

The Lexington Principles **on the** **Rights of Detainees**

**A TRANSNATIONAL LEGAL PROCESS APPROACH TO
DUE PROCESS**

(FINAL PROVISIONS WITH RESEARCH ANNOTATIONS – APRIL 1, 2009)



Attribution

The Lexington Principles on the Rights of Detainees is a product of the Lexington Principles Project in conjunction with the Transnational Law Institute at Washington and Lee University School of Law and The Washington and Lee University Institute for Honor.

Lexington Principles Project Website

This document and more information about the Lexington Principles can be found at www.lexingtonprinciples.org.

A NOTE FROM THE CHAIR

The Lexington Principles Project is an independent international project on the rights of detainees hosted and supported by the School of Law and Washington and Lee University Institute for Honor. Its members hail from many different disciplines and institutions. It is with great pleasure that the Steering Committee of the Lexington Principles Project in conjunction with the Transnational Law Institute at Washington and Lee University School of Law and the Washington and Lee University Institute for Honor offer these Principles to the international community in the hope that they will further a constructive dialogue on the treatment of detainees. The Lexington Principles Project seeks also to be a resource to the United States Congress as it implements the recommendations of the 9/11 Commission by engaging other nations that confront these issues.

We felt that there could be no more fitting a place for this effort to begin than at Washington and Lee University, whose namesakes were known for their humanity as well as their military excellence. Before we were a nation, at the Battle of Trenton, George Washington issued America's first policy statement on the treatment of detainees. A number of prisoners had been taken by General Washington's troops. Some Hessian mercenaries had been guilty of barbarous behavior, and a few Americans thought that retribution was in order. Washington's order was unequivocal. He said, "Treat them humanely- let no dishonour come to us." This has been our national ethic ever since, and no enemy, however barbarous, should cause us to abandon it.

The Lexington Principles Project is a non-partisan, apolitical organization with values shared by people of differing political affiliations and different opinions on solutions to the issues we consider. We hope to continue the lively debate we have provoked and welcome opposing views on anything put forth by the Project.

It is my own pleasure to acknowledge and thank those who did the yeoman's work that went into the Lexington Principles. The core group of us who were stirred to action by Ambassador Richard Holbrooke's speech at Washington and Lee in 2007 rapidly expanded and will continue to do so. Professor of Economics Emeritus John Gunn, who left on a bus as a student from Lexington, Virginia to fight in World War II and who had a distinguished teaching career at Washington and Lee, was the first to ask that spark of a question, "Why not here?"

Lawyers Robert R. Feagin, III, and J. Frank Surface, quickly put the support of Washington and Lee's Institute for Honor behind the project. Col. Thomas C. Greenwood (USMC ret.) and Washington attorney Bennett L. Ross have spent countless hours with me on the Steering Committee, and every minute spent with these high-minded men has been an honor for me.

Washington and Lee University School of Law Dean, and First Amendment scholar, Rodney A. Smolla is a Project member, and he pledged the full support of the School of Law. Within the School of Law, the Transnational Law Institute run by Professor Mark A. Drumbl has been indispensable. Young law professor and our Editor-in-Chief David Alan Jordan has been a boundless source of ideas and sheer hard work from the moment Dean Smolla appointed him School of Law Liaison to the Project. Professor Jordan served as drafter, and his enthusiasm for the project attracted 25% of the law student body to participate in the writing of over 200 annotations to the Principles. That is a labor of love, volunteered by busy young law students motivated by high ideals and the exceptional Professor Jordan. International Law Professor Emeritus Frederick L. Kirgis was an indispensable source of wisdom to all of us and especially to Dave Jordan during the drafting period.

All of our members, volunteers every one, have contributed in myriad ways to make this Project come about and they will continue to do so as we take the debate abroad and as we work in Washington to encourage legislation in keeping with our national values. To all of them, The Institute for Honor, and Washington and Lee University School of Law, my heartfelt thanks.

R. Brooke Lewis, Chairman
The Lexington Principles Project

April 1, 2009

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EXECUTIVE SUMMARY

In *Boumediene v. Bush*, decided June 12, 2008, the U.S. Supreme Court extended the constitutional privilege of habeas corpus to noncitizens detained at Guantanamo Bay, Cuba. Courts will now be called upon to assess the propriety of American detainee treatment practices against unclear constitutional standards. The strength and contours of the due process protections the U.S. Constitution will afford these detainees is still an unsettled question. The Lexington Principles are designed to help guide the development of American due process standards as they move outside our borders. These Principles are also intended to serve as a model for those seeking to make refinements in the domestic law of any nation based on prevailing transnational norms.

The Lexington Principles on the Rights of Detainees is a body of international due process principles reflecting the prevailing transnational norms in the area of detainee treatment. These Principles are based on international human rights law, but have been specially designed to facilitate internalization into the domestic legal systems of the United States and other common law countries. The relevant international norms have been reformulated into the familiar common law due process framework in order to provide the linguistic bridge necessary to ease domestication by lawyers and jurists in common law countries that have been conditioned to attach special significance to rights couched in the language of “due process.”

Central to the Lexington Principles is the uncontroversial proposition that there is a fundamental human right to physical liberty afforded under both the U.S. Constitution and international law, and this right is protected by the guarantee that no deprivations will occur without due process of law. This fundamental point of mutuality is then used as the anchor for all other rights contained in the instrument which are treated as essentially derivative of this central guarantee.

To further assist internalization by domestic judiciaries, these principles also propose the recognition of a new “Transnational Incorporation Doctrine” under which the most fundamental aspects of international human rights law could be constitutionally domesticated through incorporation into the Due Process Clause of the Fifth Amendment to the U.S. Constitution in a manner similar to the way the federal Bill of Rights was applied to the states. This suggestion is intended to simplify the jurisprudential process ahead and reduce subjectivity as judges begin to determine which due process rights extend beyond America’s borders.

INTRODUCTION

A. The Lexington Principles Project

1. Mission Statement

“The mission of the Lexington Principles Project is to engage the international community to clarify and strengthen transnational norms pertaining to due process of law and the treatment of persons detained on suspicion of terrorist activities, and to foster a common approach to these matters, in keeping with the recommendation of the 9/11 Commission on this subject.”

2. Our Aim

The Lexington Principles Project seeks to organize leading scholars, practitioners, and military experts to begin implementation of the 9/11 Commission Report’s recommendation regarding the development of a universal approach to the treatment of detainees.¹ The Project’s aspirations were not limited simply to identifying the prevailing international norms in this area – an effort which had already been thoroughly performed by several prominent international organizations.² We set our sights on a far more difficult task: the development of

¹ The 9/11 Commission’s recommendation regarding detainee treatment standards states:

“(t)he United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.”

See THE 9-11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (AUTHORIZED EDITION), pg. 380 (W.W. Norton & Co. 2004), available at http://www.9-11commission.gov/report/911Report_Ch12.htm (last visited October 14, 2007).

² See *The Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, 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, available at http://www.unhcr.ch/html/menu3/b/h_comp34.htm; see also *The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, adopted by U.N.

a set of principles based on international law that would be capable of being internalized into the domestic law of the United States and other common law countries as binding and enforceable legal obligations. This was certainly an ambitious proposal, but one which the Project's membership was eager to embrace given the need for clarification demonstrated by the problems that have arisen in the global struggle against international terrorism.

3. Jurisprudential Obstacles

The domestication of international human rights law is presented with unique difficulties in the United States because of the Supreme Court's jurisprudence with respect to the domestic effect of non-self-executing treaties.³ The foundational international instruments supporting our call for enhanced detainee rights are all non-self-executing, which means that while they *do* "bind the United States as a matter of international law," they *do not* by themselves create rights that are enforceable in U.S. courts.⁴ This is an interpretation strongly opposed by many of the world's top international law experts, and powerfully persuasive arguments exist for an alternative understanding under the U.S. Constitution;⁵ however the U.S. Supreme Court has unfortunately disagreed with these assessments.⁶ In an opinion issued on March 25, 2008, the Court unequivocally recognized the validity of the distinction, making it difficult for any initiative seeking domestic enforcement of obligations based on international human rights law.⁷ To the extent that this impediment exists internationally, we hope that the Lexington Principles will offer a solution to the problem.

General Assembly Resolution 43/173 on Dec. 9, 1988 available at <http://www1.umn.edu/humanrts/instree/g3bpppdi.htm>; see also *Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990) available at <http://www1.umn.edu/humanrts/instree/g2bpt.htm>.

³ See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁴ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (noting that although the International Covenant on Civil and Political Rights "does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

⁵ For a superb exposition arguing in favor of the alternative understanding of the enforcement of treaties under U.S. law, please see the brief submitted by Lexington Principles Project member Mark Drumbl and other international law experts as amici curiae in *Hamdan v. Rumsfeld*. 2005 U.S. Briefs 184 (2006).

⁶ See *Medellin v. Texas*, 128 S. Ct. 1346 (2008); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

⁷ See *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (Chief Justice Roberts, writing for the Court, stated "while treaties 'may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'").

B. Our Methodology

1. Transnational Legal Process Approach

It was clear from the outset that any attempt to overcome these obstacles would require a sophisticated approach employing the methods of vertical norm integration still being developed by the world's most prominent international lawyers and scholars. Given the extraordinary transnational law resources at our disposal by virtue of the involvement of the Transnational Law Institute at Washington and Lee University School of Law and its founder Mark Drumbl, we decided to structure our development of the Lexington Principles in accordance with the pioneering theory of Transnational Legal Process developed by Harold Koh, the Dean of Yale Law School.⁸

The use of this approach resulted in the creation of the innovative conceptual framework employed in the Lexington Principles below, which if accepted, will represent a substantial step forward in the way international human rights are understood under the domestic law of the United States and other common law countries. Although this framework is new and will require considerable scholarly analysis before it has been honed to perfection, the transnational incorporation mechanism it employs may ultimately provide the basis for both statutory and judicial norm-internalization in the United States and internationally. Perhaps the most valuable contribution is the framework's potential for use by domestic judiciaries to begin immediate implementation of our minimum standards

⁸ See Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (defining Koh's theory of Transnational Legal Process as "the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize rules of transnational law."); see also Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 625 (1998) (stating that "by 'transnational legal process,' I mean the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system. Through this *three-part process* of interaction, interpretation, and internalization, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations.") (emphasis added). Dean Koh also expresses the process as comprising four steps later in the same article. *Id.* at 643 (stating that "[t]he process usually occurs in *four phases*: interaction, interpretation, internalization, and obedience.") (emphasis added). Most recently, in 2004, Dean Koh again expounded his model using the three-part approach. See Harold Hongju Koh, *Agora: The United States Constitution and International Law: International Law as Part of Our Law*, 98 A.J.I.L. 42, 55 (2004) (defining Transnational Legal Process as "the process whereby domestic systems incorporate international rules into domestic law through a three-part process of interaction, interpretation, and norm internalization."). Dean Koh's model is also further developed in a number of other law review articles. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997); see also Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L. J. 1397 (1999); see also Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L. J. 2391 (1994); see also Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999, 1014-1018 (1994).

without the need to wait for ratification by politicians who may be unable to act to protect these fundamental rights due to the pressures inherent in the conflicted political climate of our times.

2. Phase I – Transnational Norm Interpretation

Under the Transnational Legal Process approach, our objective in Phase I of the Project was interpretation, *i.e.* norm-identification and definition, with an eye toward eventual attempts at domestication in the United States and other common law countries. We undertook an extensive review of all primary source materials under international law bearing on the issue of detainee treatment. This involved reviewing all principal humanitarian and human rights law treaties, relevant materials regarding customary international law, statements from leading Nongovernmental Organizations, and the analytical writings of learned scholars.

Once we had established a firm foundation built on primary legal sources, we began attempting to flesh out a broader set of requirements based on the prevailing international norms guiding the treatment of detainees. Our work at this stage was greatly facilitated by the exceptional work of U.N. organs and other transnational normative institutions. We examined the norms codified in numerous relevant instruments. Particularly instructive,⁹ were the normative principles set forth in:

- (1) The Standard Minimum Rules for the Treatment of Prisoners (1977),¹⁰
- (2) The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (1988),¹¹ and
- (3) The Basic Principles for the Treatment of Prisoners (1990).¹²

⁹ This list is far from exhaustive. There were so many codifications of normative principles that were instructive to this effort that it would be impractical to mention them all here. Specific examples from various instruments are contained in the Annotated Drafter's Commentaries to these Principles.

¹⁰ *The Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, 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, available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm.

¹¹ *The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, adopted by U.N. General Assembly Resolution 43/173 on Dec. 9, 1988 available at <http://www1.umn.edu/humanrts/instree/g3bpppd.htm>.

¹² *Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990) available at <http://www1.umn.edu/humanrts/instree/g2bpt.htm>.

After an exhaustive review of all relevant normative sources, we sat down to draft the comprehensive body of fundamental due process rights now codified in the Lexington Principles.

3. Phase II – Transnational Norm Internalization

Phase II of our project begins with the formal publication of these Principles and an invitation for national and international commentary. This stage is intended to be an ongoing process of further interpretation and eventual domestication through various modes of transnational norm internalization in the U.S. and abroad. Although this stage was far in the future during the drafting process, it was ever present in our minds. We knew that in order for the Lexington Principles to effect meaningful change, they would have to be crafted in a way that comported with the available means of transnational norm internalization in the United States. To meet this challenge, Professor David Alan Jordan of Washington and Lee University School of Law developed our common law due process paradigm and conceptualized “The Transnational Incorporation Doctrine” as a means of providing a possible avenue for domestication in the future. We then drafted all of the Lexington Principles accordingly.

C. Phase I Interpretation – Carving the Rosetta Stone

1. Recognizing the Legal Language Barrier

The rights afforded detainees under international human rights law and U.S. constitutional law often appear virtually indistinguishable. The protections are often the same, the rationales are often the same, and our respect for their virtue is often the same; however the legal status of these seemingly identical rights could not be more different. When contained in the U.S. Constitution, these rights are inviolable, viewed as sacrosanct by those in our government, and rendered functionally unassailable by all those who might seek to circumvent them. When contained in human rights treaties, these rights are viewed as merely suggestions, held to be non-self-executing, and rarely implemented in our courts.¹³ While various legal justifications exist for these distinctions, one explanation for the reason we as American lawyers feel so differently about these rights may lie in the language used to express them.

Law exists through language. The specific language of the law carries tremendous practical significance; therefore in law school we teach that in order to master the law, a person must first master the legal lexicon and then apply it with extreme precision. This linguistic sensibility is a fundamental and universal aspect of the human experience for lawyers worldwide, and explains why there are few true synonyms in the law.

¹³ See *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

Many detainee rights are protected under international law just as they are protected under the U.S. Constitution; one key difference, however, is that under U.S. constitutional law these rights are protected under the language of “due process.” The term “due process” is unique to common law legal systems and is therefore not found in most relevant international human rights instruments. It is not that the rights inherent in what we know as “due process” are not protected under international law; it is just that these protections have been expressed in different language. While certainly not determinative, these linguistic differences do impede direct integration in common law legal systems where the words may not be readily recognized as sacrosanct legal terminology by domestic jurists. In order to facilitate transnational norm-internalization of international human rights law into the domestic legal system of the United States, the Lexington Principles would first need to translate these norms into the common law lingua franca of due process.

2. Distilling Mutuality

The process of norm redefinition is arduous and uncertain. To facilitate this process we first focused on areas of commonality between the international and domestic legal systems. There is considerable overlap in the standard protections afforded to detainees under both the human rights and due process frameworks, which demonstrates the truly universal nature of these obligations. After considerable review, we distilled this mutuality down to a single fundamental principle: the right to physical liberty.

The linchpin of the Lexington Principles approach is our conclusion that there is a fundamental human right to physical liberty guaranteed under both the U.S. Constitution and international law, and this right is protected by the guarantee that no deprivations will occur without due process of law.¹⁴ Principle 1 first establishes this central right,¹⁵ and then all other rights are drafted as essentially derivative. This was done in order to anchor all of the rights contained in the Lexington Principles to a central right indisputably afforded under both legal systems.

¹⁴ Both the 5th and 14th Amendments to the U.S. Constitution contain due process clauses which establish the domestic constitutional basis for the right to physical liberty and due process of law. Various international instruments protect this same right under international law. *See* Universal Declaration of Human Rights Art. 13(1) (“Everyone has the right to freedom of movement and residence within the borders of each state.”); *see also* Universal Declaration of Human Rights, Art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”); *see also* Universal Declaration of Human Rights Art. 3 (“Everyone has the right to life, liberty and security of person.”); *see also* Universal Declaration of Human Rights Art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws.”).

¹⁵ LEXINGTON PRINCIPLES ON THE RIGHTS OF DETAINEES, Principle 1 (2008) (“Physical liberty is a fundamental human right and may not be denied to any person without due process of law.”).

3. Carving the Rosetta Stone

After identifying this common juridical nexus, the drafting of the Lexington Principles consisted of taking all the mutual rights we had identified during the norm interpretation phase and translating them into elements of the fundamental right to physical liberty and due process of law. Once this was complete, we compiled all of the Principles into a conceptual framework that is comfortably familiar to the common law world. This framework breaks down all rights into three general categories:

- I. General Provisions
- II. Procedural Due Process
- III. Substantive Due Process

The result of this lengthy effort is the Lexington Principles on the Rights of Detainees: a body of international due process principles intended to provide the linguistic bridge necessary to foster transnational norm internalization of international human rights law by lawyers and jurists in common law countries who have been conditioned to attach special significance to rights couched in “due process” terminology.

D. Phase II Internalization – The Transnational Incorporation Doctrine

1. The Need for Domestication

As previously stated, most of the fundamental human rights contained in the Lexington Principles are already protected under the Due Process Clauses of the U.S. Constitution. The work of the Lexington Principles Project would not have been necessary, but for two early interpretations of these Clauses pertaining to applicability. Although the language of the Fifth Amendment’s Due Process Clause places no qualifications on its seemingly unambiguous mandate that “*no person*” shall be deprived of life, liberty, or property, without due process of law,¹⁶ the Supreme Court had interpreted both a territorial limitation and a nationality requirement into its text.¹⁷

¹⁶ U.S. CONST. AMEND V.

¹⁷ U.S. Constitutional protections afforded by the Bill of Rights clearly apply outside of the territory of the United States with respect to U.S. government actions affecting U.S. citizens. *See Reid v. Covert*, 354 U.S. 1, 6 (1957); *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721, *Applicability of Constitutional Safeguards* (“The provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.”). These protections,

In the landmark decision of *Boumediene v. Bush*, the Supreme Court moved away from this precedent by extending the constitutional privilege of habeas corpus to noncitizens detained by the U.S. government at an extraterritorial detention facility at Guantanamo Bay, Cuba.¹⁸ Courts will now be required to step in to determine the extent of due process to be afforded in these circumstances. The Lexington Principles document provides the transnational foundation on which to base these extraterritorial guarantees by laying the groundwork for selective incorporation of the most fundamental international human rights law protections into our understanding of due process under the Fifth Amendment to the U.S. Constitution.¹⁹

2. Introducing the Transnational Incorporation Doctrine

The Transnational Incorporation Doctrine, first developed for the Lexington Principles, asserts that there are some rights under international human rights law that are so fundamental that they should be included in our understanding of the right to due process of law under the Fifth Amendment to the U.S. Constitution. Because international human rights are universal, this new interpretation would result in universal application of the Fifth Amendment's Due Process Clause with respect to incorporated rights. Nationality and territoriality would play no role in determining their applicability. Rights incorporated through this mechanism would be universally applied to all human beings, and these protections would have a domestic legal status equivalent to all other due process rights. The Ninth Amendment seems to indicate that the Framers of the Constitution intended to allow for this possibility.²⁰

however, did not generally apply to the actions of the U.S. government against noncitizens abroad until *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“[n]either the U.S. Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (holding that the Fourth Amendment does not apply to the search and seizure of the person or property of a noncitizen abroad).

¹⁸ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

¹⁹ The reason the Transnational Incorporation Doctrine envisions incorporation of international human rights into the 5th Amendment's Due Process Clause instead of both the 5th and 14th Amendments is because the 14th Amendment applies to U.S. states which do not generally engage in the type of conduct that might give rise to due process rights outside of U.S. territory. The challenges presented by actions taken in the global “War on Terrorism” are fundamentally matters involving the federal government only, therefore only the 5th Amendment's Due Process Clause is implicated.

²⁰ U.S. CONST. AMEND IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

3. Jurisprudential Precedent in American Constitutional Law

The Transnational Incorporation Doctrine was inspired by the U.S. Supreme Court’s substantive due process jurisprudence related to the incorporation of fundamental rights into the Fourteenth Amendment for application to state and local governments. Originally, the rights contained in the Bill of Rights applied only to the federal government and did not restrict the actions of individual states or other political subdivisions. After the American Civil War, the Fourteenth Amendment was ratified ensuring that no state government shall “deprive any person of life, liberty, or property, without due process of law.”²¹ Although the Fourteenth Amendment did not explicitly specify all of the protections listed in the Bill of Rights, the Supreme Court held – in a series of cases - that the majority of such rights were incorporated into the Fourteenth Amendment and thus binding on state and local governments by virtue of the substantive rights implicit in the concept of due process. The Supreme Court spent 100 years fleshing out its incorporation doctrine, and the famous debates surrounding it are among the most legendary in the Court’s history.²²

4. Possible Methods for Application

In order for the Transnational Incorporation Doctrine to be applied, the proper standard for its application must first be determined. When applying its incorporation doctrine to the Bill of Rights, the U.S. Supreme Court employed several different standards over the years.²³ The most recent test used to determine whether a specific right should be incorporated into the Due Process Clause of the Fourteenth Amendment was whether the right in question is “fundamental to the American scheme of Justice.”²⁴ With this standard in mind, we drafted Principle 22, which recognizes the right to substantive due process. This Principle states that:

²¹ U.S. CONST. AMEND. XIV.

²² See JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 171-183 (1989) (providing an excellent description of the lengthy and heated battle between Justice Hugo Black and Justice Felix Frankfurter on the issue of whether to incorporate the entire Bill of Rights into the Due Process Clause of the Fourteenth Amendment wholesale, or whether to incorporate rights selectively and allow for the possibility of recognizing some rights not explicitly enumerated in the Bill of Rights. Ultimately, it was Justice Frankfurter’s selective incorporation theory that prevailed.).

²³ Initially, some prominent American jurists believed that the rights contained in the Bill of Rights should be incorporated wholesale into the legal understanding of “due process.” Ultimately, the Supreme Court decided that it was more appropriate to incorporate these rights selectively. The Court then began to make determinations on an ad hoc basis based on factors such as whether the right could be considered “implicit in the concept of ordered liberty” or “so rooted in the traditions and conscience of our people as to be fundamental.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²⁴ *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

“Implicit in the fundamental right to due process of law is the requirement that no State should deprive any person of life, liberty, or security of person²⁵ in violation of any right fundamental to accepted principles of global justice.”²⁶

Although the standard ultimately applied by the courts may differ, we believe that Principle 22 accurately represents the essence of any such substantive guarantee.

E. Concluding Remarks

Although our efforts are intended to inform jurisprudence in common law countries around the world, the Lexington Principles Project is, at its heart, chiefly an American endeavor. We hope that our efforts will help to advance our American detainee treatment standards so that they better accord with the shared values of the American people. Our development of these standards was in no way intended to disparage the noble work of those charged with protecting our national security; rather our efforts were meant only to help avoid the potential for overzealousness that arises whenever individuals fighting for noble ends operate without the balancing effect of binding legal standards.

The Lexington Principles on the Rights of Detainees contain many enhancements exceeding the minimum protections required by international law. This was done to help America set a new standard for excellence with respect to detainee treatment, and to help restore American leadership in the global effort to define and protect fundamental human rights. It is our hope that these Principles will help to shift our common law understanding of due process guarantees so that we may someday see them as rights tied to humanity rather than facticity, so that humankind will move one step closer to the ideal of universal human rights for all.

²⁵ The phrase “life, liberty, or security of person” is taken from Article 3 of the Universal Declaration of Human Rights.

²⁶ LEXINGTON PRINCIPLES ON THE RIGHTS OF DETAINEES, Principle 22 (2009).

THE LEXINGTON PRINCIPLES ON THE RIGHTS OF DETAINEES

The Lexington Principles on the Rights of Detainees (April 1, 2009).

I. PART I: GENERAL PROVISIONS

A. Section A: Fundamental Right to Physical Liberty and Due Process of Law

1. Principle 1 – Right to Physical Liberty and Due Process of Law

Physical liberty is a fundamental human right and may not be denied to any person without due process of law.

B. Section B: Scope of Application

2. Principle 2 – General Statement of Universal Applicability

The fundamental protections inherent in the right to due process of law are universal and apply in all situations where a person has been detained by a State or its agents regardless of the reasons for, or circumstances surrounding, the detention.

3. Principle 3 – Irrelevance of Geography

The fundamental protections inherent in the right to due process of law are universal and should be afforded to all persons detained by a State or its agents without regard to the location of capture or detention.

4. Principle 4 – Nondiscrimination

The fundamental protections inherent in the right to due process of law are universal and should be afforded to all persons detained by a State or its agents without regard to nationality, national origin, ethnic origin, race, color, descent, language, religion, faith, sex, age, birth, parentage, wealth, or any other such criteria.

C. Section C: State Responsibility

5. Principle 5 – General Statement of State Responsibility to Protect

Each State has the responsibility to protect the right to physical liberty for all persons within its territory or otherwise under its control except insofar as they are properly detained in accordance with Principle 1.

6. Principle 6 – Commencement of State Responsibility to Protect

At a minimum, a State's responsibility to protect the due process rights of a person begins at the moment the person is detained by its agents.

7. Principle 7 – Duration of State Responsibility to Protect

Once initiated, a State's responsibility to protect the due process rights of a person continues until that individual's physical liberty is ultimately restored.

8. Principle 8 – State Responsibility to Protect upon Transfer

Transfer of a Person to the custody of another State does not terminate the transferring State's responsibility to protect the rights of the transferee. The transferring State should maintain an active interest in the rights of the transferee and seek periodic assurances that due process rights are continuously afforded until the transferee's physical liberty is ultimately restored.

D. Section D: International Obligation

9. Principle 9 – Statement of Universal Concern

A State's compliance with its responsibility to protect the fundamental rights of persons it deprives of physical liberty is a concern of humankind and therefore should be of interest to all members of the international community.

E. Section E: Relationship to Other Laws

10. Principle 10 – Rules of Construction

These Principles should not be construed to diminish any human right or protection afforded by any other source of law.

II. PART II: PROCEDURAL DUE PROCESS

A. Section A: General Statement of Procedural Rights

11. Principle 11 – Right to Procedural Due Process

Procedural due process is a human right requiring that all persons be afforded notice of, and an opportunity to challenge, any State action substantially affecting their fundamental right to physical liberty in a fair and public hearing before an impartial adjudicator with the independent authority to remedy violations through direct action and without undue restrictions.

12. Principle 12 – Prohibition of Extralegal Arrest and Detention

Due process requires that no deprivation of liberty occur outside of a legal process designed and equipped to assess the legality of the deprivation before, after, and during the period of detention.

13. Principle 13 – Prohibition of Extralegal Rendition

No State should subject any person to nonconsensual transfer from one national jurisdiction to another unless such transfer is performed pursuant to judicial process.

B. Section B: Notice

14. Principle 14 – Notice of Reasons for Deprivation and Procedural Rights

When a State substantially impairs the right to physical liberty of any person it should provide that person with effective written notice of the reasons for the impairment and the procedural mechanisms through which the person may challenge the deprivation.

15. Principle 15 – Sufficiency of Notice

The required notice should be sufficient to inform the person of the laws authorizing the impairment and the nature of the evidence justifying its use in the specific case, described with sufficient particularity to allow the person to evaluate the factual and legal basis for the deprivation. If full disclosure of the evidence underlying the factual basis for the detention would result in a substantial risk of harm to individuals or national security, the detainee may be informed of the general nature of the State's justification for the detention sufficient to allow the detainee to communicate relevant information to the detaining authorities which might assist them in determining whether continued detention is justified.

C. Section C: Opportunity to be Heard

16. Principle 16 – Right to Challenge Substantial Deprivations

All persons should have the right to challenge any substantial State deprivations of their right to physical liberty before a fair and impartial decision maker with the authority to remedy undue infringements without unnecessary delay.

17. Principle 17 – Right to Presumption of Innocence in Criminal Hearings

All persons charged with a criminal offense should be presumed innocent until proven guilty through an adjudicative process conducted in accordance with the requirements of due process.

18. Principle 18 – Right to Participate in Legal Process

All persons should be afforded the opportunity to participate in legal proceedings adjudicating matters directly affecting their right to physical liberty.

19. Principle 19 – Right to Counsel

All persons should be afforded the opportunity to consult legal counsel before and during legal proceedings adjudicating matters pertaining to substantial deprivations of their right to physical liberty.

D. Section D: Fair and Impartial Decision Maker

20. Principle 20 – Composition of Adjudicative Mechanism

Decision makers charged with adjudicating matters affecting a person's fundamental rights should be impartial and adequately educated to properly perform that function.

21. Principle 21 – Right of Adjudicators to Report Suspected Abuses

Adjudicators should have the means to report their concerns regarding suspected rights violations to appropriate authorities outside of the control of the governmental entity suspected of committing the violations.

III. PART III: SUBSTANTIVE DUE PROCESS

A. Section A: General Statement of Substantive Rights

22. Principle 22 – Right to Substantive Due Process

Implicit in the fundamental right to due process of law is the requirement that no State should deprive any person of life, liberty, or security of person in violation of any right fundamental to accepted principles of global justice.

B. Section B: Prohibition of Arbitrary Deprivations of Physical Liberty

23. Principle 23 – Prohibition of Arbitrary Arrest and Detention

No State should arrest or detain any person for reasons that are arbitrary. An arrest or detention is arbitrary if it is not performed pursuant to law or if it is incompatible with the fundamental principles of global justice.

24. Principle 24 – Right to the Rule of Law

No person should be deprived of the right to physical liberty except pursuant to the rule of law. State actors should never deprive any person of physical liberty except pursuant to specific and demonstrable legal authority governed by written laws and procedures.

25. Principle 25 – Prohibition of Detention Based on the Exercise of Fundamental Rights

No State should detain any person based solely on that person's exercise of a fundamental human right.

26. Principle 26 – Prohibition of Detention Based on Discriminatory Animus

No State should detain any person based solely on that person's nationality, national origin, ethnic origin, race, color, descent, language, religion, faith, sex, age, birth, parentage, wealth, or any similar criteria.

27. Principle 27 – Prohibition of Ex Post Facto Application of Penal Law

No State should try any person for a penal offense based on acts or omissions which did not constitute a penal offense at the time they were committed.

28. Principle 28 – Prohibition of Double Jeopardy

No State should detain, try, or punish any person for an offence for which the person has already been finally convicted or acquitted.

29. Principle 29 – Prohibition of Deprivations Based on the Actions of Third Parties

No State should deprive any person of liberty based solely on the alleged or actual wrongdoing of a third party.

30. Principle 30 – Prohibition of Indefinite Non-Punitive Detention

Extrajudicial detention beyond the time necessary to serve a compelling and current state objective is inconsistent with the principles of due process. No State should detain any person outside the judicial process unless such detention is conducted in accordance with substantial procedural safeguards narrowly tailored to ensure the detention is strictly limited to the time necessary to serve a compelling and current state objective.

31. Principle 31 – Right to Repatriation Following Detention

All persons should be afforded the right to return to their country of nationality or citizenship upon the cessation of detention by a foreign State.

C. Section C: Prohibition of Incommunicado Detention

32. Principle 32 – Prohibition of Incommunicado Detention

Prolonged incommunicado detention is incompatible with the substantive liberty guarantees inherent in the fundamental right to due process of law.

33. Principle 33 – Right to Communicate with Relatives

Persons subjected to prolonged detention should be allowed to communicate with their family at regular intervals, subject to the supervision of the detaining authorities, unless the State demonstrates that the denial of such communication is necessary based on a demonstrable risk to national security or the safety of any person.

34. Principle 34 – Right to Communicate with Diplomatic or Consular Representatives

All persons deprived of their liberty by the government of a foreign State should be allowed reasonable opportunities to communicate with the diplomatic or consular representatives of their home State as soon as practicable after the deprivation and periodically throughout the period of detention as needed to ensure they are afforded the full benefits of the protections guaranteed to foreign nationals under international law.

All persons who are refugees, stateless persons, or nationals of States without diplomatic or consular representation in the detaining State should be allowed reasonable opportunities to communicate with the diplomatic and consular representatives of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

35. Principle 35 – Right to Unmonitored Communication with Physicians

All persons subjected to prolonged deprivations of liberty should be afforded the right to periodic unmonitored communications with the physicians charged with providing their medical care in order to allow the disclosure of allegations of abuse by the detaining authorities.

36. Principle 36 – Right of Physicians to Report Suspected Rights Violations

Physicians charged with providing medical care for persons deprived of their liberty should be afforded a mechanism for disclosure of suspected detainee abuse to an authority outside the control of the entity committing the abuse, under conditions affording the physician adequate protection against retribution.

37. Principle 37 – Right to Information about the Outside World

All persons deprived of their liberty for an extended time should be given regular access to periodicals, books, educational materials, audio programs, writing materials, and other such items intended to keep them mentally engaged, informed of world events, and to allow them to make productive use of their time while in detention.

38. Principle 38 – Right of Public Access to Facility Procedures

A detaining State should make the general procedures governing the operation of its detention facilities available to the public. Sensitive security information may be exempted from public disclosure, although such procedures should be subject to review through an independent mechanism within the detaining government.

39. Principle 39 – Rights of Relief Organizations to Inspect Prisoners and Facilities

No State should unduly restrict the ability of the International Committee of the Red Cross and other appropriate relief organizations to inspect detention facilities and to engage in unmonitored communication with individual detainees for the purpose of monitoring the State's compliance with its responsibility to protect the fundamental rights of detainees under its control.

D. Section D: Prohibition of Offenses to Personal Welfare and Human Dignity

40. Principle 40 – Prohibition of Grave Breaches

No State should subject any person to torture, cruel treatment, biological experiments, murder, mutilation, maiming, rape, sexual abuse, or the intentional infliction of serious bodily or psychological injury.

41. Principle 41 – Prohibition of Extra-Legal Interrogation Methods

No State should interrogate any person employing methods that have not been approved for use by law.

42. Principle 42 – Duty to Maintain Records of Physical Interrogations

A State employing physical interrogation methods on any person should be required to maintain records detailing the specific dates, times, and duration of each physical interrogation session and specifying all of the physical methods employed together with the written legal authorization approving their use. Such records should be maintained for a period of fifty years, and destruction of such records should be a criminal offense.

43. Principle 43 – Right of Access to Records of Physical Interrogations

All persons subjected to physical interrogation methods by a State should be given full access to the records pertaining to such interrogations.

44. Principle 44 – Right to Adequate Healthcare, Nutrition, and Exercise

All persons deprived of their liberty should be afforded adequate healthcare, nutrition, and opportunities for physical exercise necessary for the maintenance of both physical and mental fitness during the period of detention.

45. Principle 45 – Right to Religious Observance

All persons deprived of their liberty should be afforded reasonable accommodations necessary to permit religious observance in accordance with the tenets of their faith or dictates of their conscience.

RESEARCH ANNOTATIONS

I. PART I: GENERAL PROVISIONS

A. Section A: Fundamental Right to Physical Liberty and Due Process of Law

1. Principle 1 – Right to Physical Liberty and Due Process of Law

Physical liberty is a fundamental human right and may not be denied to any person without due process of law.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. European Convention on Human Rights
 - a. *Article 5* - “Everyone has the right to liberty and security of person.”
2. International Covenant on Civil and Political Rights
 - a. *Article 9* - “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

B. Normative Codifications

1. Universal Declaration of Human Rights
 - a. *Article 3* - “Everyone has the right to life, liberty and security of person.”
 - b. *Article 8* - “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws.”
 - c. *Article 9* - “No one shall be subjected to arbitrary arrest, detention or exile.”
 - d. *Article 13(1)* - “Everyone has the right to freedom of movement and residence within the borders of each state.”
2. The Basic Principles for the Treatment of Prisoners

- a. *Principle 1* – “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”
 - b. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
 - c. *Principle 7* – “Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”
3. The Standard Minimum Rules for the Treatment of Prisoners
- a. *Principle 1* – “All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”
 - b. *Principle 2* - “Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.”
 - c. *Rule 6 (1)* – “The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
4. U.N. Rules for the Protection of Juveniles Deprived of their Liberty
- a. *Fundamental Perspective 2* – “Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.”
 - b. *Fundamental Perspective 3* - The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.”

II. Secondary Analysis

A. Legal Articles

1. Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services*, 11 CHAP. L. REV. 85, 117 (2007) (stating that substantive process rights under the U.S. Constitution include the right to "bodily integrity").
2. James L. Cavallaro and Emily J. Schaffer, *Less As More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 222 (2004) ("[T]he most basic civil and political rights [are the right] to life, to physical integrity, and to due process.").
3. Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 UNIV. TORONTO L.J. 383, 385 (2007) (noting article 2(2) of the Grundgesetz protects the right, which is "fundamental," to physical integrity).
4. Ran Hirschi, *Israel's "Constitutional Revolution": The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 444 (1998) (citing Chief Justice Barak of the Israeli Supreme Court's position that due process and freedom from physical intrusion are basic elements of human dignity).
5. Julia Mangano, *The Pervasive Immunity That Surrounds Human Rights Violations Committed by Columbia's Military*, 3 DEPAUL DIG. INT'L L. 45, 46 (1997) (noting that Columbia's Constitution protects fundamental rights including due process and bodily integrity).
6. Anja Matwijkiw and Willie Mack, *Making Sense of the Right to Truth in Educational Ethics: Toward a Theory and Practice That Protect The Fundamental Interests of Adolescent Students*, 2 INTERCULTURAL HMN. RIGHTS L. REV. 329, 358 (2007) (stating that the right to life and physical integrity are among a person's fundamental rights).
7. M. Isabel Medina, *Demore v. Kim—A Dance of Power and Human Rights*, 18 GEO. INT'L L.J. 697, 703 (2004) (noting that at the Due Process Clauses in the U.S. Constitution protect fundamental rights such as the right to physical liberty).
8. Shaun D. Pattinson, *Organ Trading, Tourism, and Trafficking Within Europe*, 27 MED. & L. 191, 194 (2008) (citing Article 3 of the EU Charter of Fundamental Rights for the proposition that "everyone has a right to respect for his or her physical integrity").
9. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 33–34 (2006) ("The Supreme Court, as well as many commentators, has recognized a fundamental right to bodily integrity in the Due Process Clause.").
10. Beate Rudolf and Andrea Eriksson, *Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT'L J. CONST. L. 507, 524 (2007) (stating that the right to "physical" integrity is a "fundamental human right").

B. Section B: Scope of Application

2. Principle 2 – General Statement of Universal Applicability

The fundamental protections inherent in the right to due process of law are universal and apply in all situations where a person has been detained by a State or its agents regardless of the reasons for, or circumstances surrounding, the detention.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 1* – “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”
 - b. *Principle 2* – “There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
 - c. *Principle 3* – “It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.”
 - d. *Principle 11* – “The above Principles shall be applied impartially.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 1* – “All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”

3. Principle 3 – Irrelevance of Geography

The fundamental protections inherent in the right to due process of law are universal and should be afforded to all persons detained by a State or its agents without regard to the location of capture or detention.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. **Basic Principles for the Treatment of Prisoners**
 - a. *Principle 1* – “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”
 - b. *Principle 2* – “There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
 - c. *Principle 3* – “It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.”
 - d. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
 - e. *Principle 11* – “The above Principles shall be applied impartially.”

II. Domestic Law

A. Judicial Decisions

1. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that the privilege of habeas corpus under the U.S. Constitution extends to all prisoners held by U.S. forces at Guantanamo Bay, Cuba).
2. *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Recognizing Guantanamo Bay as a United States territory, and extending the ‘implied protection’ of the United States to it).
3. *Id.* at 482 (2004) (Court had power to issue writs of habeas corpus to anyone under the subjection of the Crown, and proper question is the extent and nature of jurisdiction exercised) (*quoting* *R. v. Cowle*, 97 Eng.

- Rep. 587, 598–599 (K.B. 1759) and *Ex parte Mwenya*, 1 Q.B. 241, 303 (C.A. 1960)); *R. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668))
4. Cf. *Johnson v. Eisentrager*, 339 U.S. 763, 777–778 (refusing due process guarantees to prisoners held in allied prisons overseas The majority writes: “We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”).
 5. *Du Castro’s Case*, 92 Eng. Rep. 816 (K.B. 1697) (ordering discharge of alleged foreign spy and rejecting the argument that an alien was “not intitled to have a habeas corpus”); *United States v. Williams* (C.C. Va. 1813) (Marshall, C.J.) (granting habeas corpus relief to British enemy alien on account of a defective warrant); *Arabas v. Ivers*, 1 Root 92 (Conn. Super. Ct. 1784) (granting habeas relief to a slave—considered a non-citizen at the time—based on his service in Continental Army); PANDEY, *THE INTRODUCTION OF ENGLISH LAW INTO INDIA* 111-115, 140, 149 (1967) (discussing a line of cases in which habeas corpus rights were asserted against the East India Company in British colonial courts by Indians, i.e. non-citizens, held in India—non-sovereign territory at the time.)

III. Secondary Analysis

A. Normative Pronouncements

1. THE FEDERALIST NO. 84 (Alexander Hamilton) (Labeling the practice of arbitrary imprisonments the favorite and most formidable instruments of tyranny). “The observations of the judicious Blackstone in reference to [such imprisonments], are well worthy of recital. 'To bereave a man of life or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person by secretly hurrying to goal, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.' And as a remedy for this fatal evil, he is *every where* peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the BULWARK of the British constitution.'" THE FEDERALIST NO. 84 (quoting 1 BLACKSTONE'S COMMENTARIES 136 (1765).

B. Legal Articles

1. Lazar, “Cession in Lease” of the Guantanamo Bay Naval Station and Cuba’s “Ultimate Sovereignty,” 63 Am. J. Int’l L. 116, 117 (1969) (observing

- that the United States and Cuba described Guantanamo as “*ceded in lease*” in a 1912 amendment, a description which indicates that sovereign authority passed to the United States, and Cuba retained a reversionary interest).
2. Alec Walen and Ingo Venzke, Detention in the "War on Terror": Constitutional Interpretation Informed by the Law of War, 14 ILSAJICL 45, 46 ("In particular, the fundamental protection the Fifth Amendment provides for liberty-guaranteeing that it cannot be deprived without due process of law-applies to all detainees, not only to citizens and resident aliens but also to aliens captured and held by the United States outside the territory of the United States.").
 3. American Journal of International Law, Application of Firth Amendment to Overseas Torture of Alien, 95 AMJIL 641, 42 ("To begin with, in adjudicating the application of constitutional rights to aliens, the Supreme Court has looked- among other factors- to whether the aliens have come within the territory of the United States and developed substantial connections with the country.").
 4. Jonathan L. Hafetz, The Supreme Court's "Enemy Combatant" Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law, 14 TMPPCRLR 409, 09-10 ("In June 2004, the Supreme Court decided a trio of cases involving the President's power to detain "enemy combatants." Of the three, two involved United States citizens. In *Hamdi v. Rumsfeld*, the Court determined that the President could not detain a United States citizen as an "enemy combatant" without the "essential constitutional promises" of due process, including notice and an opportunity to be heard before a neutral decision maker. In *Rumsfeld v. Padilla*, the second case involving a United States citizen detained as an "enemy combatant," the Court did not reach the merits, holding instead that the habeas petition should have been dismissed on procedural grounds. In *Rasul v. Bush*, the case involving non-citizens, the Court held that individuals detained at Guantanamo Bay had a right to challenge the legality of their detention on habeas corpus, even though the United States lacked formal sovereignty over that territory.").
 5. Lauren Sara Wolfe, Gill & Sandhu v. Imundi: Due Process and Judicial Inquiry into Potential Mistreatment of Extraditees by Requesting Countries, 13 LYLAICLJ 1009, 1037-38 (concluding that extradition procedures in United States courts must accord accused individuals due process of law before depriving them of their liberty interests).
 6. Linda A. Malone, From Bread to Atkins to Malvo: Legal Incompetency and Human Rights, 13 WMMBRJ 363, 413 (concluding that the Inter-American Court of Human Rights has determined that Article 36 of the Vienna Convention confers individual rights of notification on foreign detainees at the time of arrest, and that any death sentence imposed without such notice violates fundamental due process guarantees and constitutes an arbitrary deprivation of the right to life).
 7. Marcy Strauss, Center for Professional Values and Practice Symposium Criminal Defense in the Age of Terrorism Article: Torture, 48 NYLSLR

- 201, 17 (stating that there is case precedent that holds that the Due Process Clause is violated by improper interrogation techniques, which can be used to support the contention that torture of suspected terrorists should not be allowed).
8. Michael J. Tricarico, How Sufficient is the "Sufficient Connection Test" in Granting Fourth Amendment Protections to Nonresident Aliens?: *United States v. Verdugo-Urquidez*, 64 STJLR 629, 34-35 (concluding that there is some case precedent establishing that illegal aliens fall within the broad classification of the term the people and are therefore entitled to some constitutional protections).
 9. Richard Downing, The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil, 26 STJIL 573, 579 (concluding that the Court in *Verdugo-Urduidez* did not intend to completely eliminate foreign aliens' constitutional rights).
 10. Rui Wang, Assessing the Bush Administration's Detention Policy for Taliban and Al-Qaeda Combatants at Guantanamo Bay in Light of Developing United States Case Law and International Humanitarian Law, Including the Geneva Conventions, 22 AZJICL 413, 427 ("The Supreme Court ruled that with respect to anyone detained within the territorial jurisdiction of the United States, the habeas statute 28 U.S.C. 2241 (a) and (c)(3) granted federal district courts the authority to hear applications for habeas corpus by any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States.").
 11. Taeho Lim, *Rasul v. Bush*, 124 S. Ct. 2686, 11 WLLREALJ 241 (concluding that the *Rasul* ruling gives the government an incentive to be more accountable for its actions, while opening the door to federal court for innocent foreign detainees wrongfully captured and held by an overzealous military).

4. Principle 4 – Nondiscrimination

The fundamental protections inherent in the right to due process of law are universal and should be afforded to all persons detained by a State or its agents without regard to nationality, national origin, ethnic origin, race, color, descent, language, religion, faith, sex, age, birth, parentage, wealth, or any other such criteria.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 1* – “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”
 - b. *Principle 2* – “There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
 - c. *Principle 3* – “It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.”
 - d. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
 - e. *Principle 11* – “The above Principles shall be applied impartially.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 5(1)* – “These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.
 - b. *Principle 5(2)* – “Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.”

3. Standard Minimum Rules for the Treatment of Prisoners
 - a. *Rule 6(1)* - The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
 - b. *Rule 6(2)* – “On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.”

II. Secondary Analysis

A. Legal Articles

1. Avani Metha Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833 (2008) (Discussing India's constitutional right of nondiscrimination for gender and religion.)
2. Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. TOL. L. REV. 791 (2008) (Explaining how prisoners do not lose their equal protection, nondiscrimination, or due process rights just because of their incarceration.)
3. Evelyn Gong, *A Judicial "Green Light" for the Expansion of Executive Power: The Violation of Constitutional Rights and the Writ of Habeas Corpus in the Japanese American Internment and the Post-9/11 Detention of Aram and Muslim Americans*, 32 T. MARSHALL L. REV. 275 (2007) (Arguing that enemy combatants in the war on terror have been denied the adequate legal protections.)
4. Manuel Carrasco Durán, *The Attitude of Courts and Public Institutions Towards the Multicultural Reality*, 30 VT. L. REV. 433 (2006) (Discussing the role of public institutions in the United States in protecting individual rights to nondiscriminatory treatment.)
5. Jona Goldschmidt, *"Order in the Court!": Constitutional Issues in the Law of Courtroom Decorum*, 31 HAMLINE L. REV. 1 (2008) (Detailing the rights maintained by a prisoner, including due process and nondiscrimination.)
6. Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335 (2005) (Arguing that the current programs in the war on terror risk violation of basic due process rights.)
7. John Harrison, *Two Equality, Race Discrimination, and the Fourteenth Amendment*, 13 CONST. COMMENT. 243 (1996) (Arguing that the 14th Amendment provides equal protection for all rather than only protection for certain groups.)
8. Cleveland Ferguson III, *Of Politics and Policy: Can the U.S. Maintain its Credibility Abroad While Ignoring the needs of its Children at Home? – Revisiting the U.N. Convention on the Rights of the Child as a Transnational Framework for Local Governing*, 14 TULSA J. COMP. & INT'L

- L. 91 (2007) (Arguing that nondiscrimination and due process are fundamental human rights recognized by the international community.)
9. David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53 (2006) (Arguing that rights like nondiscrimination and access to due process are agreed upon norms, while socioeconomic rights do not yet have the same status.)
 10. Hugo Rojas, *Legal Responses to Discriminatory Actions: A Comparative Analysis*, 5 LOY. U. CHI. INT'L L. REV. 127 (2008) (Describing the general inclination of many countries to hold the principle of nondiscrimination at the highest level of their respective legal orderings.)

C. Section C: State Responsibility

5. Principle 5 – General Statement of State Responsibility to Protect

Each State has the responsibility to protect the right to physical liberty for all persons within its territory or otherwise under its control except insofar as they are properly detained in accordance with Principle 1.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 1* – “All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”

6. Principle 6 – Commencement of State Responsibility to Protect

At a minimum, a State's responsibility to protect the due process rights of a person begins at the moment the person is detained by its agents.

RESEARCH ANNOTATIONS

I. Domestic Law

A. Judicial Decisions

1. Al-M, Individual Constitutional Complaint Procedure, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 5, 2003, 109 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 13, para. 47, Int'l L. Domestic Cts. [ILDC] 10 (De. 2003). In a subsequent proceeding, however, the extradition was allowed to go forward).

II. Secondary Analysis

A. Legal Articles

1. Jari Pirjola, *Shadows in Paradise—Exploring Non-Refoulement as an Open Concept*, 19 INT'L J. REFUGEE L. 639, 639–43 (2008) (suggesting that principles of non-refoulement may over-promise and under-deliver due to significant ambiguity in established international law related to the definition of inhumane treatment and torture. Mr. Pirjola's further argument that this is especially problematic in the context of refugee law rests in part on a state's right to decide who may remain in its territory is one of the most strongly protected principles of international law. *See id.* at 643. That argument would be less compelling in the context of detainees captured on the battlefield. Nevertheless, the issues of conflicting and unclear definitions of torture as opposed to cruel or inhuman treatment remain salient. *See id.* at 648–56. Mr. Pirjola concludes that the guarantee of non-refoulement does not guarantee a consistent interpretation of the underlying legal concepts on which that guarantee relies. *See id.* at 656–58. A number of his concerns and conclusions in this context parallel issues raised by seeking to establish state responsibility for the transfer and treatment of detainees).
2. Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903, 903–904 (2007) (noting the conclusion of the Council of Europe that with respect to torture and exceptions to state immunity, there is a need for "a coherent and practical approach, avoiding legal insecurity resulting from differences in the case-law of individual member States.").

3. André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760, 779–80 (2007) (noting the obligation of state “not to aid or assist another state in the commission of an international wrong. Mr. Nollkaemper notes that this is incorporated into the Articles on State Responsibility. *See id.* at note 4. Article 16 was explicitly cited by the German Constitutional Court in a decision rejecting extradition of a Yemeni man to the United States, on the basis that Germany could not, under international law, aid the U.S. where the U.S. actions leading to the detainment and indictment had violated international law. *See id.* at 779–80).
4. Al-M, Individual Constitutional Complaint Procedure, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 5, 2003, 109 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 13, para. 47, Int'l L. Domestic Cts. [ILDC] 10 (De. 2003). (In a subsequent proceeding, however, the extradition was allowed to go forward).
5. E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 242–45 (2008) (arguing that international humanitarian law is better suited than mercenary regulations to regulating the actions of private military contractors. Gaston suggests that attempting to regulate wrongdoing of government contracted actors with international regulations relating to mercenary conduct is unlikely to be successful and may undermine the strength of state responsibility doctrine. *See id.* at 236–40. His article highlights the legal issues surrounding the prosecution of a CIA contractor in Afghanistan and suggests that regulations “enacted under an [international humanitarian law] principle” might have allowed provided a better legal mechanism in such situations. *See id.* at 245–47. A natural extension of this argument is that international humanitarian law and concepts of state responsibility should govern a state’s contractual dealings with other states with respect to detainees).
6. Major Michelle Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law Into Armed Conflict*, 194 MIL. L. REV. 1, 64–65 (concluding that humanitarian law and human rights law have fundamentally dissimilar structures, and that the expansion of human rights law into humanitarian law should be halted. Although most of Major Hansen’s discussion focuses on areas not related to detention or detainee treatment, and could probably be distinguished on that point, she raises significant theoretical concerns about the merger of human rights and humanitarian law that should be evaluated. Her discussion of when and why the two regimes are applied, *see id.* at 23–25, and the normative differences between the two, *see id.* at 34–38, highlight the conditionality of humanitarian law as opposed to the universality of human rights law as a basis for her conclusions).

7. Principle 7 – Duration of State Responsibility to Protect

Once initiated, a State's responsibility to protect the due process rights of a person continues until that individual's physical liberty is ultimately restored.

8. Principle 8 – State Responsibility to Protect upon Transfer

Transfer of a Person to the custody of another State does not terminate the transferring State's responsibility to protect the rights of the transferee. The transferring State should maintain an active interest in the rights of the transferee and seek periodic assurances that due process rights are continuously afforded until the transferee's physical liberty is ultimately restored.

RESEARCH ANNOTATIONS

I. Domestic Law

A. Judicial Decisions

1. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 at 1204 (9th Cir. 2007) (In its decision remanding to the district court the question whether FISA preempts the state secrets privilege, the court held that accidentally disclosed material subject to the state secrets privilege is barred from consideration because of the privilege. This bar stands despite the disclosure of the contents of the material. Because the plaintiff cannot establish standing without the sealed document, "Al-Haramain cannot establish that it suffered injury in fact, a "concrete and particularized" injury, because the Sealed Document, which Al-Haramain alleges proves that its members were unlawfully surveilled, is protected by the state secrets privilege").
2. *Arar v. Ashcroft*, 414 F. Supp 2d 250 at 287 (E.D. N.Y. 2006) (bringing suit under the Torture Victim Protection Act ("TVPA" is an appendix to the Alien Tort Claims Act) and the 5th Amendment, the court dismissed the actions on standing grounds regarding an alleged detention at JFK airport and a subsequent rendition and torture in Syria. As a non-citizen he does not meet the requirements for a private cause of action under TVPA. However, the court did hold open the possibility that Arar could bring suit for his detention at JFK airport. The court stated "plaintiff must replead those [detention] claims without regard to any rendition claim and name those defendants that were personally involved in the alleged unconstitutional treatment..." The court dismissed this claim without prejudice. Finally, as the court never reached the question of the applicability to state secrets privilege, the court declined to consider the issue).
3. *El-Masri v. United States*, 479 F. 3d 296 at 308 (4th Cir. 2007) (Holding that despite publically available documents including reports from the Council of Europe and the White House alluding to extraordinary rendition practices, the state secrets privilege is not waived. "The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of

- such state secrets.” The court reasoned the even if El-Masri could prove his prima facie case without disclosure of state secrets, the United States could not properly defend their case without revealing sensitive information).
4. Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128 (N.D. Cal. 2008) (The United States intervened in to assert the state secrets privilege where plaintiffs sued defendants because of their participation in extraordinary rendition actions. Plaintiffs attempted to rely on *Al-Haramain* because the government has recognized the extraordinary rendition program. The court, however, distinguished this case on the merits holding that “the core of the plaintiff’s case against defendant Jeppesen are allegations of covert U.S. military or CIA operations in foreign countries against foreign nationals.” The court did not reach the question of applicability of the Alien Tort Statute).

II. Secondary Analysis

A. Legal Articles

1. Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. 1333 (2007) (arguing that despite U.S. government arguments to the contrary that those arguments “are not only incorrect, but they also hide a dangerous shift in policy: rendition to justice, a practice purportedly developed to uphold the rule of law against lawless terrorists, has become a lawless practice which perverts the rule of law in relation to terrorism.”).
2. Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture*, CRS Report RL 32890 (2007) (Recognizing the differing interpretations of the language of the U.N. Convention Against Torture (“CAT”). “So long as these persons were rendered to countries where they had not previously resided, it could also be said that the United States “returned” these persons to countries where they faced torture...In addition, if such renditions were not executed via a formal process, it could be argued that they did not constitute extraditions for the purposes of Article 3 [of CAT].”).

D. Section D: International Obligation

9. Principle 9 – Statement of Universal Concern

A State's compliance with its responsibility to protect the fundamental rights of persons it deprives of physical liberty is a concern of humankind and therefore should be of interest to all members of the international community.

E. Section E: Relationship to Other Laws

10. Principle 10 – Rules of Construction

These Principles should not be construed to diminish any human right or protection afforded by any other source of law.

II. PART II: PROCEDURAL DUE PROCESS

A. Section A: General Statement of Procedural Rights

11. Principle 11 – Right to Procedural Due Process

Procedural due process is a human right requiring that all persons be afforded notice of, and an opportunity to challenge, any State action substantially affecting their fundamental right to physical liberty in a fair and public hearing before an impartial adjudicator with the independent authority to remedy violations through direct action and without undue restrictions.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 9* – “The authorities who arrest a person, keep him under detention or investigate the case, shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - b. *Principle 10* – “Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.”
 - c. *Principle 11* – “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the

reasons therefore. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”

d. *Principle 12* –

- i. “There shall be duly recorded:
 1. The reasons for the arrest;
 2. The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
 3. The identity of the law enforcement officials concerned;
 4. Precise information concerning the place of custody.
- ii. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”

e. *Principle 13* – “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”

f. *Principle 14* – “A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”

g. *Principle 16* -

- i. “Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
- ii. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.
- iii. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the

notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

- iv. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.”

h. *Principle 17* –

- i. “A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
- ii. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.”

i. *Principle 18* –

- i. “A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
- ii. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
- iii. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
- iv. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
- v. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.”

j. *Principle 30* –

- i. “The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
- ii. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.”

k. *Principle 32* –

- i. “A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
- ii. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”

l. *Principle 33* –

- i. “A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.
- ii. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.
- iii. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.
- iv. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.”

m. *Principle 36* –

- i. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.
- ii. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to

prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.”

- n. *Principle 37* – “A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.”
- o. *Principle 38* - “A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.”
- p. *Principle 39* - “Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.”

II. Domestic Law

A. Judicial Decisions

1. *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) (establishing a three-part balancing test to determine whether a procedural safeguard is required by due process. The Court stated that the three factors to be weighed as follows: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail...”).
2. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The executive branch does not have the power to hold indefinitely a U.S. citizen without basic due process protections enforceable through judicial review. O’Connor applied the 3 prong Mathew test (*Mathews v. Eldridge*, 424 U.S. 319 (1976))
3. *Hamdan v Rumsfeld*, 548 U.S. (2006) (Military commissions set up at Guantanamo Bay to try detainees were procedurally flawed.)
4. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (This case holds that the U.S. does not have jurisdiction over German war criminals. Although this is not directly related to due process, jurisdiction is an important issue and this case can be used in connection with the issue of whether the “War on Terror” falls within the traditional ‘war’ framework.).

5. *Rasul v. Bush*, 542 U.S. 466 (2004) (This case is not directly on point for due process but is important because it deals with aliens rights and the legality of confinement conditions).
6. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (This case presents the interesting questions of what procedural due process rights a suspected terrorist that is also a U.S. citizen receives. At the minimum, the defendant has the right to counsel.).

III. Secondary Analysis

A. Legal Articles

1. Rodney A. Smolla, "Terrorism and the Bill of Rights," 10 William & Mary Bill of Rights Journal 551-83 (2002).
2. Abigail d. Lauer, *The Easy Way Out?: The Yaser Hamdi Release Agreement And The United States' Treatment Of The Citizen Enemy Combatant Dilemma*, 91 Cornell L. Rev. 927 (Discussing the dichotomy between due process rights of a citizenship verses and those of an alien. *Hamdi* is cited as an example of one who waived his due process rights by promising to expatriate.)
3. Hays Butler, *The Supreme Court's Decision In Boumediene v. Bush: The Military Commissions Act Of 2006 And Habeas Corpus Jurisdiction*, 6 Rutgers J. L. & Pub. Pol'y 149 (Stating the *Boumediene* decision permits greater procedural due process rights because it allows the detainees to be free from the Bush administration's use of coercive interrogation).
4. Nickolas A. Kacprowski, *Stacking The Deck Against Suspected Terrorists: The Dwindling Procedural Limits On The Government's Power To Indefinitely Detain United States Citizens As Enemy Combatants*, 26 Seattle U. L. Rev. 651 (Criticizing the procedural due process both Padilla and Hamdi received. He argues that terming a detainee and enemy combatant is grants the US government the privilege to fully strip them of any procedural rights).
5. The Honorable Frank J. Williams, Nicole J. Dulude, Kimberly A. Tracey, *Still A Frightening Unknown Achieving A Constitutional Balance Between Civil Liberties And National Security During The War On Terror*, 12 Roger Williams U. L. Rev. 675 (Stressing the important implications that overturning parts of the MCA will cause. Greater procedural due process rights and civil liberties many times come at a cost to society).
6. Harvard Faculty, *Extraterritorial Reach Of Writ Of Habeas Corpus*, 122 Harv. L. Rev. 395 (Discussing the positive impacts that will result from *Boumediene*. However, the author is critical of the undefined terms of the decision. He believes that other detainees held outside of Gitmo will not receive the same due process rights given to those (by *Boumediene*) detained at Gitmo).

7. Matthew C. Waxman, *Detention As Targeting: Standards Of Certainty And Detention Of Suspected Terrorists*, 108 Colum. L. Rev. 1365 (Discussing detention and due process rights in the context of the law of war. Specifically stating that Waxman advocates framing terrorism as a violation of the laws of war not a criminal act. When terrorism is seen through a criminal lens, the Supreme Court's failures to properly address due process will continue).
8. Paul A. Diller, *When Congress Passes An Intentionally Unconstitutional Law: The Military Commissions Act Of 2006*, 61 SMU L. Rev. 281 (Discussing Congress deliberate failure to properly address Supreme Court guidance. The CSRT's are clearly inadequate attempt to preserve procedural due process for detainees.)
9. Robert Chesney, Jack Goldsmith Terrorism And The Convergence Of Criminal And Military Detention Models, 60 Stan. L. Rev. 1079 (Stating that there are problems with both the legal system and the military detentions in the context of dealing with suspected terrorists. Procedural due process is drastically different under each model, and neither model has been able to perfectly fit.)
10. Jenny S. Martinez, *Process And Substance In The "War On Terror,"* 108 Colum. L. Rev. 1013 (Stating that a majority of all judicial challenges in the case of detainees have not been the merits of the case; rather the grievances are mainly procedural. She states that sometimes courts will use procedural grounds to avoid substantive issues. This is not surprising given the gravity of the issues).
11. Deva Solomon, *Can Government Indefinitely Detain Individuals Accused Of Being Enemy Combatants*, 34 Wm. Mitchell L. Rev. 5155 (Describing procedural due process through habeas corpus rights over the past few decades culminating with the *Boumediene* decision. Solomon sees this decision as a shining moment for due process rights because she believes that the government was placing these detainees in a "black hole" without any judicial oversight. Now the judicial branch can ensure these detainees have due process rights).
12. Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351 (discussing the necessity to define procedural due process in relation to the war on terror).
13. Julian Mann III, *Due Process; A Detached Judge; and Enemy Combatants*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (discussing an "impartial decision maker" as a crucial part of procedural due process).
14. Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044 (discussing the shortcomings of modern procedural due process law).
15. Doran G. Arik, *The Tug of War: Combatant Status Review Tribunals and the Struggle to Balance National Security and Constitutional Values During the war on Terror*, 16 J.L. & POL'Y 657 (discussing the need for due process to extend to non-citizen detainees).
16. Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or*

- Convergence?*, 19 EUR. J. INT'L L. 161, 177 (noting the requirement of procedural due process in international law governing occupied territories).
17. Sarah A. Wiess, *Due Process Rights: Rendition of a Citizen Terrorist*, 34 Wm. Mitchell L. Rev. 5195, (analyzing due process rights afforded suspected terrorists in a mock judicial opinion).
 18. Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85 N.C. L. Rev. 1687 (discussing the shortcomings of the O'Connor opinion in Hamdi).
 19. Monré D. Carodine, *Political Judging: When Due Process Goes International*, 48 Wm. & Mary L. Rev. 1159 (discussing application of American due process to international law).
 20. Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 89-96 (discussing use of entry fiction as a determinant of procedural due process).
 21. Susan N. Herman, *The USA Patriot Act and the Submajoritarian Fourth Amendment*, 41 Harv. C.R. – C.L. L. Rev. 67 (discussing a bifurcated approach to due process jurisprudence).
 22. James W. Nickel, *Due Process Rights and Terrorist Emergencies*, European Journal of Legal Studies (Discussing procedural due process rights for terrorists. His conclusion is: Creating a special arrest and detention track without most DPRs for suspected terrorists is extremely dangerous to people's security and to the universality of protections for due process.)___(http://www.ejls.eu/index.php?mode=htmlarticle&filename=./issues/200704/nickelUK.htm#_ftn29).
 23. Whitney D. Frazier, "The Constitutionality of Detainment in the Wake of September 11," 90 Kentucky Law Journal 1089-1124 (2001-2002).

12. Principle 12 – Prohibition of Extralegal Arrest and Detention

Due process requires that no deprivation of liberty occur outside of a legal process designed and equipped to assess the legality of the deprivation before, after, and during the period of detention.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 4* – “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”
 - b. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”

13. Principle 13 – Prohibition of Extralegal Rendition

No State should subject any person to nonconsensual transfer from one national jurisdiction to another unless such transfer is performed pursuant to judicial process.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
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 - a. *Principle 4* – “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”
 - b. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - c. *Principle 16* -
 - i. “Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
 - ii. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee

or is otherwise under the protection of an intergovernmental organization.

- iii. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.”

B. Section B: Notice

14. Principle 14 – Notice of Reasons for Deprivation and Procedural Rights

When a State substantially impairs the right to physical liberty of any person it should provide that person with effective written notice of the reasons for the impairment and the procedural mechanisms through which the person may challenge the deprivation.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 10* – “Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.”
 - b. *Principle 11* –
 - i. “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
 - ii. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
 - iii. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
 - c. *Principle 12* –
 - i. There shall be duly recorded:
 1. The reasons for the arrest;
 2. The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
 3. The identity of the law enforcement officials concerned;
 4. Precise information concerning the place of custody.
 - ii. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”
 - d. *Principle 13* – “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest,

detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”

- e. *Principle 14* – “A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”
- f. *Principle 30* -
 - i. “The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
 - ii. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.”

15. Principle 15 – Sufficiency of Notice

The required notice should be sufficient to inform the person of the laws authorizing the impairment and the nature of the evidence justifying its use in the specific case, described with sufficient particularity to allow the person to evaluate the factual and legal basis for the deprivation. If full disclosure of the evidence underlying the factual basis for the detention would result in a substantial risk of harm to individuals or national security, the detainee may be informed of the general nature of the State's justification for the detention sufficient to allow the detainee to communicate relevant information to the detaining authorities which might assist them in determining whether continued detention is justified.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 10* – “Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.”
 - b. *Principle 11* –
 - i. “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
 - ii. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
 - iii. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
 - c. *Principle 12* –
 - i. “There shall be duly recorded:
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 3. The identity of the law enforcement officials concerned;
 4. Precise information concerning the place of custody.
 - ii. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”

- d. *Principle 13* – “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”
- e. *Principle 14* – “A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”
- f. *Principle 30* -
 - i. “The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
 - ii. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.”

C. Section C: Opportunity to be Heard

16. Principle 16 – Right to Challenge Substantial Deprivations

All persons should have the right to challenge any substantial State deprivations of their right to physical liberty before a fair and impartial decision maker with the authority to remedy undue infringements without unnecessary delay.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Standard Minimum Rules for the Treatment of Prisoners
 - a. *Rule 35* –
 - i. “Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.
 - ii. If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.”
 - b. *Rule 36* –
 - i. “Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.
 - ii. It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.
 - iii. Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.
 - iv. Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

- a. *Principle 4* – “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”
- b. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
- c. *Principle 11* –
 - i. “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
 - ii. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefore.
 - iii. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
- d. *Principle 13* – “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”
- e. *Principle 14* – “A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”
- f. *Principle 17* –
 - i. “A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
 - ii. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.”
- g. *Principle 18* –
 - i. “A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

- ii. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
 - iii. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
 - iv. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
 - v. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.”
- h. *Principle 30* -
- i. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
 - ii. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.
- i. *Principle 32* -
- i. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
 - ii. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.
- j. *Principle 33* -
- i. “A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

- ii. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.
 - iii. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.
 - iv. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.
- k. *Principle 36* –
- i. “A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
 - ii. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.”
- l. *Principle 37* –
- i. “A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.”
- m. *Principle 38* –
- i. “A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.”
- n. *Principle 39* –
- i. “Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of

the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.”

3. Basic Principles for the Treatment of Prisoners
 - a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”

II. Secondary Analysis

A. Legal Articles

1. Tung Yin, Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism, 73 TENN. L. REV. 351, 414 (arguing for the use of an “analogical reasoning model, which suggests that the Guantanamo detainees should be afforded a hearing, notice, appointed counsel, and a reasonable right to present evidence, including possible teleconferencing of witnesses from abroad”).
2. Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL’Y REV. 153 (asserting that the only valid detentions are those authorized by Congress, and therefore that detainees in the current war should be able to challenge their detention in the courts).
3. David Weissbrodt & Amy Bergquist, Extraordinary Rendition: A Human Rights Analysis, 19 HARV. HUM. RTS. J. 123, 158 (arguing that those subjected to extraordinary rendition by U.S. officials have a right to challenge their detention through a petition of habeas corpus in United States courts).
4. Michael German, Trying Enemy Combatants in Civilian Courts, 75 GEO. WASH. L. REV. 1421 (arguing that civilian courts should handle the trial of terror suspects, inferring a right to challenge deprivation of their right to physical liberty before a fair and impartial decision maker).
5. Diane Marie Amann, Guantanamo, 42 COLUM. J. TRANSNAT’L L. 263 (asserting that “reported conditions of detention and interrogation, as well as the proposal for trial before special tribunals, may violate core guarantees of the U.S. Constitution”).
6. Jordan P. Faust, Judicial Power to Determine the Status and Rights of Persons Detained Without Trial, 44 HARV. INT’L L.J. 503, 530 (arguing that “international law requires access to courts for review of the propriety of detention, and detention in times of armed conflict can continue only so

- long as the person detained is a real security threat, as determined under a necessity standard”).
7. Jordan P. Faust, Customary International Law and Human Rights Treaties are Law of the United States, 20 MICH. J. INT'L L. 301 (arguing that international law is the law of the United States, implying a prohibition of denying due process to individuals detained).
 8. Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 STAN. L. REV. 1079 (arguing that the military detention model has made progress in affording greater rights, yet is still inadequate to handle the current threats to the United States, nor is the law enforcement model the correct model, and that a new way forward through a process of “convergence” should be able to ensure procedural due process rights).
 9. Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 33 YALE J. INT'L L. 369, 415 (arguing that “detainees must be afforded prompt and meaningful legal process”).
 10. David E. Graham, The Treatment and Interrogation of Prisoners of War and Detainees, 37 GEO. J. INT'L L. 61, 92 (arguing that the Fourth Geneva Convention, which ensures certain procedural protections relating to detention of protected persons, applies to nearly all detainees).
 11. Rosemary Byrne, *Assessing the Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 19 INT'L J. REFUGEE L. 609 (2007) (Rosemary Byrne applies as a guide the general procedure processes from international criminal law in her examination of the rights of asylum seekers. She emphasizes the importance to of being able to challenge charges placed against a defendant and raises concerns such as the ability of the court to accommodate the defendant’s language and culture).
 12. Jon M. Sands notes in his book review, *Active Liberty: Interpreting our Democratic Constitution by Stephen G. Breyer*, 53-OCT FED. LAW. 53, 53 (2006), that *Hamdan v. Rumsfeld* was a ruling of “key importance to the rule of law and the protection of fundamental freedoms.” Though the note primarily focuses on Justice Breyer’s book, the author briefly discusses how Justice Breyer’s Concurring Opinion in *Hamdan* “could serve as an epilogue to *Active Liberty*.”
 13. Robert M. Chesney, Leaving Guantanamo: The Law of International Detainee Transfers, 40 U. Rich. L. Rev. 657 (2006), considers the problems in detainee transfer and analyzes the obstacles to judicial enforcement pursuant to CAT Article 3. Though the article was written and published before *Hamdan* was handed down, Chesney takes an extensive look at the applicable treaty obligations and how the United States tried to avoid them by strategically placing detainees in Guantanamo Bay.
 14. For a look at the fall out of *Hamdan* and considers the Constitutional analysis of the Detainee Treatment Act, see Arthur H. Garrison, *Hamdan v. Rumsfeld, Military Commission, and Acts of Congress: A Summary*, 30

- Am. J. Trial Advoc. 339 (2006). Garrison takes an in-depth look at the legal reasoning process implemented by the Court to reach its ruling in that case. He concludes that it is the job of the Judiciary to ensure that the executive does not assert executive power to detain prisoners in the “war on terror,” at least not without Congressional approval.
15. For a discussion of the negative impact not affording a fair right for detainees to challenge their detention has on states, see David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 *Lewis & Clark L. Rev.* 131 (2008). The focus of his article is the indefinite detention of detainees at Guantanamo Bay. Glazier examines the problems that arise out of the Military Commissions Act and how those proceedings have lost their credibility. He concludes that the Military Commission approach has been an international embarrassment that must be abandoned in order to pursue a more legitimate process.
 16. For an examination of how the criminal model and the military treat and prosecute detainees, as well as the convergence of the two that has taken place over the last six years in the U.S., see Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stan. L. Rev.* 1079 (2008). Chesney and Goldsmith conclude that while the convergence of these two models has “helped to flesh out the contours of a more appropriate model . . . the convergence process is no recipe for the sustainable reform now required.” The authors’ examination of this issue includes the Detainee Treatment Act and constitutional *habeas corpus* actions.

17. Principle 17 – Right to Presumption of Innocence in Criminal Hearings

All persons charged with a criminal offense should be presumed innocent until proven guilty through an adjudicative process conducted in accordance with the requirements of due process.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 36* –
 - i. “1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
 - ii. 2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.”
 - b. *Principle 39* –
 - i. “Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.”
2. Basic Principles for the Treatment of Prisoners
 - a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil

and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

II. Secondary Analysis

A. Legal Articles

1. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L. J. 457, 509-510 (1989) (concluding that the presumption of innocence is given meaning at the criminal trial through the reasonable doubt rule, which informs the jury that when deciding if the defendant has violated the criminal law, the greater injustice would be in wrongfully condemning someone who was not criminally responsible).
2. Stacie A. Seiler, Recent Case, *Connecticut v. Johnson*, 103 S. Ct. 969 (1983), 52 U. CIN. L. REV. 1142, 1154 (1983) (finding that the Supreme Court's decision in *Connecticut v. Johnson*—a conclusive presumption instruction on the issue of intent violates due process—reaffirms the belief inherent in the criminal system that an accused is presumed innocent until proven guilty of all elements of the crime beyond a reasonable doubt).
3. George C. Harris, *Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. L.A. INT'L & COMP. L. REV. 31, 45-46 (2003) (concluding that the unlawful enemy combatant doctrine threatens principles fundamental to the criminal justice system, including the right to due process and the presumption of innocence).
4. Alexander Goldenberg, Note, *Interested, But Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745, 747-748 (2007) (noting that the fundamental premise of our criminal justice system is the presumption of innocence which is essential to protecting a defendant's due process rights).
5. Brandon J. Lester, Note, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 578 (2005) (arguing that the use of plea negotiations undermine a criminal defendant's basic right to due process and the presumption of innocence).
6. Scott Kitner, Note, *The Need and Means to Restrict Spectators from Wearing Buttons at Criminal Trials*, 27 REV. LITIG. 733, 768 (2008) (concluding that spectators wearing buttons in the courtroom erode the adversarial process based on the presumption of innocence because it suggests to the jury that the defendant is already guilty).
7. Daniel J. Lyons, Note, *Federal Sentencing Guidelines: Retaining the Preponderance Standard of Proof*, 67 ST. JOHN'S L. REV. 639, 648-649 (1993) (noting that numerous procedural safeguards protect the criminal defendant, including the presumption of innocence and due process).
8. Shelly Nieto Dahlberg, Comment, *The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is*

- Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L. J. 239, 303 (1988) (concluding that the use of the REACT stun belt deprives criminal defendants the right to due process and destroys the presumption of innocence).
9. Charles I. Lugosi, *Executing the Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J.C.R. & C.L. 473, 494 (2005) (noting that reasonable doubt and presumption of innocence are the foundation of procedural due process in a criminal trial and are incorporated within the meaning of the Due Process Clauses).
 10. Molly Armour, Comment, *Dazed and Confused: The Need for a Legislative Solution To the Constitutional Problem of Juror Incomprehension*, 17 TEM. POL. & CIV. RTS. L. REV. 641, 672-673 (2008) (concluding that instructions to the jury do not adequately inform them of the criminal defendant's constitutional right to the privilege against self-incrimination, the presumption of innocence, and the prosecution's burden of proof beyond a reasonable doubt).
 11. The history and theory regarding the right to a presumption of innocence is important in a discussion of the problem of balancing that right with other competing human rights, specifically the collective right to a corruption-free society. See Ndiva Kofele-Kale, *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes*, 40 Int'l Law. 909 (2006).
 12. For a discussion of another balancing issue, the right to a fair trial, including the right to a presumption of innocence versus the right to safety, see Ana Bostan, *The Right to a Fair Trial: Balancing the Safety and Civil Liberties*, 12 Cardozo J. Int'l & Comp. L. 1 (2004). This article also focuses on the particular difficulties that civil liberties have faced in the wake of 9/11.
 13. The Charter of Fundamental Rights of the European Union, December 18, 2000 (C 364/01), art. 48, entitled "Presumption of Innocence and Right of Defence," is a comparative source further demonstrating the widespread belief in the presumption of innocence.
 14. Saby Goshray, *Untangling the Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 St. Thomas L. Rev. 249 (2006), deals with the post-9/11 struggle between civil liberties, including the presumption of innocence, and safety concerns. The article focuses on the legal framework surrounding the indefinite detention of non-combatants in Guantanamo.
 15. For a discussion of the high stakes of habeas petitions, especially as they concern enemy combatants, including the possibility that enemy combatants will be denied a presumption of innocence if they are tried by a military tribunal, see Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. Colo. L. Rev. 77 (2008).

18. Principle 18 – Right to Participate in Legal Process

All persons should be afforded the opportunity to participate in legal proceedings adjudicating matters directly²⁷ affecting their right to physical liberty.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

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

a. *Principle 10* – “Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.”

b. *Principle 11* –

i. “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

ii. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

iii. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”

c. *Principle 12* –

i. “1. There shall be duly recorded:

1. (a) The reasons for the arrest;

2. (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of

²⁷ The reason for the wording of this Principle is to exclude claims from individuals arguing for participatory rights in legislative hearings, Presidential conferences, and other such non-judicial proceedings where broad determinations affecting the rights of groups to which they belong are being made. *E.g. Bi-Metallic Investment Co. v. State Bd. Of Equalization*, 239 U.S. 441 (1916). Examples of some of the specific rights of participation which may be afforded under this right include: (1) the Right to be Present at Hearings; (2) the Right to Act as One’s Own Counsel in Hearings Affecting Substantial Legal Rights; (3) Right to Adequate Time to Prepare Legal Defense during Detention; (4) Access to Legal Materials Translated into a Language Understood by the Detainee; (5) Access to Writing Utensils, Paper, Reading Light, Desk, and Other Basic Items Necessary to the Preparation of a Legal Defense; (6) Right to Simultaneous Translation at Hearings; (7) Right to Hearing Transcripts; etc.

- his first appearance before a judicial or other authority;
3. (c) The identity of the law enforcement officials concerned;
 4. (d) Precise information concerning the place of custody.
- ii. 2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.
- d. *Principle 13* – “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”
 - e. *Principle 14* – “A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”
 - f. *Principle 18* -
 - i. “1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
 - ii. 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
 - iii. 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
 - iv. 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
 - v. 5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.”
 - g. *Principle 32* -
 - i. “1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his

detention in order to obtain his release without delay, if it is unlawful.

- ii. 2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”

h. *Principle 33-*

- i. “1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

- ii. 2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

- iii. 3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

- iv. 4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.”

i. *Principle 37-*

- i. “A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.”

II. Secondary Analysis

A. Legal Articles

1. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273-75 (2004) (arguing that an individual's right to participate in legal proceedings is essential for the legitimacy of the legal process).
2. M. Cherif Bassiouni, *Humans Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 280-85 (1993) (noting that numerous international agreements, including the International Covenant on Civil and Political Rights, provide individuals with the right to participate in legal proceedings adjudicating matters directly affecting their personal liberty).
3. Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 74-77 (1979) (arguing that clients should have greater control over all aspects of their case to give the client greater control over the legal proceedings directly affecting their rights).
4. Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 124 (2003) (advocating "hybrid" representation where an accused may choose to be represented by counsel and simultaneously appear pro se in order to maximize the defendant's control over one's trial).
5. Shelley A. Nieto Dahlberg, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups Into Questioning Whether its Use is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239, 281-82 (1998) (criticizing the use of modern restraining devices due to its effect of inhibiting the defendant's right to effectively participate in her defense).
6. Brian L. Schwalb, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 202-203 (1991) (criticizing closed-circuit television procedures that curtail the defendant's ability to confront the witness because it compromises the defendant's ability to participate in her defense).
7. A. Michelle Willis, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 EMORY L.J. 995, 1004 (1988) (noting the Supreme Court's assertion that the Due Process clause of the Fourteenth Amendment protects an indigent defendant's right to participate in her own defense).
8. Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 4 (1999) (noting that it has long been recognized that the United States Constitution provides criminal defendants with the right to participate in their defense).

9. Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 619 (arguing that the absence of an interpreter would violate a defendant's Sixth Amendment right to confront witnesses and ability to participate in one's own defense).
10. Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of State Criminal Responsibility?*, 31 FORDHAM INT'L L.J. 911, 989 (criticizing the International Court of Justice's procedures in making final determinations regarding the states of mind of state officials because the Court does not provide these individuals with the right to participate in the proceedings).
11. (1) The right to be present at hearings ICCPR, art. 14(3)(d)(stating that "everyone shall be entitled . . . [t]o be tried in his presence").
12. For an argument against the presence of the accused in cases of classified information, see James Nicholas Boeving, *The Right to be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL'Y 463 (2007).
13. (2) The right to act as one's own counsel in hearings affecting substantial legal rights ICCPR, art. 14(3)(d) (stating that "everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing").
14. In the trial of Slobodan Milošević, the drawbacks of allowing self-representation were often on display. Despite Milošević's outbursts, delays, and general thwarting of the process, the right to self-representation was confirmed as an essential and important right by the court. See Prosecutor v. Milosevic, Case No. IT-02-54, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, Trial Chamber (Apr. 4 2003)(available online at <http://www.un.org/icty/milosevic/trialc/decision-e/040403.htm>) (last visited May 4, 2005). Later, the Tribunal decided to appoint representatives for Milošević, as his poor health was preventing him from proceeding with his defense even with a reduced court schedule. See Prosecutor v Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel (Sept. 22, 2004). For a discussion of the legal history of self-representation during the trial and an argument that Milosevic's rights were unduly restricted, see Joanne Williams, *Slobodan Milosevic and the Guarantee of Self-Representation*, 32 BROOK. J. INT'L L. 553 (2007).
15. The right to unlimited self-representation has its critics, especially when the case is a highly publicized international trial. See Michael P. Scharf, *Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 31, 33 (2006) (arguing that in the case of leaders charged with international crimes, the true objective of a fair trial can be achieved "by assigning the defendant a highly qualified attorney who is vigilantly committed to representing his client's interests").

16. Some argue that self-representation is justified and should be expected in the hearings surrounding the Guantanamo Bay detainees. Some critics have argued that detainees have been tricked into talking to interrogators who posed as lawyers and other detainees are told that anything they say to their lawyer can be used against them—as a result, some detainees see self-representation as their only option. *See* Mark Denbeaux and Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 *FORDHAM INT'L L.J.* 491, 507 (2007) (noting the problems with the attorney-client relationship in Guantanamo Bay). I would note a few issues with the accuracy of citations in this article and several others like it. Many of the citations seem to be to inflammatory sources with titles such as: *American Gulag*. While the accounts may very well be true, there is some concern with the one-sided nature of many of the sources—as a result, I would recommend treating this area with a good deal of caution.
17. The right to self-representation has a long history in U.S. jurisprudence. *See, e.g., Adams v. United States*, 317 U.S. 269, 279 (1942) (“[T]he Constitution does not force a lawyer upon a defendant.”); *Faretta v. California*, 422 U.S. 806, 836 (1975) (finding a constitutional right to conduct one’s own defense); *Martinez v. Court of Appeal of California*, 120 S. Ct. 684 (2000) (finding that the constitutional right to self defense did not apply to an appeal from a criminal conviction).
18. (3) Right to adequate time to prepare legal defense during detention
ICCPR, art. 14(3)(b) (stating “everyone shall be entitled . . . To have adequate time . . . for the preparation of his defence”).
19. (5) Access to writing utensils, paper, reading light, desk, and other basic items necessary to the preparation of a legal defense
20. ICCPR, art. 14(3)(b) (stating “everyone shall be entitled . . . [t]o have adequate . . . facilities for the preparation of his defence”).
21. (6) Right to simultaneous translation at hearings
22. ICCPR, art. 14(3)(f) (stating “everyone shall be entitled . . . [t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court”).
23. For a discussion of the difficulties involved in translation in an especially extreme context, see Irus Braverman, *The Place of Translation in Jerusalem’s Criminal Trial Court*, 10 *NEW CRIM. L. REV.* 239 (2007). This piece provides an illustration of the translator’s role in criminal proceedings, paying special attention to the fact that the role is often much more than a passive technical effort at translation.

19. Principle 19 – Right to Counsel

All persons should be afforded the opportunity to consult legal counsel before and during legal proceedings adjudicating matters pertaining to substantial deprivations of their right to physical liberty.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

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

a. *Principle 11* –

- i. “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
- ii. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
- iii. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”

b. *Principle 12* –

- i. “1. There shall be duly recorded:
 1. (a) The reasons for the arrest;
 2. (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
 3. (c) The identity of the law enforcement officials concerned;
 4. (d) Precise information concerning the place of custody.
- ii. 2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”

c. *Principle 17*

- i. “1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
- ii. 2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases

where the interests of justice so require and without payment by him if he does not have sufficient means to pay.”

d. *Principle 18* -

- i. “1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
- ii. 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
- iii. 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
- iv. 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
- v. 5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.”

e. *Principle 32* -

- i. “1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
- ii. 2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”

f. *Principle 33* -

- i. “1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.
- ii. 2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any

other person who has knowledge of the case may exercise such rights.

- iii. 3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.
- iv. 4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.”

g. *Principle 36 (1)* –

- i. “1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

II. Secondary Analysis

A. Legal Articles

1. Doran G. Arik, *The Tug of War: Combatant Status Review Tribunals and the Struggle to Balance National Security and Constitutional Values During the War on Terror*, 16 J.L. & POL’Y 657, 693-697 (concluding that the Combatant Review Status Tribunals, which are non-adversarial, take away some of the most crucial procedural safeguards of the constitution, such as the right to counsel, and most often deny the other procedural safeguards they purport to offer. By doing so, these CRSTs are undermining the traditional constitutional protections of liberty and demonstrate the detainees’ total inability to mount any kind of meaningful defense).
2. Heather L. Rooney, *Parlaying Prisoner Protections: A Look at the International Law and Supreme Court Decisions That Should be Governing our Treatment of Guantanamo Detainees*, 54 DRAKE L. REV. 679, 730-732 (concluding that under international human rights laws detainees must still be given certain minimum protections such as the right to counsel if charged with a crime. The United States should be applying the protections provided by customary international law, but has yet to fully comply).
3. Emily Calhoun, *The Accounting: Habeas Corpus and the Government*, 79 U. COLO. L. REV. 77, 136-137 (concluding that habeas review, properly

- implemented to secure a meaningful accounting from the executive, stands as a barrier to illegitimate government).
4. David L. Herman, *A Dish Best Not Served At All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 *MIL. L. REV.* 40, 95-96 (concluding that in the absence of universal ratification of Protocol I to the Geneva Conventions, all international tribunals must have their statutes amended to guarantee ICTY-style primacy jurisdiction, procedures, and rules of evidence that guarantee fair trials of foreign military war crimes suspects. The ICTY-style procedures give charged war criminals the right to counsel).
 5. Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administration Reform*, 29 *CONN. L. REV.* 1647, 1700 (concluding that the United States must stress the importance of providing legal representation to detained aliens, in an attempt to counterbalance the emphasis on efficient immigrant enforcement with a renewed concern for fair procedures and just outcomes in removal proceedings).
 6. Daryl L. Hecht, *Controlling the Executive Power to Detain Aliens Offshore: What Process is Due the Guantanamo Prisoners?*, 50 *S.D. L. REV.* 78, 111 (concluding that the remaining uncharged prisoners have languished too long in prison without charge or access to counsel, and the courts must be vigilant to prevent the continuation of arbitrary detentions in violation of international humanitarian and human rights principles).
 7. Susan M. Burns, *Access to Counsel for "Enemy Combatant" Citizens in Military Detention: A Statutory or Constitutional Right? Padilla v. Bush*, 233 *F. Supp. 2d* 564 (S.D.N.Y. 2002), 28 *S. ILL. U. L.J.* 599, 649 (concluding that even if the Congressional Joint Resolution of September 18, 2001, constitutes sufficient intent to grant the President, as Commander in Chief, broad authority to capture and detain enemy combatants, it is doubtful Congress contemplated such authority would encompass the power to deny an American citizen originally arrested on U.S. soil access to an attorney).
 8. Rachel V. Stevens, *Center for National Security Studies v. United States Department of Justice: Keeping the USA Patriot Act in Check One Material Witness at a Time*, 81 *N.C. L. REV.* 2157, 2175-2176 (concluding that the effect of the Center for National Security Studies decision is to ensure some level of accountability: public scrutiny will help protect the civil liberties of the detainees).
 9. Michael Beattie, Lisa Yonka Stevens, *An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go From Here?*, 62 *MD. L. REV.* 975 (concluding that a United States citizen designated as an enemy combatant cannot be detained indefinitely by the executive

- branch without recognizing inherent constitutional rights and safeguards, such as the access to counsel).
10. Neal K. Katyal, Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259, 1309-1310 (concluding that by extending to all “persons” within the Constitution's reach such guarantees as equal protection and due process of law, the Constitution constrains how our government may conduct itself in bringing terrorists to justice. Those guarantees require at least an assured opportunity to appeal a conviction to an authority independent of the prosecuting military power, as well as meaningful access to habeas review).

D. Section D: Fair and Impartial Decision Maker

20. Principle 20 – Composition of Adjudicative Mechanism

Decision makers charged with adjudicating matters affecting a person's fundamental rights should be impartial and adequately educated to properly perform that function.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - b. *Principle 11* –
 - i. “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
 - ii. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
 - iii. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
 - c. *Principle 32* -
 - i. “1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
 - ii. 2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”

II. Secondary Analysis

A. Legal Articles

1. Thomas R. Johnson, *Combatant Status Review Tribunals: An Ordeal through the Eyes of One "Enemy Combatant,"* 11 LEWIS & CLARK L. REV. 943 (2007) (concluding that among the many problems with the Combatant Status Review Tribunals (CSRTs) used by the United States to determine the status of detainees brought to Guantanamo Bay is that only one of the members of a particular tribunal is required to be a lawyer, much less a judge. Given the consequences of an adverse decision for a detainee, it is essential that the finder of fact be familiar with the weighing of evidence and, if military, be insulated as much as possible from the chain of command, as are military judges).
2. David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure,* 24 B.U. INT'L L.J. 55 (2006) (concluding that international law would prohibit the use of Military Commissions to try detainees held at Guantanamo).
3. Julian Mann, III, *Due Process; A Detached Judge; and Enemy Combatants,* 28 J. NAT'L. ASS'N. ADMIN. L. JUDICIARY 1 (2008) (concluding that CSRTs are invalid under standards of administrative law because of the lack of a decision maker detached from the agency responsible for the detention).
4. Derek Jinks, *The Declining Significance of POW Status,* 45 HARV. INT'L L.J. 367 (2004) (arguing that there is a convergence in the level of protection afforded by POW law and human rights law to combatants, whether lawful or unlawful, captured during hostilities).
5. Christina D. Elmore, *An Enemy within Our Midst: Distinguishing Combatants from Civilians in the War Against Terrorism,* 57 U. KAN. L.REV. 213 (2008) (discussing standards for determining whether an individual is an "enemy combatant").
6. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models,* 60 STAN. L. REV. 1079 (2008) (discussing the recent evolution of process for adjudicating matters related to an individual's detention in armed conflict involving non-state actors and suggesting further reforms).
7. Douglas A. Hass, *Crafting Military Commissions Post-Hamdan: The Military Commissions Act of 2006,* 82 IND. L.J. 1101 (2007) (discussing the sufficiency of military commissions as outlined in the MCA in terms of international law).
8. George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants,* 96 AM. J. INT'L L. 891 (2002) (arguing that categorical determination by President that personnel detained in conflict in Afghanistan are not entitled to POW status is insufficient under the Geneva Conventions, and the Article 5 requires a competent tribunal to determine status of detainee).

9. Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811 (2008) (discussing requirement for fair judicial hearing for any detainee wishing to challenge grounds for his detention).
10. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (discussing the tensions between military necessity in detaining certain individuals with liberty interests in U.S. and international law).

21. Principle 21 – Right of Adjudicators to Report Suspected Abuses

Adjudicators should have the means to report their concerns regarding suspected rights violations to appropriate authorities outside of the control of the governmental entity suspected of committing the violations.²⁸

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 7* –
 - i. “1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
 - ii. 2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall

²⁸ This requirement is a direct corollary of the independence requirement for decision makers adjudicating matters involving the fundamental rights of detainees. It is common for states, such as the United States, to restrict disclosure of matters related to terror detainees and their detention on grounds related to the protection of classified information in the interest of national security. *E.g.* Military Commissions Act of 2006, 949(d), Pub. L. 109-366, 120 Stat. 2611 (allowing for non-public military commission proceedings for certain purposes including for national security reasons). It is the position of the Lexington Principles that the bare facts surrounding specific actions of abuse by government actors against detainees – absent any attendant information regarding the identity of the abused detainee or the reasons for their detention – are never the proper subject for an absolute nondisclosure restriction on national security grounds. Detainee abuse is not a legitimate use of a State’s authority; therefore States may not prevent disclosure of that abuse under the guise of national security concerns. This Principle requires that adjudicators have an avenue through which to make abuses known to appropriate authorities outside of the political organization committing the violations. For example, in a situation where an adjudicator believes the military – an executive branch entity - has engaged in abuses of detainees within its control, that adjudicator must be free, at a minimum, to inform the legislative or judicial branch of the government. This may be subject to reasonable limitations to prevent risks to national security information. For example, the government may create a special mechanism through which adjudicator complaints must be submitted where complaints are only allowed to be sent to specific judicial or legislative oversight bodies created with safeguards to prevent leaks of sensitive information. In the absence of such a mechanism, however, adjudicators must be free to make abuses known to appropriate authorities outside of the military without fear of retribution. In the event that no truly independent domestic oversight body exists, adjudicators must be permitted to transmit their concerns directly to an organ of the United Nations or an appropriate nongovernmental organization such as the International Committee of the Red Cross without the possibility of prosecution or reprisal.

report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

- iii. 3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.”

II. Secondary Analysis

A. Legal Analysis

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
2. Jeffrey Waincymer, *Commentary: Reformulated Gasoline Under Rerormulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?* 18 Mich. J. Int'l L. 141 (Fall, 1996) (Discussing the importance of adjudicator reports for setting precedent).
3. Peter H. Schuck * and Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan. L. Rev. 115 (November, 1992) (Providing an example of adjudicator reporting methods used by INS to create buffers between its law enforcement operation and its adjudication of amnesty claims).
4. Leila Choukroune, *Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 19 Colum. J. Asian L. 30 (Spring / Fall, 2005) (Concluding that there are various international mechanisms for ensuring compliance with treaty obligations related to economic, social, and cultural rights, but the main compliance mechanism remains reporting).
5. Gregory F. Laufer, *Admission Denied: In Support of a Duress Excetion to the Immigration and Nationality Act's "Material Suppot for Terrorism" Provision*, 20 Geo. Immigr. L.J. 437 (Spring, 2006) (Discussing the rights of adjudicator's to use their discretion).
6. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigr. L.J. 367 (Spring, 2003) (Observing the subjectivity of adjudications which could be lessened by reporting procedures)
7. Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 Geo. Immigr. L.J. 391 (Spring, 2001) (Discussing the creation of a framework for adjudicators to use in deciding cases of human rights violations).

8. Susan D. Franck, *International Arbitrators: Civil Servants?: Sub Rosa Advocates?: Men of Affairs?: The Role of International Arbitrators*, 12 ILSA J Int'l & Comp L 499 (Spring, 2006) (Concluding that the integrity and the legitimacy of international arbitration therefore depends, in large part, upon the perceived integrity of arbitrators as well as their independence and impartiality).
9. Payal Salsburg, *Substantial Change in Circumstances: An Unjustified Reason to Deny Post-War Asylum Claims From Afghan and Iraqi Women*, 32 Nova L. Rev. 495 (Spring, 2008) (Suggesting many asylum adjudicators in the United States apply a restrictive interpretation of the international definition of a [woman] refugee entitled to protection).
10. Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 Okla. L. Rev. 109 (Spring, 2007) (Discussing the lack of consistency and incorrect application of law by adjudicators in immigration appeals).
11. Amy M. Lighter Steill, *Incorporating the Realities of Gender and Power into U.S. Asylum Law Jurisprudence*, 1 Tenn. J. L. & Pol'y 445 (Spring, 2005) (Arguing for providing clearer guidance to asylum adjudicators and judges, who must be informed about the realities of gender discrimination and how the existing law can address them).

III. PART III: SUBSTANTIVE DUE PROCESS

A. Section A: General Statement of Substantive Rights

22. Principle 22 – Right to Substantive Due Process

Implicit in the fundamental right to due process of law is the requirement that no State should deprive any person of life, liberty, or security of person in violation of any right fundamental to accepted principles of global justice.²⁹

²⁹ This Principle asserts that the fundamental human right to due process of law is not merely procedural in nature, but also substantive, as it places limitations on the ability of States to deprive individuals of their physical liberty. The drafting of this substantive due process provision was inspired by the U.S. Supreme Court's substantive due process jurisprudence related to the incorporation of fundamental rights into the Fourteenth Amendment for application to state and local governments. Originally, the rights contained in the Bill of Rights applied only to the federal government and did not restrict the actions of individual states or other political subdivisions. After the American Civil War, the Fourteenth Amendment was ratified ensuring that no state government shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Although the Fourteenth Amendment didn't explicitly specify all of the protections listed in the Bill of Rights, the Supreme Court held – in a series of cases - that the majority of such rights were incorporated into the Fourteenth Amendment and thus binding on state and local governments by virtue of the substantive rights implicit in the concept of due process. The Supreme Court spent 100 years fleshing out its incorporation doctrine, and the famous debates surrounding it are among the most legendary in the Court's history. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment applies to states via the Fourteenth Amendment). After deciding to incorporate rights selectively rather than wholesale, the Court began to make determinations on an ad hoc basis based on factors such as whether the right could be considered "implicit in the concept of ordered liberty" or "so rooted in the traditions and conscience of our people as to be fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (holding that the protection against double jeopardy is not a fundamental right incorporated under the Fourteenth Amendment). The most recent test applied by the Court to determine whether a specific right is incorporated into the Due Process Clause of the Fourteenth Amendment is whether the right in question is "fundamental to the American scheme of Justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that a jury trial was required under the Sixth and Fourteenth Amendment for a crime punishable by a two year sentence term and a fine.) In crafting the Draft Lexington Principles, we have relied on this jurisprudential foundation to argue for a similar form of incorporation to be used to make the fundamental rights expressed under international law binding on the U.S. government as domestically enforceable legal obligations by operation of the Due Process Clause of the Fifth Amendment. The U.S. Constitution is the supreme law of the land in the United States. In order for international human rights protections to become binding on U.S. government actors as inescapable legal obligations in the absence of a legislative mandate, these protections would need to somehow become tied to existing provisions in the U.S. Constitution. The use of the Transnational Incorporation Doctrine for the Fifth Amendment's Due

RESEARCH ANNOTATIONS

I. Secondary Analysis

A. Legal Articles

1. Rebecca Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. Rev. 1413 (arguing that the debate as to whether or not US Courts should use foreign law in cases addressing substantive due process continues).
2. Daniel Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CA L. Rev. 1335, 1340-1342 (stating that it is important for American courts to be attuned to international rights norms which includes the right of due process).
3. Jerry Norton, *Liberty: A Human Right, or a Citizen Right*, 36 LYUCHI L. J. 565, 566-568 (arguing that the right to due process is not solely a right possessed by US citizens, but a right possessed by all citizens).
4. David M. Siegel, *Canadian Fundamental Justice and US Due Process: Two Models for a Guarantee of Basic Adjudicative Fairness*, 37 GWI L. Rev. 1, 9-12 (arguing that due process is a fundamental right and such basic guarantees can always be a source for invalidating a rule or law).
5. Markus Dubber, *Toward A Constitutional Law and Punishment*, 55 Hastings L. J. 509, 546-560 (concluding that there are challenges in criminal law in light of the concept of human dignity is to consider the implications for the social dignity of the punished).
6. Anthony Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 3 So. Tex. L. Rev. 1115, 1128-1131 (stating that the United States should take into account international law, such as the Universal Declaration of Human Rights when applying due process rights especially when pertaining to the death penalty).
7. Mark Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 Fdm. L. Rev. 555, 568-571 (stating that one of the freedoms that should be granted internationally is that of due process of law).
8. William Michael Treanor, *A Community of Reason and Rights*, 77 Fdm. L. Rev. 583, 597-599 (the United States needs to look at the international community when applying due process of rights).
9. Larry Johnson, *UN-Based International Criminal Tribunals: How They Mix and Match*, Den. J. 275, 278-279 (stating that international tribunals should exercise jurisdiction in accordance with international standards of due process of law).

Process Clause would be a viable mechanism to achieve this constitutional domestication of transnational norms.

10. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary of System Values*, Corn. L. Rev. 1377, 1410-1412 (arguing that in an adversarial system like the United States, the observance of due process of law is important in cases regarding terrorism).

B. Section B: Prohibition of Arbitrary Deprivations of Physical Liberty

23. Principle 23 – Prohibition of Arbitrary Arrest and Detention

No State should arrest or detain any person for reasons that are arbitrary. An arrest or detention is arbitrary if it is not performed pursuant to law or if it is incompatible with the fundamental principles of global justice.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. International Covenant on Civil & Political Rights

a. Article 9

- i. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- ii. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- iii. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
- iv. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- v. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. Rome Statute on International Criminal Court

a. Article 55: Rights of persons during an investigation

- i. “In respect of an investigation under this Statute, a person:

1. (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 2. (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 3. (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 4. (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
- ii. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
1. (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
 2. (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
 3. (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
 4. (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”
3. European Convention on Human Rights
- a. *Article 5* – Right to liberty and security
 - i. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 1. a. the lawful detention of a person after conviction by a competent court;

2. b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 3. c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 4. d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 5. e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 6. f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- ii. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 - iii. 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 - iv. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 - v. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

4. African Charter on Human and People's Rights

a. *Article 7* –

- i. Every individual shall have the right to have his cause heard. This comprises:
 1. (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 2. (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

3. (c) the right to defence, including the right to be defended by counsel of his choice;
 4. (d) the right to be tried within a reasonable time by an impartial court or tribunal.
- ii. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

B. Normative Codifications

1. Universal Declaration of Human Rights
 - a. *Article 9* – “No one shall be subjected to arbitrary arrest, detention or exile.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 4* – “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”
 - b. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - c. *Principle 10* – “Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.”
 - d. *Principle 11* –
 - i. “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
 - ii. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
 - iii. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
 - e. *Principle 13* – “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”

f. Principle 30

- i. “1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
 - ii. 2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.”
3. Basic Principles for the Treatment of Prisoners
- a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”

II. Secondary Analysis

A. Legal Articles

1. Rebecca Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. Rev. 1413 (arguing that the debate as to whether or not US Courts should use foreign law in cases addressing substantive due process continues).
2. Daniel Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CA L. Rev. 1335, 1340-1342 (stating that it is important for American courts to be attuned to international rights norms which includes the right of due process).
3. Jerry Norton, *Liberty: A Human Right, or a Citizen Right*, 36 LYUCHI L. J. 565, 566-568 (arguing that the right to due process is not solely a right possessed by US citizens, but a right possessed by all citizens).
4. David M. Siegel, *Canadian Fundamental Justice and US Due Process: Two Models for a Guarantee of Basic Adjudicative Fairness*, 37 GWI L. Rev. 1, 9-12 (arguing that due process is a fundamental right and such basic guarantees can always be a source for invalidating a rule or law).
5. Markus Dubber, *Toward A Constitutional Law and Punishment*, 55 Hastings L. J. 509, 546-560 (concluding that there are challenges in criminal law in light of the concept of human dignity is to consider the implications for the social dignity of the punished).
6. Anthony Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 3 So. Tex. L. Rev. 1115, 1128-1131 (stating that the United States should take into account international

- law, such as the Universal Declaration of Human Rights when applying due process rights especially when pertaining to the death penalty).
7. Mark Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 Fdm. L. Rev. 555, 568-571 (stating that one of the freedoms that should be granted internationally is that of due process of law).
 8. William Michael Treanor, *A Community of Reason and Rights*, 77 Fdm. L. Rev. 583, 597-599 (the United States needs to look at the international community when applying due process of rights).
 9. Larry Johnson, *UN-Based International Criminal Tribunals: How They Mix and Match*, Den. J. 275, 278-279 (stating that international tribunals should exercise jurisdiction in accordance with international standards of due process of law).
 10. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary of System Values*, Corn. L. Rev. 1377, 1410-1412 (arguing that in an adversarial system like the United States, the observance of due process of law is important in cases regarding terrorism).

24. Principle 24 – Right to the Rule of Law

No person should be deprived of the right to physical liberty except pursuant to the rule of law. State actors should never deprive any person of physical liberty except pursuant to specific and demonstrable legal authority governed by written laws and procedures.³⁰

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. Convention for the Protection of Human Rights and Fundamental Freedoms³¹

a. Article 5 : Right to liberty and security

- i. 1. “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his

³⁰ To protect the right to physical liberty, all countries respecting the rule of law must have laws governing all of the instances where a person’s liberty may be deprived by the State. For this reason, Article 5 of the Council of Europe’s 1950 Convention for the Protection of Human Rights and Fundamental Freedoms contains an exhaustive list of all cases in which a person may be deprived of physical liberty. No State shall deprive individuals of liberty outside of these enumerated situations.

³¹ Counsel of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms (CPRH) Article 5: “Right to liberty and security” (ETS No.005) of 4 November 1950. Available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

- lawful detention for the purpose of bringing him before the competent legal authority;
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- ii. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”
 - iii. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 - iv. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 - v. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

B. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 2* - “Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.”
 - b. *Principle 4* - “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”
 - c. *Principle 9* - “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - d. *Principle 10* - “Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.”

- e. *Principle 11* –
 - i. “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
 - ii. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
 - iii. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
 - f. *Principle 13* – “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.”
 - g. *Principle 30* -
 - i. “1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
 - ii. 2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.”
2. Basic Principles for the Treatment of Prisoners
- a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”

II. Secondary Analysis

A. Legal Articles

1. Simon Chesterman, *An International Rule of Law*, 56 AM. J. COMP. L. 331 (2008) (proposing that "rule of law" be defined as a political ideal that serves as a means rather than an end and that can be applied in a coherent manner across nations and cultures).

2. Noah Bialostozky, Note, *The Misuse of Terrorism Prosecution in Chile: The Need for Discrete Consideration of Minority and Indigenous Group Treatment in Rule of Law Analyses*, 6 NW. U. J. INT'L HUM. RTS. 81 (2007) (employing a study of the Mapuche people in Chile to emphasize the importance of considering the treatment of minority groups as part of rule of law analyses, especially in analyses that promote the use of the rule of law as a balance between counterterrorism and the protection of human rights).
3. Stephen A. Saltzburg, *A Different War: Ten Key Questions About the War on Terror*, 75 GEO. WASH. L. REV. 1021 (2007) (articulating, in Question Four, the rule of law issues arising out of Hamdan v. Rumsfeld, and providing a very basic analysis of how the United States has traditionally viewed the rule of law in contrast with its recent actions after 9/11).
4. Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345 (2007) (examining actions of the executive branch regarding detainee treatment in the Iraq War and the War Against Terrorism and concluding that such actions were illegal and that such violations of the rule of law have short- and long-term consequences including, among others, threats to our common dignity, degradation of our military, deflation of our authority and influence abroad place, and increased risk of harm to our soldiers and CIA personnel).
5. Mark D. Kielsingard, *A Human Rights Approach to Counter-Terrorism*, 36 CAL. W. INT'L L.J. 249 (2006) (advocating for counter-terrorism measures directed at ensuring the rule of law and promoting adherence to human rights norms in the face of extremist violence and political pressure).
6. Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235 (2006) (examining the Supreme Court's first encounter with the Bush Administration's conduct in the War Against Terrorism and concluding that the Court's rulings badly compromised basic foundational principles of American law, including the rule of law, i.e. the government's duty to abide by the Constitution).
7. Mark S. Kende, *The Constitutionality of the Death Penalty: South Africa as a Model for the United States*, 38 GEO. WASH. INT'L L. REV. 209 (2006) (addressing the absence of true rule of law in American death penalty jurisprudence—a result of what the author calls arbitrary implementation of the death penalty—and proposing a new model based on South African law).
8. Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811 (2008) (recognizing that preventive detention for security purposes is generally permitted by international law, provided that it is based on grounds and procedures previously established by law; is not arbitrary, discriminatory or disproportionate; is publicly registered and subject to fair and effective judicial review; and that the detainee is not mistreated and is compensated for any unlawful detention).

9. Katherine Nesbitt, *Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis*, 17 B.U. PUB. INT. L.J. 39 (2007) (comparing the legal regimes used in Australia and the United States to deal with the preventative detention of terrorist suspects and analyzing each system's compliance with rule of law norms).
10. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (proposing a "targeting" approach to the standard-of-certainty in detention cases as a means of filling a gap in the rule of law regarding suspected terrorists by creating a legal framework that balances security and liberty interests and helps answer questions left raised by recent Supreme Court detention cases, including *Boumediene v. Bush*).

25. Principle 25 – Prohibition of Detention Based on the Exercise of Fundamental Rights

No State should detain any person based solely on that person's exercise of a fundamental human right.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 1* – “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”
 - b. *Principle 2* – “There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
 - c. *Principle 3* – “It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.”
 - d. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
 - e. *Principle 6* – “All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.”

II. Secondary Analysis

A. U.N. Working Group on Arbitrary Detention

1. U.N. Working Group on Arbitrary Detention, *Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment. Decisions Adopted by the Working Group on Arbitrary Detention*, 52nd session of the Commission on Human Rights, October, 31, 1995, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/12996cb61ec38ee2802566b20055126b?Opendocument> (stating “[i]t is clear from the

- facts described above that Edip Polat was sentenced and detained solely for expressing in a book his opinion on the conditions of Kurdish prisoners in Turkey and on his previous trial, when he was simply peaceably exercising his rights to freedom of opinion and expression, guaranteed under article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights... In the light of the above the Working Group decides: The detention of Edip Polat is declared to be arbitrary, being in contravention of article 19 of the Universal Declaration of Human Rights ...Consequent upon the decision of the Working Group declaring the detention of Edip Polat to be arbitrary, the Working Group requests the Government of Turkey to take the necessary steps to remedy the situation in order to bring it into conformity with the provisions and principles incorporated in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.”).
2. U.N. Working Group on Arbitrary Detention, *Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment. Decisions Adopted by the Working Group on Arbitrary Detention*, 53rd session of the Commission on Human Rights, December, 17, 1996, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/eif423e674324e7e8025664f0057310f?Opendocument> (denouncing “[t]he imprisonment of Alfred Dreyfus on Devil's Island (Guayana) in 1894, accused of treason and sentenced by a court martial on the basis of false documents, and which according to the Group's principles and working methods would now be considered arbitrary; The case of Nelson Mandela, sentenced in 1964 to life imprisonment for offences that involved the legitimate exercise of rights provided for in the international human rights instruments, and following a trial in which due process was not guaranteed; The case of Mahatma Gandhi, who was sentenced by a colonial court in India for the offence of incitement to civil disobedience, whereas the acts of which he was accused were no more than the legitimate exercise of the rights to freedom of opinion, expression, assembly and association; The trials of Vaclav Havel, President of the Czech Republic, and Petr Uhl, a member of the Working Group, both sentenced by the Prague court to prison terms of four and a half and five years respectively, for legitimately exercising the right to freedom of expression and opinion as Charter 77 militants; The detentions of thousands of Chilean patriots sentenced during the dictatorship of General Pinochet by so-called "wartime military tribunals" (although there was no war at the time), which did not observe even one principle of due process, simply because they called for respect for human rights.”).

B. Human Rights Watch

1. Human Rights Watch, *Arbitrary Detention and Unfair Trials in the Deficient Criminal Justice System of Saudi Arabia*, Vol. 20 No. 3E, 140,

- March 2008, available at http://www.crin.org/docs/HRW_Saudi_Justice_1.pdf (stating that the exercise of individual rights should be protected under international human rights law).
2. Human Rights Watch, *Memorandum to the Syrian Government, Decree No. 50/2001: Human Rights Concerns*, January 31, 2002, available at <http://hrw.org/backgrounders/mena/syria/> (denouncing a decree that subjects publishers, editors, journalists, authors, printers, distributors, and bookstore owners to imprisonment for publication of “propaganda,” in contravention of the right to freedom of expression).

26. Principle 26 – Prohibition of Detention Based on Discriminatory Animus

No State should detain any person based solely on that person's nationality, national origin, ethnic origin, race, color, descent, language, religion, faith, sex, age, birth, parentage, wealth, or any similar criteria.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 1* – “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”
 - b. *Principle 2* – “There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
 - c. *Principle 3* – “It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.”
 - d. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
 - e. *Principle 6* – “All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.”
 - f. *Principle 11* – “The above Principles shall be applied impartially.”

II. Secondary Analysis

A. Legal Articles

1. Natsu Taylor Saito, Will Force Trump Legality after September 11? – American Jurisprudence Confronts the Rule of Law, 17 Geo. Immigr. L.J. 1 (2002) (Examines the government's plenary power and emergency exceptions to the law regarding to the detention of U.S. citizens, immigrants and aliens in the framework of applicable constitutional and

- international law, emphasizing on nondiscrimination and equal protection.)
2. Liam Braber, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 *Vill. L. Rev.* 451 (2002) (Analyzes the legal standards regarding racial profiling of Arabs under the national political push and the violation of both of their 4th and 14th Amendment rights).
 3. Ronald J. Sievert, [Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law](#), 37 *Hous. L. Rev.* 1421 (2000) (Expresses concerns on the lack of legal standards on the War on Terrorism, examines the needs of establishing such standards for both international operations and domestic measures, including racial profiling that violate Arabs' 4th and 14th Amendment rights).
 4. Michelle Brané, Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States through Human Rights Frameworks*. 22 *Geo. Immigr. L.J.* 147 (2008) (Analyzes the problem of arbitrary detention of aliens and immigrants by the U.S. government in the framework of applicable international human rights law, including International Covenant on Civil and Political Rights and International Convention on the Elimination of All Forms of Racial Discrimination. Also explores the possibilities to expand protection for detainees based on these international human rights law). Alfred C. Yen, [Introduction: Praising with Faint Damnation--The Troubling Rehabilitation of Korematsu](#), 40 *B.C. L. Rev.* 1 (1998) (Cautioned that proclamations of Korematsu's permanent discrediting are premature. The Supreme Court has never overruled the case. It stands as valid precedent, an authoritative interpretation of our Constitution and the supreme Law of the Land.)
 5. Carl J. Schifferle, *After Whren v. United States: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law*. 2 *Mich. L. & Pol'y Rev.* 159 (1997) (Studies the issue of elective law enforcement based on race and its equal protection implications. Also suggests alternative legal approaches in such cases).
 6. Michael J. Whidden, Note, [Unequal Justice: Arabs in America and United States Terrorism Legislation](#), 69 *Fordham L. Rev.* 2825 (2001) (Explored history, application and ramifications of Anti-terrorism and Effective Death Penalty Act (AEDPA), [Pub. L. No. 104-132, 110 Stat. 1214 \(1996\)](#), which codified use of secret evidence and indefinite detention).
 7. David A. Martin, [Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis](#), 2001 *SUP. CT. REV.* 47 (2001) (Analyzes the different levels of legal protection applicable to persons with different legal status in the U.S., examines the statutory, administrative, and constitutional framework for detention of aliens).
 8. Dean Masaru Hashimoto, [The Legacy of Korematsu v. United States: A Dangerous Narrative Retold](#), 4 *Asian Pac. Am. L.J.* 72 (1996) (Expressed concern that even though the public narratives about the Japanese internment have changed markedly, the Korematsu case remains

- consistent with modern legal doctrines and may lead to repetition of similar governmental actions.)
9. Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976) (Takes on a social-economical approach of examining the pro and con of the antidiscrimination principle and concluded that such principle will reduce social cost and advocates for aggressive judicial enforcement of such principle based on the equal protection clause).

27. Principle 27 – Prohibition of Ex Post Facto Application of Penal Law

No State should try any person for a penal offense based on acts or omissions which did not constitute a penal offense at the time they were committed.³²

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. International Covenant on Civil and Political Rights

a. Article 15 -

- i. “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 national or international law, at the time when it was committed. [...]Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”

2. European Convention on Human Rights

a. Article 7(1) -

- i. “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 national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. [...] This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

3. Rome Statute of International Criminal Court

a. Article 22 -

³² The text of this ex post facto provision mirrors the text of the Universal Declaration of Human Rights rather closely. *See* Art. 11(2) (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”). The right is also contained in Article 15 of the International Covenant on Civil and Political Rights. Transnational incorporation of this international right would likely not be controversial, as a virtually identical protection exists under the Fifth Amendment to the U.S. Constitution.

- i. 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”
- b. *Article 24* –
 - i. “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”

B. Normative Codifications

1. Universal Declaration of Human Rights

a. *Article 11(2)* -

- i. “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

II. Domestic Law

A. Constitutional Law

- 1. Magna Carta Article 39 (1215) - “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.”
- 2. U.S. Const. art. I, § 9, cl. 3 - "No Bill of Attainder or ex post facto Law shall be passed."

B. Statutes

- 1. Feuerbachm, Paul, *Bavarian Code of 1813*, etc. (stating “*Nullum crimen, nulla poena sine praevia lege poenali*” [No crime, [can be committed] no punishment [can be imposed] without [having been prescribed by] a previous penal law]. This principle is a basic maxim in continental European thinking and can also be stated *Nullum poena sine lege* [no penalty without a law].

C. Judicial Decisions

1. *Calder v. Bull*, 3 U.S. 386, 388 (1798) ("no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit.").

III. Secondary Analysis

A. Legal Articles

1. Nancy J. King, Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 Duke L.J. 1, 26 (discussing the allegation that the applying parole guidelines enacted after an individual's original conviction and sentence violated the Ex Post Facto clause of the Constitution).
2. Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 Va. L. Rev. 1295, 1338 - 40 (discussing the deterrence theory of the Ex Post Facto clause).
3. Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 Nw. U. L. Rev. Colloquy 88, 94 (discussing whether charges brought against Mr. Hamden, a foreigner who did not have U.S. citizenship, violated the Constitution's Ex Post Facto clause).
4. Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 Geo. L.J. 119, 121 - 22 (asserting that the ex post facto clauses of the Constitution restrain the legislative branches of the government from imposing retroactive legislation upon its people, particularly highlighting theory the Framers likely had specific historical tyrannies in mind when drafting the Constitution).
5. Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 Ariz. St. L.J. 527, 572 (stating that it would be a violation of the Ex Post Facto clause to single out and omit a "youthful lack of guidance" as being a factor in overall consideration of the state's sentencing guideline equation).
6. John F. Hart, *Human Law, Higher Law, and Property Rights: Judicial Review in the Federal Courts*, 45 San Diego L. Rev. 823, 827 (stating that federal ex post facto laws, if challenged in court, would be declared void even if the Constitution did not expressly prohibit them, because the illegitimacy of ex post facto laws was among "the first principles of Legislation").
7. Shawndra Jones, *Setting Their Record Straight: Granting Wrongly Branded Individuals Relief From Sex Offender Registration*, 41 Colum. J.L. & Soc. Probs. 479, 489 (stating that courts have found laws requiring registries are regulatory, rather than punitive, therefore they do not violate the Ex Post Facto Clause).
8. Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 Cal. L. Rev. 553, 567 (arguing that the ex

- post facto clause of the Constitution should apply to deportation, because deportation is effectively equivalent to punishment for a crime).
9. Charles L. Barzun, *Rules of Weight*, 83 Notre Dame L. Rev. 1957, 1975 (concluding that laws which alter the legal rules of evidence and require less evidence to obtain a conviction violate the Constitution's Ex Post Facto Clause).
 10. Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love Is A Many Splendored Thing"*, 15 Duke J. Gender L. & Pol'y 315, 319 (concluding that the Edmunds Act was not an ex post facto law because it prohibited any continuing bigamy or polygamy).

28. Principle 28 – Prohibition of Double Jeopardy

No State should detain, try, or punish any person for an offence for which the person has already been finally convicted or acquitted.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Basic Principles for the Treatment of Prisoners
 - a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”

II. Secondary Analysis

A. Legal Articles

1. Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, n.260 (2008) (reciting the ICC principal of complementarity, which bars ICC jurisdiction if a competent domestic court is or has heard the case, noting, however, the lack of restriction on domestic courts for the reverse situation).
2. Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT'L J. REFUGEE L. 373, 376 (2008) (noting that the provisions of the 1951 Refugee Convention do not apply to criminals who have yet to be prosecuted for crimes without violating the principal of double jeopardy).
3. David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1052-53 (2008) (discussing the similarities between the ICC provision against double jeopardy in the Rome Statute and the US Constitution, Amendment Five).
4. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 n.8 (1987) (“The International Covenant on Civil and Political Rights requires states 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, for example, the

- freedoms protected by the First Amendment, and the prohibition on double jeopardy.”).
5. Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT'L L. 1, 46 (2007) (recognizing the established exceptions to international double jeopardy and human rights due to a lack of due process or a sham proceeding).
 6. Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 688-89 (2007) (supporting the international support of *non bis in idem*, Latin for “not twice for the same thing,” but explaining the difference between it and double jeopardy – appeals may question issues of fact).
 7. Mirko Bagarix & John Morss, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 SUFFOLK TRANSNAT'L L. REV. 157, 204-06 (2006) (recognizing the universal acceptance of punishment for certain crimes that international courts should address, but also advocating that the international court yield jurisdiction to competent national courts to avoid confusion and potential injustice).
 8. Nyssa Taylor, Comment, *England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes*, 19 TEMP. INT'L & COMP. L.J. 189, 206-10 (2005) (generally outlining the theory and reasoning behind double jeopardy).
 9. Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 52-54 & n.245 (2005) (demonstrating the complications between military court marshals and civilian courts, and providing hypothetical situations where a court may overreach or underreach based upon current international double jeopardy laws).
 10. Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 Notre Dame L. Rev. 111, 142-45 (2004) (stating that universal jurisdiction crimes, such as piracy, should not be tried in multiple nations, if it has been adjudicated in a court of a civilized State).
 11. Seth F. Kreimer, *Truth Machines and Consequences: The Light and Dark Sides of 'Accuracy' in Criminal Justice*, 60 N.Y.U. Ann. Surv. Am. L. 655, 670-74 (2005) (arguing that enough loopholes exist in double jeopardy for the introduction of new evidence that it should continue to have full force, rather than a loose construction, as in the United Kingdom and Australia).
 12. Olaoluwa Olusanya, DOUBLE JEOPARDY WITHOUT PARAMETERS: RE-CHARACTERISATION IN INTERNATIONAL CRIMINAL LAW 177-239 (Intersentia Publishers 2004) (proposing a hierarchical system to deal with re-characterisation, or the practice of calling the same crime multiple names in international criminal law).
 13. Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, Congressional Research Service at 35, Sept. 27, 2007, available at

- <http://www.fas.org/sgp/crs/natsec/RL33688.pdf> (comparing and reinforcing the double jeopardy doctrine under the Military Commissions Act section 949h(a)).
14. Frank J. Williams, Nicole J. Dulude & Kimberly A. Tracey, Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror, 12 Roger Williams U. L. Rev. 675, 736 (2007) (explaining that “a detainee may not be tried a second time for the same offense”).
 15. Morris D. Davis, In Defense of Guantanamo Bay, 117 Yale L.J. Pocket Part 21, 28 (2007)(citing Hamdan v. Rumsfeld, 548 U.S. 557 (2006))(explaining that “it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I).” The author explains that, specifically within Article 75 of Protocol I, it includes the “basic right” that a person is not to be “tried again by the same party for an offense already the subject of a pronounced judgment (no double jeopardy”).
 16. Hong S. Wills, Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR, 17 Emory Int'l L. Rev. 341, 377 (2003)(stating that “both the ICTY Statute and the ICTR Statute provide certain protections against the practice of trying an accused twice for the same crime”
 17. Salley C. Quillian, Ohio v. Johnson: Prohibiting the offensive use of guilty pleas to invoke double jeopardy protection, 19 Ga. L. Rev. 159, 162-65 (noting that “many jurists consider the principle of double jeopardy to be part of the universal law of reason, justice, and conscience,” and giving a historical recount of Demosthenes from nearly two thousand years ago stating that “the laws forbid the same man to be tried twice on the same issue” tracing this concept back to Roman law and English common law)
 18. Donald T. Kramer, Double Jeopardy Considerations in Federal Criminal Cases—Supreme Court Cases, 162 A.L.R. Fed. 415 (2002)(noting an updated anthology of recent double jeopardy cases on a domestic front).
 19. John W. Broomes, Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects in Cuba, 42 Washburn L.J. 107, 111 (examining the issue of the lack of double jeopardy for non-citizens by explaining the “notion that these protections might not always be available to a criminal defendant seems foreign to many; the idea that the U.S. government could prosecute someone for a crime without the benefit of a public trial by an impartial jury seems simply inconceivable. Yet, that is precisely what will happen under the Presidential Order calling for trials by military commissions”).
 20. Diane Marie Amann, Harmonic Convergence? Constitutional Criminal Procedure in an International Context, 75 Ind. L.J. 809, 825 (2000) (examining the constitutional rights on an international plane, the author stresses at the end the final right against double jeopardy by explaining “its fair trial rights were most extensive, providing for, inter alia: an equal,

fair, public, and speedy trial before a competent tribunal; a presumption of innocence; the rights to be informed of the charges, to have assistance of an interpreter, and to have adequate time and resources to prepare a defense; the assistance of counsel, including appointment of state-paid counsel if necessary; the rights to cross-examine adverse witnesses and to secure favorable witnesses; the right to silence; the right to an appeal; compensation for unjust convictions; and the right against double jeopardy”)

29. Principle 29 – Prohibition of Deprivations Based on the Actions of Third Parties

No State should deprive any person of liberty based solely on the alleged or actual wrongdoing of a third party.

30. Principle 30 – Prohibition of Indefinite Non-Punitive Detention

Extrajudicial detention beyond the time necessary to serve a compelling and current³³ state objective is inconsistent with the principles of due process. No State should detain any person outside the judicial process unless such detention is conducted in accordance with substantial procedural safeguards narrowly tailored to ensure the detention is strictly limited to the time necessary to serve a compelling and current state objective.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 11* –
 - i. “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
 - ii. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
 - iii. 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”
2. Basic Principles for the Treatment of Prisoners
 - a. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”

³³ The currency requirement is to ensure that security concerns existing when a person is first captured are reevaluated throughout their detention to ensure that preventive detention on security grounds is not continued past the point of absolute necessity.

II. Domestic Law

A. Judicial Decisions

1. *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997) (Mere fact that person is detained does not inexorably lead to conclusion that government has imposed “punishment”; state may take measures to restrict freedom of the dangerously mentally ill, which is a legitimate, nonpunitive governmental objective).
2. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (“The alien’s release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions.”).
3. *See generally id. At* (2001) (stating that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem” and inferring a reasonable time restriction into a statute allowing for the indefinite detention of a removable aliens in situations where removal is no longer reasonably foreseeable because of a lack of a willing receiving state).

B. Statutes

1. *Cf.* 18 U.S.C.A. § 3142(e) and (f) (2001) (Controlled Substance Act):. Due process requires that a hearing be held for detainees. The judicial officer presiding, upon hearing the alleged offenses, decide whether “Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense” of sufficient severity to continue detention. Implied in a bail hearing is the right to be heard, and the right to a trial for a higher burden of proof than “probable cause.” Procedural due process is designed to vitiate indefinite non-punitive detention, or at least to limit it temporally and narrow its use/abuse.

III. Secondary Analysis

A. Legal Articles and Commentaries

1. Amnesty International, *The Impact of Indefinite Detention: The Case to Change Australia’s Mandatory Detention Regime* (2005), <http://www.amnesty.org/en/library/asset/ASA12/001/2005/en/dom-ASA120012005en.html> (Amnesty International focuses on Australia’s mandatory detention policy, and in particular how it has allowed for prolonged and indefinite detention).

2. The Association of the Bar of the City of New York Committee on Federal Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, (2004) (These detentions, effected unilaterally by the executive without congressional authorization and not subject to meaningful judicial review, violate core due process rights under the Constitution).
3. 2004 Constitutional Law Conference, *Unfinished Matters: The Federal And State Supreme Courts On Constitutional Law: The 2003 Term* (2004), http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mccoll200204 (In the Supreme Court of the New South Wales a justice stated that he did not doubt the authority of the State to make general laws for preventative detention when those laws operated in accordance with the ordinary judicial processes of the State Courts).
4. Jennifer K. Elsea, *Detention of American Citizens as Enemy Combatants*, CRS Report for Congress (2005), <http://www.au.af.mil/au/awc/awcgate/crs/rl31724.pdf> ("While the broad language of the Authorization for the Use of Military Force ('AUMF') authorizes the use of such military force as the President deems appropriate in order to prevent future acts of terrorism, it remains possible to argue that the AUMF was not intended to authorize the President to assert *all* of the war powers usually reserved for formal declarations of war").
5. Seattle University School of Law International Human Rights Clinic, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington* (2008), <http://www.law.seattleu.edu/x3333.xml> (This report corroborates detainee claims of human rights violations at the Northwest Detention Center on the tide flats of Tacoma, Washington).
6. Andrew Lynch and Alexander Reilly, *The Constitutional Validity of Terrorism Orders of Control and Preventative Detention*, 10 FJLR 105 (2007) (A discussion of Australia's constitutional provisions and judicial cases that deal with preventative detention).
7. Juliet Curtin, Comment, 'Never Say Never': *Al-Kateb v Godwin*, Sydney Law Review (2005), <http://www.austlii.edu.au/au/journals/SydLRev/2005/16.html> (In terms of the majority's sanctioning of the Executive's power to detain indefinitely, the High Court has embarked upon a trajectory fundamentally opposed to the course which is being followed by both the US Supreme Court and the British House of Lords).
8. Patrick Keyser and Sam Blay, *Double Punishment? Preventative Detention and Schemes Under Australian Legislation and Their Consistency with International Law: The Fardon Communication*, *Melbourne Journal of International Law*, Vol. 7 (2006) [http://www.mjil.law.unimelb.edu.au/issues/archive/2006\(2\)/06KeyzerBlay.pdf](http://www.mjil.law.unimelb.edu.au/issues/archive/2006(2)/06KeyzerBlay.pdf) (This commentary critically analyses legislation enacted by the Queensland Parliament that reincarcerates sex offenders who have already completed their terms of imprisonment).

9. Andrew Hammel, Preventive Detention in Comparative Perspective, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=andrew_hammel (In the author's opinion the attempts of the high courts of Germany and the United States to reconcile subsequently- imposed preventive detention with the rule of law fall short).

31. Principle 31 – Right to Repatriation Following Detention

All persons should be afforded the right to return to their country of nationality or citizenship upon the cessation of detention by a foreign State.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. Geneva Convention Relative to the Treatment of Prisoners of War
 - a. *Article 118* – (mandating that Prisoners of War must be released after the cessation of active hostilities)

B. Normative Codifications

1. Universal Declaration of Human Rights
 - a. *Article 13(2)* – “Everyone has the right to leave any country, including his own, and to return to his country.”

II. Domestic Law

A. Treaties

1. Repatriations of Citizens Bill, 2007, (Austl.)
 - a. Provides for the repatriations of Australian citizens detained abroad. Though not yet an act the bill represents a concerted effort on the part of one of the US’s largest allies to repatriate their citizens when they are detained overseas.
2. The Repatriation of Prisoners Bill, 2002, No. 39 of 2002; India Code (2002)
 - a. This is an Indian bill to provide for the transfer of certain prisoners from India to countries outside of India and reception in India of certain prisoners from country or place outside of India. <http://rajyasabha.nic.in/bills-ls-rs/39-2002.pdf>

III. Secondary Analysis

A. Legal Articles and Commentary

1. Refugees International, *Issues: Stateless Persons*
<http://www.refugeesinternational.org/content/issue/detail/4835>
(Analogizing refugees and asylum seekers: The situation of detainees)

- found to present no threat to the detaining state (in other words, they are “innocent”) seems to be similar to that of illegal aliens seeking political asylum. The detaining state usually does not want the detainee released into the detaining state, but is unwilling to give the detainee up to his state of origin for fear of torture, execution, persecution, etc. This website states that 11 million people around the world have been made stateless in contravention of 1948 Universal Declaration of Human Rights. The page contains links to reports concerning areas of the world where statelessness is a major problem. While not directly linking to the Right to Repatriation or Release, there is a longer history of analysis and commentary that may be useful to those making arguments in the detainee context).
2. Statement, Lawyers Without Borders, Statement and Request Concerning Omar Khadr’s Repatriation, (September 15, 2008) (available at <http://www.bringomarhome.ca/PDFs/LWB-statement.pdf>) (A statement written by Lawyers Without Border alleging various human rights abuses perpetrated on Omar Khadr, who was arrested by Canadian forces in Afghanistan and transferred to military detention facility at Guantanamo Bay, Cuba. The statement calls for his immediate release and repatriation back to Afghanistan.).
 3. Mark Huband, *Prisoners of War, Non-repatriation of*, in Crimes of War Project <http://www.crimesofwar.org/thebook/pow-non-repatriation.html> (article discusses the issue of Moroccan soldiers held by the Polisario front in Moroccan Sahara and Algeria. The issue presented in the article is what to do with the soldier now that active hostilities have ceased and a peace process is underway. Article 118 of the Geneva Conventions mandates that prisoners be released when active hostilities have ended.).
 4. Prisoners’ Advice Service, Foreign Nationals in the Prison System <http://www.prisonersadvice.org.uk/info/infoforeignnat.html> (I could not find the additional information needed to cite this article properly but the article address the needs, definitions, and relevant acts that pertain to foreign nationals in the UK prison system.).
 5. http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BE858D572-7A8F-4C11-A543-D92FDE4578E3%7D_TRANSFER_PRISONERS_pt3.pdf (A database of all British Commonwealth and former Commonwealth countries and their extradition and repatriation requirements.).
 6. Christian Peregin, *Fewer Migrants Repatriated*, Times of Malta, Oct. 25, 2008 <http://www.timesofmalta.com/articles/view/20081025/local/fewer-migrants-repatriated> (Article discusses the growing number of refugees not being repatriated but also not being granted refugee status that would allow them to stay legally in their countries.).
 7. Adelman, Howard. "Canada's Balancing Act: Protecting Human Rights and Countering Terrorist Threats" *Paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA*, Mar 22, 2006 <Not Available>.

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- http://www.allacademic.com/meta/p99019_index.html (Discusses the pitfall of repatriating people back to places where they will be tortured and in fact advocated for people to have a right not to be repatriated back to those countries.).
8. J.A.C. Gutteridge, *The Repatriation of Prisoners of War*, International and Comparative Law Quarterly (1953), 2:207-216. (1953) (Article deals with the implications and consequences of repatriating prisoners of war.).
 9. Ulysses S. Smith, "*More Ours than Theirs*": *The Uighurs, Indefinite Detention, and the Constitution*, 40 Cornell Int'l L.J. 265 (2007) (concluding that the Uighurs held at Guantanamo Bay, who have been cleared for release by Combatant Status Review Tribunals, but who would face persecution in their native China, are held illegally. The paper specifically addresses the lack of substantial due process under the U.S. constitution, given the liberty interests of the detainees and the lack of sufficiently important countervailing interests in their detention).
 10. Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657 (2006) (discussing the range of legal issues that occur when the detainee objects on grounds of possibility of torture to repatriation or transfer. When the detaining state rather desperately desires to repatriate, but the detainee would just as desperately not exercise this particular right, what is the end result?).
 11. Kara Simard, *Innocent at Guantanamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 Suffolk Transnat'l L. Rev 365 (2007) (arguing that the United States has a duty to grant political asylum to the Uyghur detainees held at Guantanamo Bay. The conclusion is that, because asylum is the only potential option that does not violate international law, the U.S. must grant refuge).
 12. Rosa Ehrenreich Brooks, *War everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 727 (2004) (arguing that the current war on terror's lack of temporal boundaries requires a new law of armed conflict, as there is no differentiation between peace and war. The effects on detainees, who are usually released at the cessation of hostilities, hinges on this issue).

C. Section C: Prohibition of Incommunicado Detention

32. Principle 32 – Prohibition of Incommunicado Detention

Prolonged incommunicado detention is incompatible with the substantive liberty guarantees inherent in the fundamental right to due process of law.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 15* – “Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”
 - b. *Principle 19* – “A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”
2. Declaration on the Protection of all Persons from Enforced Disappearance³⁴
 - a. *Preamble* - “In many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law. Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.”

³⁴ *Declaration on the Protection of all Persons from Enforced Disappearance*, adopted by General Assembly Resolution 47/133 of 18 December 1992, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.47.133.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.47.133.En?OpenDocument).

- b. *Article 1* - “Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.”

II. Secondary Analysis

A. Legal Articles

1. Anna Oehmichen, *Incommunicado Detention in Germany: an Example of Reactive Anti-Terror Legislation and Long-Term Consequences*, 8 GERMAN L.J. 855, 868 (2008) (concluding that incommunicado detention may conflict with human rights guaranteed under the ECHR such as prohibition of torture, right to life and security of person, and right to a fair trial).
2. Susan W. Tiefenbrun, *The Semiotics of Women’s Human Rights in Iran*, 23 CONN. J. INT’L L. 1, 3–4 (2007) (considering incommunicado detention as a serious human rights abuse).
3. Amos N. Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism*, 20 TEMP. INT’L & COMP. L.J. 363, 391 (2006) (“Incommunicado detention reflects a policy of firmness verging on denial of basic human rights.”).
4. Christopher E. Smith & Cheryl D. Lema, *Justice Clarence Thomas and Incommunicado Detention: Justifications and Risks*, 39 VAL. U. L. REV. 783, 797 (2005) (“Incommunicado detention is not merely a threat to individual liberty; it also raises risks that the government will employ torture or impose inhumane conditions of confinement.”).
5. Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457, 480 (2003) (“Indefinite incommunicado detention itself may contravene human rights norms because of the debilitating psychological effects.”).
6. Vincent-Joël Proulx, *If the Hat Fits, Wear it, if the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 820 (2005) (“It is no secret that long-term incommunicado detention, in itself, engenders devastating

- psychological damage, which, in turn, may be equated with inhuman and/or degrading treatment.”).
7. Amos N. Guiora, *Where are Terrorists to be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805, 832 (2007) (finding that incommunicado detention is at odds with commonly accepted criminal law process).
 8. Kathleen Cavanaugh, *The Israeli Military Court System in the West Bank and Gaza*, 12 J. CONFLICT & SECURITY L. 197, 219 n.77 (2007) (characterizing incommunicado detention as an interrogation method that “meet[s] the threshold of cruel, inhuman or degrading treatment or torture”).
 9. Jeffrey K. Cassin, *United States’ Moral Authority Undermined: The Foreign Affairs Costs of Abusive Detentions*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 421, 430 (2006) (characterizing incommunicado detention as abusive detention).
 10. Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 705 (2004) (concluding that incommunicado detention is cruel and unusual punishment under the eighth amendment).

33. Principle 33 – Right to Communicate with Relatives

Persons subjected to prolonged detention should be allowed to communicate with their family at regular intervals, subject to the supervision of the detaining authorities, unless the State demonstrates that the denial of such communication is necessary based on a demonstrable risk to national security or the safety of any person.³⁵

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 15* – “Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”
 - b. *Principle 19* – “A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”
 - c. *Principle 16* -
 - i. “1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
 - ii. 2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by

³⁵ The wording of this Principle was inspired by paragraph 37 of the *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, 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, available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm. Support for a right to communicate with family can also be found in: Article 71 of Geneva Convention III; Articles 25, 107, 116 of Geneva Convention IV; and Principle 19 of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment.

appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

- iii. 3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.”

34. Principle 34 – Right to Communicate with Diplomatic or Consular Representatives³⁶

All persons deprived of their liberty by the government of a foreign State should be allowed reasonable opportunities to communicate with the diplomatic or consular representatives of their home State as soon as practicable after the deprivation and periodically throughout the period of detention as needed to ensure they are afforded the full benefits of the protections guaranteed to foreign nationals under international law.

All persons who are refugees, stateless persons, or nationals of States without diplomatic or consular representation in the detaining State should be allowed reasonable opportunities to communicate with the diplomatic and consular representatives of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. Vienna Convention on Consular Relations
 - a. *Article 36* - (stating that foreign nationals have an international right to speak with their consular upon arrest).

B. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 15* – “Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”
 - b. *Principle 16* -
 - i. “1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or

³⁶ In the interests of promoting uniformity, the wording of this Principle was taken almost verbatim from paragraph 38 of the *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, 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, *available at* http://www.unhcr.ch/html/menu3/b/h_comp34.htm.

imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

- ii. 2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.
- iii. 3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.”

II. Domestic Law

A. Judicial Decisions

1. *Medellin v. Texas*, 128 S. Ct. 1346, (U.S. 2008) (holding that the *Avena* judgment dealing with the Vienna Convention was not binding on US domestic law).

III. Secondary Analysis

A. Legal Articles

1. Janet Koven Levit, *Does Medellín Matter?*, 77 *FORDHAM L. REV.* 617, 631 (2008) (focusing on the ground level impact of Medellín and noting that the positive in this case does not come from the actual High Court decision, but rather from the under discussed issue of “public awareness” of consular rights for foreigners and further the “institutionalizing processes that effectively cured Vienna Convention transgressions.”).
2. Steven Stansky, *Sanchez-Llamas v. Oregon: A Missed Opportunity In Treaty Interpretation*, 20 *ST. THOMAS L. REV.* 25, 54 (2007) (documenting the problematic and “overwhelming evidence” that should have guided the U.S. Supreme Court to rule that the “VCCR does not create individual enforceable rights.”).
3. Sital Kalantry, *The Intent-To-Benefit: Individually Enforceable Rights Under International Treaties*, 44 *STAN. J. INT'L L.* 63 (2008) (utilizing an

- “intent-to-benefit” contractual law intentionalist theory framework in application to the Vienna Conventions on Consular Relations “gives rise” to an individual having enforceable rights in U.S. Courts).
4. Asa Markel, *The Vienna Convention on Consular Relations: After the Federal Courts’ Abdication, Will State Courts Fill the Breach*, 7 Chi.-Kent J. Int’l Comp. L. 1 (2007) (reviewing the current domestic legal status of rights available to a foreign national under international law and if apprehended within the United States).
 5. Joshua E. Carpenter, *Medellin v. Dretke and the United States’ Myopic Failure to Guarantee the “Full Effect” of the Vienna Convention on Consular Relations*, 17 Geo. MASON U. CIV. RTS. L.J. 515 (2007) (highlighting the current operation of the Vienna Convention on Consular Relations within the United States).
 6. Craig Forcese, *The Capacity to Protect: Diplomatic Protection of Dual Nationals In the ‘War On Terror,’* 17 EUR. J. INT’L L. 369 (2006) (focusing on diplomatic and consular protection, explaining the intricacies of international law, diplomatic protection of dual national, and stressing that dual nationality is not a bar on diplomatic protection for people apprehended by extraordinary rendition).
 7. Linda E. Carter, *Lessons from Avena: The Adequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT’L L. 259 (2005) (stressing that the U.S. post-conviction proceedings regarding clemency and the legal process fail to satisfy the VCC treaty requirement for consular notification and congressional action is quickly needed).
 8. David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks The Issue In Hamdan And Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L. 20 (2006) (analyzing the most recent consular relations cases within the U.S. Supreme Court and addressing the Courts’ deeply divided approach to judicial remedies for treaty violations under a nationalist and transnationalist framework and whether the law will change in the future on this issue).
 9. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States About the Fundamental Nature of the Right to Consul*, 36 GEO. J. INT’L L. 1 (2005) (leveling the playing field of recent and future jurisprudence on behalf the United States in a post-Avena world to eventually “pay heed to the ICJ and the Inter-American Court of Human Rights” on consular rights).
 10. Antônio Augusto Cançado Trindade, *The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice*, 6 CHINESE J. INT’L L. 1 (2007) (reviewing the progression to the humanization of consular law and the United States action with on the world stage from. Arguing that due to an incipient practice under Article 36(1) of the Vienna Convention on Consular Relations, such international

- practice was confirmed and enhanced by an Advisory Opinion, which has decisively contributed to the formation of an *opinio juris communis* as to the individual rights crystallized under Article 36(1) of the 1963 Vienna Convention, reflecting the ongoing process of humanization of International Law, encompassing relevant aspects of consular relations).
11. Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617, 631 (2008) (focusing on the ground level impact of Medellín and noting that the positive in this case does not come from the actual High Court decision, but rather the under discussed issue of “public awareness” of consular rights for foreigners and further the “institutionalizing processes that effectively cured Vienna Convention transgressions.”).
 12. Mark Warren, Rights of Consular Information, Notification and Access for Detained Foreign Nationals Proposed Model Standards for Law Enforcement (September 6, 2001), <http://www3.sympatico.ca/aiwarren/standards.htm> (recognizing that under Article 36 of the Vienna Convention, foreign citizens may face unique disadvantages when confronted with prosecution and imprisonment under the legal system of another nation and that Consular communication and visits may ensure that foreigners are not subject to discriminatory or abusive treatment while in custody).
 13. A Universal Safeguard: Providing Consular Assistance to Nationals in Custody (Anne James, ed., The International Justice Project 2002) (Arguing that international concerns over acts of terrorism have prompted many nations to enact new security measures, resulting in the widespread and sometimes indiscriminate arrests of foreign nationals. Also notes that the significance of consular notification and assistance under international law has been the recent subject of landmark rulings by international courts, underscoring the consular rights and obligations of all States).

35. Principle 35 – Right to Unmonitored Communication with Physicians

All persons subjected to prolonged deprivations of liberty should be afforded the right to periodic unmonitored communications with the physicians charged with providing their medical care in order to allow the disclosure of allegations of abuse by the detaining authorities.

36. Principle 36 – Right of Physicians to Report Suspected Rights Violations

Physicians charged with providing medical care for persons deprived of their liberty should be afforded a mechanism for disclosure of suspected detainee abuse to an authority outside the control of the entity committing the abuse, under conditions affording the physician adequate protection against retribution.³⁷

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 7* –
 - i. “1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
 - ii. 2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.
 - iii. 3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.”

³⁷ Conversations between doctors and detainees must be afforded privilege beyond mere doctor-patient confidentiality. Detainees from other legal systems might not be familiar with the role played by attorneys, and may naturally seek to discuss matters of a legal nature with their physician. Doctors should be given training on the minimum standards of treatment required by law, and should be in a position to report violations of those standards that they witness during examinations or that are confided to them by their patients. The process for reporting abuses must contain assurances of immunity from retribution for such disclosures.

37. Principle 37 – Right to Information about the Outside World

All persons deprived of their liberty for an extended time should be given regular access to periodicals, books, educational materials, audio programs, writing materials, and other such items intended to keep them mentally engaged, informed of world events, and to allow them to make productive use of their time while in detention.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Standard Minimum Rules for the Treatment of Prisoners
 - a. *Rule 37* – “Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.
 - b. *Rule 38* –
 - i. “(1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.
 - ii. (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.”
 - c. *Rule 39* – “Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.”
 - d. *Rule 40* – “Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.”
 - e. *Rule 44* –
 - i. “(1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.

- ii. (2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.
 - iii. (3) Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution.”
 - f. *Rule 77* –
 - i. “(1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.
 - ii. (2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.”
 - g. *Rule 78* – “Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners”
- 2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 15* – “Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”
 - b. *Principle 16*
 - i. “1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
 - ii. 2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

- iii. 3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.”
 - c. *Principle 19* – “A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”
 - d. *Principle 28* – “A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.”
3. Basic Principles for the Treatment of Prisoners
- a. *Principle 8* – “Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.”

II. Domestic Law

A. Judicial Decisions

1. *Reno v. Flores*, 507 U.S. 292, 298 (2003) (explaining that juveniles in INS detention centers must have access to "an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation and leisure-time activities.").

III. Secondary Analysis

A. Legal Annotations and Official Commentaries

1. UNESCO Fifth International Conference on Adult Education, Theme 8, Paragraph 47 (1997), *available at* <http://www.unesco.org/education/uie/confintea/pdf/finrepeng.pdf> (stating that ". . . by providing prison inmates with information on and access to different levels of education and training; and (c)... providing prisoners with access to educational institutions and encouraging initiatives that link courses carried out inside and outside prisons.").

2. Situation of the Detainees at Guantánamo, U.N. Doc. E/CN.4/2006/120, 66-82 (2006), *available at* <http://www.universalhumanrightsindex.org/documents/844/815/document/en/pdf/text.pdf> (acknowledging the right to "enjoyment of the highest attainable standard of physical and mental health.").
3. 6 A.L.R. Fed. 2d 185, Section 10 (2005) (describing the right of the detainee to a "healthy environment" and stating ". . . an alien detainee incarcerated outside the United States [has] a right to a healthy environment.").

38. Principle 38 – Right of Public Access to Facility Procedures

A detaining State should make the general procedures governing the operation of its detention facilities available to the public. Sensitive security information may be exempted from public disclosure, although such procedures should be subject to review through an independent mechanism within the detaining government.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - b. *Principle 29* –
 - i. “1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
 - ii. 2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.”
 - c. *Principle 35* –
 - i. “1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.
 - ii. 2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.”

II. Secondary Analysis

A. Legal Articles

1. David Schultz, *Article: Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 Golden Gate U.L. Rev. 195, 206-207 (2008) (discusses Amnesty International and the International Red Cross's critical position on that the Bush Administration has violated international human rights law).
2. Ralph Wilde, *Black Hole? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 Mich. J. Int'l L. 739 (2005) (discusses the need for greater scrutiny and involvement of foreign authorities of the detention and interrogation of detainees).
3. Mary Ellen O'Connell, *Article: Affirming the Ban on Harsh Interrogation*, 66 Ohio St. L.J. 1231, 1240 (2005) (discussing the Bush Administrations denial of basic IHL detainee protections, namely the right to be visited by the International Red Cross).
4. George J. Annas, *Symposium: Extraordinary Powers in Ordinary Times: Human Rights Outlaws: Nuremburg, Geneva, and the Global War on Terror*, 87 B.U.L. Rev. 427 (2007) (noting an unsatisfactory International Red Cross inspection in 2004).
5. Laura A. Dickinson, *Article: Government For Hire: Privatizing Foreign Affairs And The Problem Of Accountability Under International Law*, 47 Wm and Mary L. Rev. 135, 207 (2005) (discussing options to hold governments accountable, including asking international organizations like the Red Cross to play a role).
6. Jared A. Goldstein, *Habeas Without Rights*, 2007 Wis. L. Rev. 1165, 1203 (2007) (discussing the lack of individual rights that have been found at Guantanamo Bay).
7. Marjorie Cohn, *Rounding Up Unusual Suspects: Human Rights In The Wake Of 9/11: Human Rights: Casualty Of The War On Terrorism*, 25 T. Jefferson L. Rev. 317, 321-325 (2003) (discussing the basic rights that should be afforded the detainees at Guantanamo Bay).
8. Geoffrey Corn, *Taking The Bitter With The Sweet: A Law Of War Based Analysis Of The Military Commission*, 35 Stetson L. Rev. 811, 816-820 (2006) (discussing the difficulty in enforcing the compliance of the Red Cross's mission statement with the Laws of War).
9. Jennifer Moore, *Practicing What We Preach: Humane Treatment For Detainees in the War on Terror*, 34 Denv. J. Int'l L. & Pol'y 33, 52- 57 (2006) (Geneva Convention protections that grant prisoners of war access to the Red Cross).
10. Miri Lim, *Student Note: Redefining Torture In The Age Of Terrorism: An Argument Against The Dilution Of Human Rights*, 13 Wash. & Lee J. Civil Rts. & Soc. Just. 83, 86-87 (2006) (discussing the definition of torture and noting the Red Cross's findings in an inspection in 2004).
11. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. Times, Nov. 30, 2004, at A1 (describing the report of the International

Committee of the Red Cross following a month-long visit to Guantanamo in June 2004).

39. Principle 39 – Rights of Relief Organizations to Inspect Prisoners and Facilities

No State should unduly restrict the ability of the International Committee of the Red Cross and other appropriate relief organizations to inspect detention facilities and to engage in unmonitored communication with individual detainees for the purpose of monitoring the State's compliance with its responsibility to protect the fundamental rights of detainees under its control.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
 - a. *Article 14* - (Mandating the inspection of detention facilities by the UN or other NGO's and in article 14 outlining that mandate . Also specifying independent and private interviews with prisoners as part of the inspection proceedings. The protocol or OPCAT as it is known, is an addition to the UN Convention Against Torture. The US has not ratified the optional protocol.).

B. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 7* –
 - i. “1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
 - ii. 2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.
 - iii. 3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.”

- b. *Principle 15* – “Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”
- c. *Principle 29* –
 - i. “1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
 - ii. 2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.”
- d. *Principle 35* –
 - i. “1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.
 - ii. 2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.”

II. Secondary Analysis

A. Legal Articles and Commentaries

1. Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 127, 138-139 (2005) (describing how a report from the ICRC in 2002 may have led to a U.S. policy change regarding the return of juvenile combatants to Afghanistan).
2. *U.S Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT'L L. 591, 594 (discussing how reports of the ICRC drew the attention of the U.S. military to the abuses at Abu Ghraib).
3. Berta Esperanza Hernández-Truyol, *Globalized Citizenship: Sovereignty, Security, and Soul*, 50 VILL. L. REV. 1009, 1059 (2005) (“The ICRC’s knowledge base can provide incentives for a state to observe accepted norms and bring much needed public attention to alleged violations.”).
4. Priti Patel, *Ensuring Accountability: International Law and Post 9/11 U.S. Detention Policy*, 12 NO. 2 HUM. RTS. BRIEF 5, 6 (2005) (mentioning

- that ICRC has had very limited access to detention centers close to the point of capture, termed “firebases”) (article not sourced).
5. Robert Cryer, *The Fine Art of Friendship: Jus in Bello in Afghanistan*, 7 J. CONFLICT & SECURITY L. 37, 80 (2002) (describing the scope of the ICRC’s activities in Afghanistan and noting that over 4,000 detainees were interviewed by late December of 2001).
 6. Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739, 768 (2005) (“Given that the extraterritorial locus [of detention centers] often creates greater opportunities for States to avoid scrutiny of their treatment of individuals, one should not have to rely exclusively on assurances given by the governments of those States and the possibility in extreme circumstances of attenuated intimations of inappropriate treatment from the ICRC, to be sure that the States involved are not taking what they perceive to be advantages from such opportunities.”).
 7. *Developments relating to Continued Detentions at Guantanamo Bay*, 102 AM. J. INT’L L. 181, 183 (2008) (stating that an unclassified operations manual “authorized some detainees to be denied access to representatives of the International Committee of the Red Cross (ICRC), in order to render them more vulnerable to interrogation” –the U.S. military has stated that those procedures are no longer in force).
 8. Howard S. Levie, *How It All Started – And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 218-220 (2002) (detailing the benefits of ICRC inspections of UNC POW camps during the Korean War and the drawbacks of the North Korean refusal to allow ICRC inspections).
 9. Won Kidane, *Civil Liability for Violation of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague*, 25 WIS. INT’L L.J. 23, 62, 80 (2007) (noting “Ethiopia’s claim against Eritrea for refusing to allow the ICRC to send delegates to visit Ethiopian prisoner-of-war camps in Eritrea during the conflict” and also the fact that both sides (and the Commission) sought – and were denied – the permission of the ICRC to use ICRC documents as evidence). Joshua A. Decker, Comment, *Is the United States Bound by the Customary International Law of Torture? A Proposal For ATS Litigation in the War on Terror*, 6 CHI. J. INT’L L. 803, 807-808 (2006) (noting that even though the ICRC is a guardian of the Geneva Convention rights and President Bush determined that the illegal combatants at Guantanamo Bay were not entitled to those rights, the ICRC was allowed to inspect the facilities and prisoners at the detention center).
 10. Michael A. Newton, *War By Proxy: Legal and Moral Duties of ‘Other Actors’ Derived From Government Affiliation*, 37 Case Western Reserve Journal of International Law 249, 254 (2006) (Establishing the need for inspections and references the US Congress’s declaration in Section 1092 of the Defense Authorization Act for Fiscal Year for 2005 that there be “periodic unannounced and announced inspections of detention facilities in order to provide continued oversight of interrogation and detention operations.”).

11. U.N. Office of the High Commissioner for Human Rights, *Professional Training Series No. 8 Rev. 1: Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations 2004), available at <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf> (Establishing the methods used by physicians and others when investigating torture including detainee inspection and physical examinations of the detainees themselves.).
12. Association for the Prevention of Torture, *Monitoring places of detention: a practical guide*, April 2004, available at <http://www.apt.ch/> (follow "Publications and Tools" drop-down menu; then follow "Detention Monitoring" hyperlink.) (Detailing, in manual form, the rights to inspection in specific countries and detailing the methods to be used by NGO personnel when conducting detention facility inspections.).
13. Council of Europe: Committee for the Prevention of Torture, *The CPT Standards: "Substantive" Sections of the CPT's General Reports*. CPT/Inf/E (2002) 1 - Rev. 2006, at 19, available at <http://www.cpt.coe.int/en/docsstandards.htm> (Providing a stable and time tested model through which NGO and relief organizations can assert their rights to inspect and methods to be used when inspecting US detention facilities. The Committee for the Prevention of Torture is a significant European body that has the power to inspect all detention facilities of all member states of the Council of Europe. The detentions are far-reaching and independently observed.).

D. Section D: Prohibition of Offenses to Personal Welfare and Human Dignity

40. Principle 40 – Prohibition of Grave Breaches

No State should subject any person to torture, cruel treatment, biological experiments, murder, mutilation, maiming, rape, sexual abuse, or the intentional infliction of serious bodily or psychological injury.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 6* – “No person under any form of detention or imprisonment shall be subjected to torture or to 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.”
 - b. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - c. *Principle 21* –
 - i. “1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
 - ii. 2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.”
 - d. *Principle 23* –
 - i. “1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
 - ii. 2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.”

- e. *Principle 34* – “Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.”

II. Secondary Analysis

A. Legal Articles

1. Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 431 (2003) (“In 1984, the United Nations adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment placing an obligation on States Parties to take effective legislative, administrative, judicial, or other measures to prevent acts of torture within their respective territories and to incorporate the crime of torture as defined in the Convention into their national criminal justice systems.”).
2. Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 329 (2007) (“Another interpretive provision deals with the U.S. obligation under Article 129 of the Third Geneva Convention to enact legislation to punish grave breaches of the Convention, which are defined as breaches involving wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”).
3. Hamed Adibnatanzi, *The U.S. Codification of War Crimes: 18 USCA §2441*, 14 ANN. SURV. INT’L & COMP. L. 151, 157 (2008) (“The prohibited list includes torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.”).

4. M. Angela Buenaventura, *Torture in the Living Room*, 6 SEATTLE J. FOR SOC. JUST. 103 (2007), (“The prohibition against torture has become a jus cogens of international law.”).
5. Hannah R. Bornstein, *The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority*, 82 IND. L. J. 1077, 1083-84 (2007) (“In this decision, the Second Circuit opened the doors of federal courthouses to ATCA litigation from anywhere in the world so that plaintiffs could allege violations of the prohibition against torture and perhaps other rules of customary international law.”).
6. Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT’L L. 517, 521 (2007) (“The [law of armed conflict] regime also designates some uses of force as ‘grave breaches’ of the law of war, such as torture, biological experiments, taking hostages, and genocide.”).
7. Marco Roscini, *Great Expectations: The Implementation of the Rome Statute in Italy*, 5 J. INT’L CRIM. JUST. 493, 496 (2007) (“In the case of torture, however, the ICTY stated that ‘the requirement that states expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice’ and therefore ‘states must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring’. It also added that ‘[t]he mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international state responsibility.’”).
8. Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 220 (2006) (“The question of whether or not biological experiments conducted at the expense of human beings was constitutional or not was never decided by Justice Jackson. But the way in which he posed the question left no doubt that he felt it was the duty of the Court to rescue defenseless human beings at whose expense other human beings are willing to benefit.”).
9. Diane Marie Amann, *National Security: Detention, War Powers, and Anti-Proliferation*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 873, 885 (2007) (“The second such statute was enacted in 1994 to give internal effect to the ratification by the United States of the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment.”).
10. Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT’L L. 225, 229 (2006-07) (“The 1949 Geneva Convention Relative to the Treatment of Prisoners of War was the first modern-day

international instrument to establish protections against rape for women. However, the most important development in breaking the silence of rape as an international crime has come through the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).”).

41. Principle 41 – Prohibition of Extra-Legal Interrogation Methods

No State should interrogate any person employing methods that have not been approved for use by law.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. **Standard Minimum Rules for the Treatment of Prisoners**
 - a. *Rule 31* – “Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.”
 - b. *Rule 32* –
 - i. “(1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.
 - ii. (2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.
 - iii. (3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.”
2. **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**
 - a. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - b. *Principle 21* –
 - i. “1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
 - ii. 2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.”
 - c. *Principle 23* –
 - i. “1. The duration of any interrogation of a detained or imprisoned person and of the intervals between

interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

- ii. 2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.”

3. Basic Principles for the Treatment of Prisoners

- a. *Principle 1* – “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”
- b. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
- c. *Principle 7* – “Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”
- d. *Principle 9* – “Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.”

II. Secondary Analysis

A. Legal Articles

1. Amos N. Guiora, *Interrogation of Detainees: Extending a Hand or a Boot?*, 41 U. Mich. J.L. Reform 375, 418-19 (2008) (recommending the United States use criminal law, prisoner of war law, and the historical treatment of African Americans in the South to establish clear laws regarding detainee interrogations).
2. Evan J. Wallach, *Symposium “Terrorism on Trial” The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and Al Qaeda and the Mistreatment of Prisoners*, 36 Case W. Res. J. Int’l L. 541, 553 (2004) (concluding that by not adhering strictly to the international laws regarding interrogation of prisoners of war, the United States has committed further more egregious breaches of domestic and international law).
3. Kim D. Chanbonpin, *Ditching “The Disposal Plan:” Revisiting Miranda in an Age of Terror*, 20 St. Thomas L. Rev. 155, 174-82 (2008) (arguing that terror suspects should be tried in federal courts under the rules of Miranda, so as to exclude evidence obtained by illegal interrogation practices).

4. Peter Jan Honigsberg, Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse, 12 *UCLA J. Int’l L. & Foreign Aff.* 1, 74 (2007) (concluding the United States should not continue to circumvent established interrogation and treatment laws by labeling detainees as enemy combatants and thereby leading other nations to do the same).
5. Simon Chesterman, Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis, 28 *Mich. J. Int’l L.* 553, 572-3 (2007) (supporting general adherence to the rule of law even in times of turmoil regarding the collection intelligence information).
6. Jordana S. Rubel, A Missed Opportunity: The Ramifications of the Committee Against Torture’s Failure to Adequately Address Israel’s Ill-treatment of Palestinian Detainees, 20 *Emory Int’l L. Rev.* 699, 739 (2006) (concluding that the Committee Against Torture and the United Nations should do more to establish a general international laws making torture illegal).
7. Jennifer Moore, Practicing What We Preach: Humane Treatment for Detainees in the War on Terror, 34 *Denv. J. Int’l L. & Pol’y* 33, 60-61 (2006) (advocating that even terrorism suspects are not immune from the rule of law, and that laws regarding human rights still apply today to the treatment and interrogation of detainees).
8. M. Cherif Bassiouni, The Institutionalization of Torture Under the Bush Administration, 37 *Case W. Res. J. Int’l L.* 389, 424-25 (2006) (condemning the Bush administration for not upholding its legal obligations to conform to the established laws regarding the prohibitions against torture).
9. Gabor Rona, Legal Issues in the “War on Terrorism” – Reflecting on the Conversation Between Silja N.U. Voneky and John Bellinger, 9 *German L.J.* 711, 734 (2008) (concluding that humanitarian and human rights law are established in the international community and that the United State in particular should return to a more strict adherence to these principles especially with regards to detainees).
10. J. Trevor Ulbrick, Tortured Logic: The (Il)legality of United States Interrogation Practices in the War on Terror, 4 *Nw. U. J. Int’l Hum. Rts.* 210 (2005) (concluding that the United States should conform its rules of interrogation to mirror United States law, and prosecute those who uphold illegal interrogation).

42. Principle 42 – Duty to Maintain Records of Physical Interrogations

A State employing physical interrogation methods on any person should be required to maintain records detailing the specific dates, times, and duration of each physical interrogation session and specifying all of the physical methods employed together with the written legal authorization approving their use. Such records should be maintained for a period of fifty years, and destruction of such records should be a criminal offense.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Standard Minimum Rules for the Treatment of Prisoners
 - a. *Rule 7-*
 - i. (1) “In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
 1. (a) Information concerning his identity;
 2. (b) The reasons for his commitment and the authority therefor;
 3. (c) The day and hour of his admission and release.
 - ii. (2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 4* – “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”
 - b. *Principle 9* – “The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”
 - c. *Principle 21* –
 - i. “1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
 - ii. 2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.”

d. *Principle 23* -

- i. "1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
- ii. 2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle."

e. *Principle 35* -

- i. "1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.
- ii. 2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle."

43. Principle 43 – Right of Access to Records of Physical Interrogations

All persons subjected to physical interrogation methods by a State should be given full access to the records pertaining to such interrogations.

RESEARCH ANNOTATIONS

I. International Law

A. Normative Codifications

1. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
 - a. *Principle 35* –
 - i. “1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.
 - ii. 2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.”

44. Principle 44 – Right to Adequate Healthcare, Nutrition, and Exercise

All persons deprived of their liberty should be afforded adequate healthcare, nutrition, and opportunities for physical exercise necessary for the maintenance of both physical and mental fitness during the period of detention.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. Convention for the Protection of Human Rights and Fundamental Freedoms³⁸
 - a. *Article 3 - Prohibition on Torture*
 - i. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
 - b. *Article 34 - Individual Applications*
 - i. “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

B. Normative Codifications

1. Standard Minimum Rules for the Treatment of Prisoners
 - a. *Rule 9 –*
 - i. “(1) Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.
 - ii. (2) Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution.”

³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

- b. *Rule 10* – “All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.”
- c. *Rule 11* – “In all places where prisoners are required to live or work,
 - i. (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;
 - ii. (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.”
- d. *Rule 12* – “The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.”
- e. *Rule 13* – “Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.”
- f. *Rule 14* – “All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.”
- g. *Rule 15* – “Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”
- h. *Rule 16* – “In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.”
- i. *Rule 17* –
 - i. (1) – “Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.
 - ii. (2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.
 - iii. (3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.”
- j. *Rule 18* – “If prisoners are allowed to wear their own clothing, arrangements shall be made on their admission to the institution to ensure that it shall be clean and fit for use.”

- k. *Rule 19* – “Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.”
- l. *Rule 20* –
 - i. (1) “Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.
 - ii. (2) Drinking water shall be available to every prisoner whenever he needs it.”
- m. *Rule 21* –
 - i. “(1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
 - ii. (2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.”
- n. *Rule 22* –
 - i. “(1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
 - ii. (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
 - iii. (3) The services of a qualified dental officer shall be available to every prisoner.”
- o. *Rule 23* –
 - i. (1) – “In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.
 - ii. (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.”

- p. *Rule 24* – “The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.”
- q. *Rule 25* –
- i. “(1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
 - ii. (2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.”
- r. *Rule 26* –
- i. “(1) The medical officer shall regularly inspect and advise the director upon:
 1. (a) The quantity, quality, preparation and service of food;
 2. (b) The hygiene and cleanliness of the institution and the prisoners;
 3. (c) The sanitation, heating, lighting and ventilation of the institution;
 4. (d) The suitability and cleanliness of the prisoners' clothing and bedding;
 5. (e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.
 - ii. (2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.”
2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- a. *Principle 22* – “No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.”
 - b. *Principle 24* – “A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and

thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.”

c. *Principle 25* – “A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.”

d. *Principle 26* – “The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.”

3. Basic Principles for the Treatment of Prisoners

a. *Principle 9* – “Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.”

4. European Prison Rules³⁹

a. *Personal hygiene*

i. 20. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

ii. 21. For reasons of health and in order that prisoners may maintain a good appearance and preserve their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.

b. *Clothing and bedding*

i. 22.

1. 1. Prisoners who are not allowed to wear their own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep them in good health. Such clothing shall in no manner be degrading or humiliating.

2. 2. All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

3. 3. Whenever prisoners obtain permission to go outside the institution, they shall be allowed to wear their own clothing or other inconspicuous clothing.

³⁹ Eur. Consult. Ass., Rec. of the Comm. of Ministers, 35th Session., Doc. No. R(87)3 (1987), <http://www.uncjin.org/Laws/prisrul.htm>.

- ii. 23. On the admission of the prisoners to an institution, adequate arrangements shall be made to ensure that their personal clothing is kept in good condition and fit for use.
- iii. 24. Every prisoner shall be provided with a separate bed and separate and appropriate bedding which shall be kept in good order and changed often enough to ensure its cleanliness.

c. Food

- i. 25.
 - 1. 1. In accordance with the standards laid down by the health authorities, the administration shall provide the prisoners at the normal times with food which is suitably prepared and presented, and which satisfies in quality and quantity the standards of dietetics and modern hygiene and takes into account their age, health, the nature of their work and so far as possible, religious or cultural requirements.
 - 2. 2. Drinking water shall be available to every prisoner.

d. Medical services

- i. 26.
 - 1. 1. At every institution there shall be available the services of at least one qualified general practitioner. The medical services should be organised in close relation with the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
 - 2. 2. Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be suitable for the medical care and treatment of sick prisoners, and there shall be staff of suitably trained officers.
 - 3. 3. The services of a qualified dental officer shall be available to every prisoner.
- ii. 27. Prisoners may not be submitted to any experiments which may result in physical or moral injury.
- iii. 28.
 - 1. 1. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. However, unless special arrangements are made, there shall in penal institutions be the necessary staff and accommodation for the confinement and post-natal care of pregnant women. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

2. 2. Where infants are allowed to remain in the institution with their mothers, special provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.
- iv. 29. The medical officer shall see and examine every prisoner as soon as possible after admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all measures necessary for medical treatment; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might impede resettlement after release; and the determination of the fitness of every prisoner to work.
- v. 30.
 1. 1. The medical officer shall have the care of the physical and mental health of the prisoners and shall see, under the conditions and with a frequency consistent with hospital standards, all sick prisoners, all who report illness or injury and any prisoner to whom attention is specially directed.
 2. 2. The medical officer shall report to the director whenever it is considered that a prisoner's physical or mental health has been or will be adversely affected by continued imprisonment or by an condition of imprisonment.
- vi. 31.
 1. 1. The medical officer or a competent authority shall regularly inspect and advise the director upon:
 - a. a. the quantity, quality, preparation and serving of food and water;
 - b. b. the hygiene and cleanliness of the institution and prisoners;
 - c. c. the sanitation, heating, lighting and ventilation of the institution;
 - d. d. the suitability and cleanliness of the prisoners' clothing and bedding.
 2. 2. The director shall consider the reports and advice that the medical officer submits according to Rules 30, paragraph 2, and 31, paragraph 1, and, when in concurrence with the recommendations made, shall take within the director's competence or if the director does not concur with them, the director shall immediately submit a personal report and the advice of the medical officer to higher authority.
- vii. 32. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects

which may impede a prisoner's resettlement after release. All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner to that end.

II. Domestic Law

A. Administrative Regulations and Materials

1. Department of Defense Instruction 2310.08E, <http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf> (The DoD policy on Detainee healthcare).
2. U.S. Immigration and Customs Enforcement, (May 7, 2008), <http://www.ice.gov/pi/news/factsheets/detaineehealthcare.htm> (This website describes the U.S. Immigration and Customs Enforcement Detainees healthcare facts and procedures).
3. Sgt. Sara Wood, DoD Instruction Consolidates Detainee Medical Care Policy, AMERICAN FORCES PRESS SERVICE, June 7, 2006, <http://www.defenselink.mil/news/newsarticle.aspx?id=16107> (This article was written to discuss the new DoD instructions for detainee healthcare. The instructions are included below).

III. Secondary Analysis

A. Legal Articles

1. Mark Earnest & Dayna Bowen Matthew, A Property Right to Medical Care, 29 J. LEGAL MED. 1, 65-80 (2008) (primarily examining the public right of American citizen to claim healthcare from their government as an extension of a property right, though it could obviously be extended to give some support to the right of detainees to medical care).
2. Y.M Barilan & M. Brusa, Human Rights and Bioethics, 34 J. MED ETHICS 5, 379-83 (May 2008) (surveying the concept of human rights from a philosophical perspective, especially in relation to the "right to healthcare," and arguing that the notion of moral deliberation to human rights is indispensable to any ethics placing the victim and sufferer in its center).
3. Puneet K. Sandhu, A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence, 95 CAL L. REV. 4, 1151-92 (Aug. 2007) (examining the right to health care provisions in the United States, including the visions, justifications and definitions of the right to health care, a debate for its legal and statutory rights, and a comparison with the rights to health care from Canada and South Africa).

4. Veelke Derckx, Expulsion of Illegal Residents with Medical Problems and Article 3 of the European Convention on Human Rights, 13 *EURO J. HEATH L.* 4, 313-19 (Dec. 2006) (arguing that the deportation of sick illegal immigrants is illegal and a violation of human rights by denying the right to health care).
5. W. Austin, Using the Human Right Paradigm in Health Ethics: The Problems and the Possibilities, 8 *NURSING ETHICS* 3, 193-195 (May 2001) (pointing out arguments from human right proponents stressing human right's power to frame health as an entitlement rather than a commodity).
6. Aart Hendriks, The Right to Health in National and International Jurisprudence, 5 *EURO J. HEALTH L.* 4, 389-408 (Dec. 1998) (describing and analyzing national and international case law with respect to three components of the right to health to describe the general parameters of this right, with special attention paid to the difficulty of defining the minimum core content of the right to health).
7. Aart Hendriks, Health Care and Positive State Obligations, 5 *EURO J. HEALTH L.* 4, 409-10 (Dec. 1998) (discussing the obligation of the state to provide access to health care, referencing Article 25 of the Universal Declaration of Human Rights, and questioning whether the denial of access to health care amounts to a human rights violation. A brief to the Swiss Federal Court arguing the positive obligation of the state to provide some form of support to everyone in need).
8. Alison Barnes & Michael McCrystal, The Various Human Rights in Healthcare, 25 *HUM. RTS.: J. SECTION INDIV. RTS. & RESP.* 4, 12-14 (1998) (Arguing for the right to healthcare of every U.S. citizen, on the notion that a human right, derived from natural law, is based on the dignity and worth of the human being).
9. Matthew K. Wynia, Breaching Confidentiality to Protect the Public: Evolving Standards of Medical Confidentiality for Military Detainees, 7 *AM. J. BIOETHICS* 8, 1-5 (2007) (examining the evolution of how the military treats detainee health confidentiality, and focusing on how the use of detainee medical records to craft coercive interrogations has led to condemnation and increased detainee health problems).
10. Astrid Birgden & Michael L. Perlin, 'Tolling for the Luckless, the Abandoned and Forsaked': Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists, 13 *LEGAL & CRIMINOLOGICAL PSY.* 2, 231-43 (2008) (attempting to provide a intersection between human rights, therapeutic jurisprudence, and forensic psychology, and arguing that psychologists need to address the core values of freedom and well-being in detainees with a mental illness).
11. William P. Ziegelmueller, Sixth Amendment Due Process on Drugs: The Implications of Forcibly Medicating Pretrial Detainees with Antipsychotic Drugs, 83 *J. CRIM. L. & CRIMINOLOGY* 4, 836-67 (1993) (examining the Supreme Court case of *Riggins v. Nevada*, which held that person detained for trial has liberty interest under the Fourteenth Amendment from being free from the unwanted administration of antipsychotic drugs, and

- arguing that the court did not provide enough guidance as to how competing personal and state interests should be balanced in future cases).
12. Samuel L. Wright, Protecting the Right to Medical Treatment from the War on Terror, 28 J. LEGAL MED. 1, 135-49 (2007) (reporting on the level of medical treatment given to prisoners of war at Guantanamo Bay, including the government's standards of how they should be treated, including differing accounts about the level of living conditions there).
 13. Marcela X. Berdion, The Right to Health Care in the United States: Local Answers to Global Responsibilities, 60 SMU L. Rev. 1633, 1642-1643 (Fall 2007) (This article discusses the US's obligations under the ICESCR to provide health care to detainees, but the US has not complied with this obligation).
 14. Briana G. Kennedy, Law at the Intersection of Civilian and Military Public Health Practice, 35:4 J.L. Med. & Ethics 83, 86-87 (2007) (This was a Panel Discussion. In it, there is a description of the responsibility of the Department of Defense to provide adequate healthcare to the detainees).
 15. Symposium, First, Do no Harm: Medical Professionals and Guantanamo, 37 Seton Hall L. Rev 711 (2007)(This article discusses the conflict a healthcare professional has in Guantanamo. If they nurse a person back to health, other people may in turn harm him in order to get more information).

45. Principle 45 – Right to Religious Observance

All persons deprived of their liberty should be afforded reasonable accommodations necessary to permit religious observance in accordance with the tenets of their faith or dictates of their conscience.

RESEARCH ANNOTATIONS

I. International Law

A. Treaties

1. International Covenant on Civil and Political Rights
 - a. *Section 18(1)* –
 - i. “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

B. Normative Codifications

1. American Declaration of the Rights and Duties of Man⁴⁰
 - a. *Article III* - “Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.”
2. American Convention on Human Rights
 - a. *Article XII* – “Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.” While this source has provisions that seem to support a detainee’s right to religious observance, the provision quoted above seems to support limitations on this right.”
3. Standard Minimum Rules for the Treatment of Prisoners⁴¹

⁴⁰ American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser.L./V./II.23, doc 21. Rev. 6 (1948), *reprinted in* Basis Documents Pertaining to Human Rights and the Inter-American System, OAS/Ser.L/V/I.4 Rev.9 (2003), *and in* 43 A.J.I.L. Supp. 133 (1949), *available at* http://www.oas.org/cji/DIL/American_Declaration_of_the_Rights_and_Duties_of_Man.pdf

⁴¹ United Nations Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C (XXIV), U.N. ESCOR, 24th Sess., ¶ 42, U.N. Doc. E/3048 (July 31, 1957) (amended 1977) (“So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.”).

- a. *Rule 41* –
 - i. “(1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.
 - ii. (2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.
 - iii. (3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.
- b. *Rule 42* – “So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.”
- 4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁴²
 - a. “Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”
- 5. Basic Principles for the Treatment of Prisoners
 - a. *Principle 2* – “There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
 - b. *Principle 3* – “It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.”
 - c. *Principle 5* – “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”
 - d. *Principle 6* – “All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.
 - e. *Principle 11* – “The above Principles shall be applied impartially.”

⁴² Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, ¶ 1(3), U.N. Doc. A/36/684 (Nov. 25, 1981).

II. Secondary Analysis

A. Legal Articles and Official Commentaries

1. RENATA UNIZ, FREEDOM OF RELIGION 132-145 (Council of Eur. Publ'g 2007) (summarizing the current state of international law regarding religious freedom of prisoners and presenting relevant case law from European courts and the United States Supreme Court. The author also notes the “willingness of courts to accept justifications which do not live up to principles of constitutionalism outside of [the military and prison] contexts.”).
2. U.N. Human Rights Comm., *Gen. Comment*, No. 22, ¶8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 20, 1993) (“Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.”).
3. Crown Office and Procurator Fiscal Service, Guidelines on the Detention, Treatment and Questioning by Police Officers of Persons Arrested under Section 41 and Schedule 8 of the Terrorism Act 2000, 6 (2006), *available at* <http://www.copfs.gov.uk/>
4. Resource/Doc/13547/0000185.pdf (“Where practicable, provision should be made for detainees to practice religious observance. Consideration should be given to providing a separate room which can be used as a prayer room. The supply of appropriate food and clothing, and suitable provision for prayer facilities, such as uncontaminated copies of religious books, should also be considered.”).
5. U.N. Econ & Soc. Council, Sub-Comm. on Human Rights, *Situation of detainees at Guantànamo Bay*, ¶ 57–65, U.N. Doc E/CN.4/2006/120 (Feb. 15, 2006) (reporting on human rights violations by U.S. regarding religious freedoms of detainees at Guantanamo Bay).
6. Col. Michael W. Meier, *A Treaty We Can Live With: The Overlooked Strategic Value of Protocol II*, ARMY LAW., Sept. 2007, at 28. (discussing the value of Protocol II and the rights of prisoners regarding religious observance).
7. FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 407-416 (Tore Lindholm et al. eds., Martinus Nijhoff Publishers 2004) (discussing the legal standards for protections of inmates' and penal institutions' freedom of religion and the implementation of religious freedom in prisons in the United States This source includes an appendix with all relevant treaty and convention provisions. This is an excellent starting point for researching the topic in U.S. and European law. Chapter 6 discusses “Permissible Restrictions on Freedom of Religion or Belief” in the prison

- context at page 155. Chapter 32 discusses the effect of the International Religious Freedom Act of 1998 on U.S. foreign policy and its requirement that the State maintain list of prisoners imprisoned or detained because of their religious beliefs, but does not discuss restrictions on religious observance.).
8. PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 134-135, 237-242 (Cambridge Univ. Press 2005) (discussing court decisions based on “justified limitation on manifestation” and discussing the “freedom to worship or assemble in connection with religion or belief.”).