantánamo Bay Prison*, WASH. POST (Dec. 24, 2014), http://www.washingtonpost.com/world/national-security/us-prepares-to-ramp-up-transfers-from-guantanamo/2014/12/24/46685a86-8ab9-11e4-a085-34e9b9f09a58_story.html.

202. See *Senate Paralyzed on Guantánamo, Rejects Bills to Loosen, Tighten Rules on Moving Detainees*, FOX NEWS (Nov. 19, 2013), <http://www.foxnews.com/us/2013/11/19/senate-paralyzed-on-guantanamo-rejects-bills-to-loosen-tighten-rules-on-moving/>.

nation that holds overwhelming power in determining foreign affairs, such as the United States. Current enforcement mechanisms have been ineffective in dealing with the violations at Guantánamo—for example, the applicable treaty bodies made forceful recommendations without consequences; any forceful UN action has been stunted by the United States' position on the Security Council; and the United States refused to allow the UN Rapporteur to visit the facility and further analyze the situation.

Therefore, it seems the only way in which the U.S. government has been held accountable for its clear violation of international law is through the tarnishing of its reputation. Unfortunately, the lack of a real enforcement mechanism for violations of human rights has resulted in a state of limbo for detainees, who are entirely dependent on the U.S. domestic court system and the Obama Administration for release, transfer, and even the opportunity to be heard. Thus, international law enforcement mechanisms must be amended to prevent *any* nation from being above the law, especially when being above the law results in the continuous violation of human rights without consequences.