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

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

PATRICE CORPUS*

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

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

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

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

I. INTRODUCTION

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

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

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

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

3. Leung, supra, note 1.
House and the Supreme Court of the United States, donning orange jumpsuits while objecting to GTMO detention practices and demanding its closure. Similarly, the Islamic State of Iraq and the Levant ("ISIL") dresses its hostages in orange jumpsuits during videotaped executions, likely to elicit the negative reputation the U.S. has garnered regarding its detention practices at GTMO. On August 19, 2014, ISIL released a video of American journalist James Wright Foley dressed in an orange jumpsuit while beheaded by "Jihadi John." ISIL again dressed hostages in orange jumpsuits throughout propaganda videos condemning President Obama and the U.S., followed by the beheadings of American-Israeli journalist Steven Sotloff on September 2, 2014, and British aid worker David Haines just days later. Alan Henning, a volunteer humanitarian aid worker, also wore an orange jumpsuit when he was executed by ISIL, just like the hostages before him. Most recently, on February 15, 2015, ISIL released a video depicting the beheadings of 21 Egyptian Coptic Christian fishermen donning blue jumpsuits, and while not orange, are similar to those initially worn by GTMO detainees.


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

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

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

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

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

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

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

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

23. Id.
24. Id. at 3.
still remain at GTMO, twenty-nine detainees have been designated for trial or commission, and thirty-five detainees have been approved for indefinite detention without trial. The conditions of confinement at each of the camps arguably violate international standards the U.S. is bound to follow.

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

A. Categories of Detainees at Guantanamo Bay

The detention center at Guantanamo Bay, Cuba houses detainees of various classifications. While the status of detainees should directly impact the protections of confinement and treatment afforded to each individual, in practice, the status has had no such effect. Four categories for detainees exist at GTMO: long-term preventative detainees who have been approved for indefinite detention while having never been charged or convicted of a crime (35); detainees currently pending or engaged in trial or military commission (29); detainees who have been convicted and are serving sentences at GTMO (3), and detainees who have been cleared for release (5). Since 2002, the U.S. has expanded classifications for detainees. GTMO detainees were collectively deemed “unlawful combatants” be-

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


30. Guantánamo by the Numbers, supra note 26.

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

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

B. Camp X-Ray

Camp X-Ray, although closed, was the first operational detention camp used at GTMO. Detainees arrived on January 11, 2002 and relocated in April 2002, to the newly-opened Camp Delta. In Camp X-Ray, detainees were confined in “separate make-shift rooms, made of chain-link fencing,” corrugated metal roofs, and concrete floor measur-
ing 6 feet by 8 feet per cell. Detainees were provided very few ameni-
ties, including: a foam sleeping mat, two buckets (one to be used as a
toilet), a one-quart canteen, two orange jumpsuits, one pair of flip-flops,
two bath towels (one to be used as a prayer mat), a washcloth, tooth-
paste, soap and shampoo.

C. Camp Iguana

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

D. Camp Delta

1. Conditions in Delta Camps 1-3

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

39. Id.
40. Id.
41. Id. at 3.
42. Id.
43. Id.
44. Id.
45. See Guantanamo’s Children: The Wikileaked Testimonies, CTR. FOR THE STUDY OF
HUMAN RIGHTS IN THE AMERICAS (2014), http://humanrights.ucdavis.edu/reports/guantanamos-
children-the-wikileaked-testimonies/guantanamos-children-the-wikileaked-testimonies (last visit-
ed on Nov. 21, 2014); Munro-Nelson, supra note 20, at 3.
46. Combatant Status Review Tribunal, supra note 34.
47. Id.
49. Munro-Nelson, supra note 20, at 3.
light, and a steel roof.\textsuperscript{50} The cells include a toilet, sink and mattress.\textsuperscript{51} Delta Camps 1-3 provide no air-conditioning, and use of exhaust fans offer limited relief.\textsuperscript{52} In addition to the harsh daytime conditions detainees are forced to endure, those housed in Delta Camps 1-3 are also subjected to fluorescent lighting which remain on throughout the day and night.\textsuperscript{53}

2. Conditions in Delta Camp 4

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

3. Conditions in Delta Camp 5

Camp 5, designed to house 100 detainees, is modeled directly after the Miami Correctional Facility in Bunker Hill, Indiana.\textsuperscript{60} Barbed wire surrounds Camp 5 and heavy green sheets are draped along the walls to obstruct any external view or airflow into the facility to offer detainees some relief.\textsuperscript{61} The Camp is a two-story, maximum security, multi-
winged complex made of concrete and prefabricated steel cells that measures 9 feet by 12 feet. Each cell includes a small window looking onto an interior corridor manned by military police and a narrow frosted window on the outside wall which provides limited access to natural light. Instead, sunlight has been replaced with fluorescent lights that are left on 24 hours a day. In addition to constant light, the camp is centrally air-conditioned with the temperature under the guards’ control. Recreation time occurs in a cage-like pen with no opportunity for communal interaction while cameras monitor every room within the facility 24 hours a day. One detainee housed in Camp 5 stated “I’m fighting for my sanity,” and a year later the same individual said, “the walls are really beginning to close in on me now.” This detainee’s reaction to his housing situation highlights inhumane treatment and its effects on the human psyche.

4. Conditions in Delta Camp 6 and 7

Camp 6 was initially designed to provide detainees with communal living spaces akin to Camp 4. Unfortunately, Camp 6 was redesigned following detainee protests in 2006 and the deaths of three detainees housed in Camp 1. After the protests, security at GTMO was tightened further and Camp 6 was retrofitted into a maximum-security facility to comply with American Corrections Association standards. Camp 6 is modeled directly after a jail in Lenawee County, Michigan and is intended to accommodate roughly 178 detainees. Comprised of prefabricated units, the two-story building is surrounded by high concrete walls

63. Id.
64. Munro-Nelson, supra note 20, at 4.
65. Id.
66. Guantanamo Bay – Camp Delta, supra note 56, at 5.
68. United States of America Cruel and Inhuman, supra note 62, at 9-10
69. Id.; Guantanamo Bay – Camp Delta, supra note 56.
70. Id.
71. Guantanamo Bay – Camp Delta, supra note 56, at 6.
72. United States of America Cruel and Inhuman, supra note 62, at 3.
and photos of the building show no windows discernible on the façade. \(^{73}\)
Within the facility, detainees remain confined in individual steel cells that measure 6 feet by 12 feet for at least 22 hours a day. \(^{74}\) The only window is a strip of glass a few inches wide, located adjacent to the cell door. \(^{75}\) The window looks onto the interior corridor patrolled by military police. \(^{76}\) The cells’ walls, doors, ceilings and floors are comprised of prefabricated steel, causing each individual movement to reverberate and echo, resulting in constant noise within the facility. \(^{77}\) Each cell contains a built-in bed and a combined metal toilet and sink unit. \(^{78}\) The only source of air is from air conditioning controlled by military police. \(^{79}\) Reported to permanently be on too high, one lawyer stated that her client huddled on the floor trying to keep warm and was too cold to sit on the chair. \(^{80}\) One detainee described Camp 6 as a “dungeon above the ground.” \(^{81}\)

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

Minimal communication between detainees is compounded by

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\(^{73}\) Id. at 3, 5.  
\(^{74}\) Id. at 3, 15.  
\(^{75}\) Id. at 3.  
\(^{76}\) Id.  
\(^{77}\) Id. at 6.  
\(^{78}\) Id. at 4.  
\(^{79}\) Id.  
\(^{80}\) Id.  
\(^{82}\) United States of America \textit{Cruel and Inhuman}, supra note 62, at 5.  
\(^{83}\) Id.  
\(^{84}\) Id.  
\(^{85}\) Id.  
\(^{86}\) Id.
constant exposure to guards.\textsuperscript{87} The level of exposure by guards extends to surveillance while detainees are in their cells.\textsuperscript{88} It has been reported to occur while detainees use the in-cell toilets because detainees are not allowed to cover themselves from the view of guards at any time.\textsuperscript{89} It has further been alleged that female guards observe detainees while using the toilet and during showers.\textsuperscript{90} One lawyer has described time spent in Camp 6 as “a combination of no peace and nothing to do.”\textsuperscript{91}

Little is known of Camp 7 except that it is purportedly used for “high value” detainees previously held by the U.S. Central Intelligence Agency.\textsuperscript{92} The Human Rights Watch contends that conditions at Camp 7 are worse than those at Camps 5 and 6.\textsuperscript{93} There are believed to be 15 detainees held in Camp 7.\textsuperscript{94}

5. Conditions in Camp Echo

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

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 6.
\textsuperscript{92} Munro-Nelson, supra note 20, at 5.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 4.
\textsuperscript{97} United States of America Cruel and Inhuman, supra note 62, at 8, 14.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 8.
\textsuperscript{100} Id.
E. Treatment of Detainees, as Directly Related to Confinement
Conditions, at the GTMO Detention Facility

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

102. United States of America Cruel and Inhuman, supra note 62, at 3.
103. Id. at 14-15.
104. Id. at 4.
105. Id.
107. Id.
109. Id.
110. Id.
III. The Legal Framework of Authority Over Guantanamo Bay Detainees

You are in a place where there is no law – we are the law.\textsuperscript{112}

- U.S. military intelligence officer

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

A. International Humanitarian Law

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

\textsuperscript{111} Id.


\textsuperscript{114} Chlopak, supra note 4, at 2.

\textsuperscript{115} TREATIES AND STATES PARTIES TO SUCH TREATIES, CONVENTION (III) RELATIVE TO
tarian law concerning international armed conflicts. The U.S. believes that the Geneva Conventions are not applicable to GTMO detainees since the detainees are not prisoners of war, rather, detainees are purported “unlawful combatants.” However, this belief does not excuse the U.S. from complying with the Geneva Conventions’ prohibitions against cruel, inhuman and degrading treatment.

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

Common Article 3 of the Geneva Conventions applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War (“Third Geneva Convention”) states that “prisoners of war must at all times be humanely treat-
The Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention") protects persons who find themselves in the event of a conflict or occupation in the hands of a Party to the conflict or occupying power of which the person is not a national. The Fourth Geneva Convention states, "Nationals of a State which is not bound by the Convention are not protected by it." While the United States argues that GTMO detainees are neither prisoners of war nor civilians protected by the Geneva Conventions, the minimum protections under Common Article 3 of the Geneva Conventions should still apply to GTMO detainees. Given the broad safeguards for detained persons, even as parties of a non-international conflict, the United States is still in violation of international human rights law. Specifically, the detention conditions at the GTMO facility, particularly the lack of livable cell sizes, privacy, and exposure to the outside and to other detainees, demonstrate how the U.S. fails to uphold its obligations under the Geneva Conventions.

B. International Human Rights Law

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

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

123. Id.
125. Id.
126. Rumsfeld News Briefing, supra note 29, at 5.
128. Id. at 178.
129. Id. at 171.
130. Body of Principles for the Protection of All Persons under Any Form of Detention or
detention or imprisonment shall be subjected to cruel, inhuman or degrading treatment or punishment" where the interpretation extends to the widest possible protection against abuses. The protections prohibit holding a detained person “in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or his awareness of place and the passing of time.” At GTMO, the routine use of solitary confinement and sensory deprivation practices, including playing music during sleeping hours, maintaining 24 hour a day artificial lighting and confinement to small spaces, constitute an unlawful deprivation of detainees’ “natural senses” and “awareness of the passing of time,” thereby violating The Body of Principles.

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

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

131. Id. at 3.
132. Id.
134.Id.
135. Id.
136. ICCPR, supra note 113.
137. Id. at Art. 2.
138. Id.
The U.S. ratified the ICCPR with reservations, including one that specified that where the U.S. is bound by Article 7’s classification of "cruel, inhuman or degrading treatment or punishment," the meaning would be interpreted according to the Fifth, Eighth and/or Fourteenth Amendments of the U.S. Constitution. Stating, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” Article 9 of the ICCPR further reads: “no one shall be subjected to arbitrary arrest or detention.” Thus, “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Surely this understanding is consistent with the U.S. Constitution.

The 1934 Treaty between the U.S. and Cuba granted U.S. jurisdiction over Guantanamo Bay, effectively giving the U.S. exclusive control of that area since 1898. Given the fact that GTMO detainees are under the exclusive control of the U.S., one can reasonably conclude that Article 7 of the ICCPR is applicable to detainees held at Guantanamo Bay. Accordingly, any allowance of female guards to watch male detainees while using his in-cell toilet or showering amounts to a form of sexual abuse and stands in violation of international standards prohibiting cruel, inhumane or degrading treatment under the ICCPR. Constant observation may also violate the right to privacy and respect for human dignity, both of which are expressly addressed in the ICCPR.

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

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140. ICCPR, supra note 113, at 19.
141. Id. at Art. 7, at 175.
142. Id. at Art. 9.
143. Id. at Art. 10, at 176.
144. Packard, supra note 19.
145. Id.
146. United States of America Cruel and Inhuman, supra note 62, at 5.
147. Id.
ment or punishment...” which does not amount to torture as defined by Article 1 under the Convention Against Torture. 149

On November 20, 2014, the U.N. Committee created by the Convention Against Torture released its periodic report on U.S. compliance. 150 The Committee reiterated in their report, “any territory” includes “all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.” 151 Moreover, the Committee specifically stated that “any territory” includes detention facilities where prohibited acts are committed. 152 The report also discusses extraterritoriality and welcomes the U.S. position concerning the extraterritoriality of the Convention Against Torture to “certain areas beyond” its sovereign territory. 153

Given this position, application of the Convention Against Torture would extend to places where the U.S. controls as a governing authority like the U.S. Naval Station at Guantanamo Bay, Cuba. In light of the language within the Convention Against Torture and subsequent reports by its Committee, the treaty clearly applies to GTMO detainees since the 1934 Treaty granted U.S. jurisdiction over Guantanamo Bay, and the U.S. has exercised exclusive control over Guantanamo Bay.

C. Customary International Law

Customary international law originates from “a general and consistent practice of states followed by them from a sense of legal obligation.” 154 A practice is considered customary international law when the custom becomes more than habit or procedure and is felt by those who adhere to it, to be an obligation; departure from the custom could then result in some form of sanction. 155

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


151. Id.

152. Id.

153. Id.


manner as treaties that contain mandates, provide detailed guidance regarding general rules and often reflect norms of customary law.\textsuperscript{156} Customary international law is of much importance to the conditions of confinement experienced by GTMO detainees.\textsuperscript{157} The U.S.' position that detainees are simply “unlawful combatants” leaves detainees with little international protections. Thus, it may be necessary to turn to customary international law for guidance. Much of international law is rooted in customary international practices that have evolved into treaty-based international law.\textsuperscript{158} International humanitarian and human rights law discussed above provides the fundamental protection against cruel, inhumane and degrading treatment while also providing for the protection of the inherent dignity of the person.\textsuperscript{159} Nevertheless, these laws fail to establish detailed guidelines regarding conditions of confinement.\textsuperscript{160} The application of customary international law to set guidelines for minimum standards of confinement conditions is appropriate given the historical use of customary international law.\textsuperscript{161} Additionally, as will be discussed in Part V, the ICC Detention Centre is the embodiment of customary international law practices pertaining to conditions of confinement and may be used as an archetype of such principles and protections.\textsuperscript{162}

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

\begin{itemize}
  \item \textsuperscript{157} Rumsfeld News Briefing, supra note 29, at 2.
  \item \textsuperscript{159} \textit{Id}.
  \item \textsuperscript{161} Restatement of the Law, Third, the Foreign Relations Law of the United States, supra note 154, at 32.
  \item \textsuperscript{162} See The ICC Detention Centre, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/detention/Pages/detention.aspx (last visited Dec. 11, 2014).
  \item \textsuperscript{163} Lieber Code, supra note 158.
  \item \textsuperscript{164} \textit{Id}.
\end{itemize}
it paralleled the "laws and customs of war existing at that time."\textsuperscript{165} The Lieber Code was an important early step towards the development of the modern customary international law of armed conflict.\textsuperscript{166} The Hague Regulations of 1907, and the four Geneva Conventions of 1949, are treaty-based international laws that reflect customary international law with progressive development.\textsuperscript{167} Although some of the practices allowed under the Lieber Code are considered illegal by today's standards, the Lieber Code remains significant since it embodied and mandated customary practices of that time, and as armed conflicts have evolved, the rules governing those conflicts have as well.\textsuperscript{168}

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

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

\begin{itemize}
\item \textsuperscript{166} Lieber Code, supra note 158.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Rafael Nieto-Navia, International Peremptory Norms (Jus Cogens) and International Humanitarian Law, in Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese vol. 5, 595 (Lal Chand Vohrah et al. eds., 2003).
\item \textsuperscript{171} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 UNTS 609 [hereinafter Protocol I].
\item \textsuperscript{172} Fact Sheet: New Actions on Guantanamo and Detainee Policy, The White House Office of the Press Secretary 6 (Mar. 7, 2011).
\end{itemize}
Furthermore, the Obama Administration has remarked that the U.S. government will treat Article 75 as legally binding (even though the Senate has not ratified). Article 75 prohibits outrages upon personal dignity, torture “at any time and in any place whatsoever, whether committed by civilian or by military agents,” and humiliating and degrading treatment. The U.S. asserts that GTMO detainees are not protected by the Geneva Conventions. However, the Geneva Conventions should apply to GTMO detainees since the protections within are customary international law. Also, the Obama Administration has declared that certain provisions of the Geneva Conventions are applicable to the situation on Guantanamo Bay.

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

178. Id. at 1.
179. Id.
180. Id.
181. Id. at 2.
182. Id.
ness. In regards to physical health, prisoners shall have at least one
hour of “suitable exercise in the open air daily” and shall receive physi-
cal and recreational training during that period of exercise. Part II ad-
dresses special categories of prisoners including convicted prisoners
under sentence, prisoners awaiting trial, and prisoners without charge.
For convicted prisoners, their treatment should not emphasize their ex-
clusion from the community, but rather “their continuing part in it.”
Prisoners awaiting trial are presumed innocent and shall be treated as
such. They shall also be kept separate from convicted prisoners.
The SMRs asserts that persons detained without charge are to be ac-
corded the protections afforded in both Part I and Section C of Part II
for untried prisoners.

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

D. United States Law, Directives and Guidelines

Since 1994, the U.S. has followed the Department of Defense Di-
rective 2310.01, officially entitled “DOD Program for Enemy Prisoners
of War and Other Detainees,” that sets forth broad policy guidelines for
the treatment of traditional prisoners of war. On September 6, 2006,
the directive was re-issued titled “Department of Defense Directive 2310.01E” (“The Directive”) and has last been updated on August 19, 2014. The Directive acts as the manual of United States detention policy and sets forth guidelines for “all DOD detention operations necessary and appropriate to ensure the safe, secure, and humane detention of all enemy combatants, both lawful and unlawful, regardless of the nature of the conflict.” The Directive asserts that “all detainees will be treated humanely and with respect for their dignity, in accordance with applicable U.S. law and policy and the law of war.” The Directive also states that all detainees must be treated “humanely” even “during all military operations, however characterized.” In light of the self-issued directives—purported adherence to the “law of war” and international humanitarian obligations required under the Geneva Conventions—there is no doubt the U.S. is required to treat detainees humanely and with respect for their dignity.

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

In 2006, the U.S. Supreme Court held in Hamdan v. Rumsfeld, a
petition brought by a Yemeni detainee at GTMO, that Common Article 3 of the Geneva Conventions affords minimal protections to individuals captured within the territory of a Party engaged in a conflict not between two nations. Although the holding falls short of the enhanced protections afforded to prisoners of war, *Hamdan* clarified that minimum treatment standards of detention apply as a matter of treaty law and not merely as policy as Rumsfeld and President Bush previously maintained.

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

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

Prior to the “War on Terror” and the Bush Administration’s coined term “unlawful enemy combatants,” the rules governing detention during times of conflict were easier to decipher and apply. Some argue “the Geneva Conventions do not provide answers about who may be held in a conflict with a non-state actor like al-Qaida or how long that person may be detained.” While the U.S. maintains that the Geneva Conventions are not applicable to GTMO detainees, the U.S. “recognizes its
commitment to the actual text and spirit of the Geneva Conventions.\textsuperscript{204}

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

\textbf{A. Is the War on Terror an International Armed Conflict?}

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

\begin{footnotesize}
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\item 204. Id.
\end{itemize}
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conflicts were international in scope and Common Article 3 only applies to non-international armed conflict. Based on these assertions, the conflicts with Afghanistan and al-Qaeda are of an international character.

B. Classifying Detainees as “Unlawful Combatants”

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

U.S. government officials determined that the Taliban acted as the Afghan government during the armed conflict, while al-Qaeda, despite the Taliban’s support, was a terrorist organization. The U.S. made this distinction after reviewing Article 4 of the Third Geneva Convention, entitling some groups to prisoner of war status when captured in an armed conflict, and Article 4(a), which dictates whether groups from non-occupied territories are entitled to prisoner of war status. Article 4(a) defines prisoners of war as either members of the armed forces of a Party to the conflict, or members of militias or volunteer corps.
fication for the latter group requires the following: a commander who is responsible for subordinates; a fixed distinctive sign recognizable at a distance; openly-carried arms; and adherence with the laws and customs of war. Taliban fighters failed to satisfy all the criteria for privileged combatants, and as a result, were labeled “unlawful combatants.” Al-Qaida detainees were categorically denied prisoner of war status under the Geneva Conventions because they were not deemed to be a State Party to the Geneva Conventions.

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

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

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

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

A. Confinement Conditions at the ICC’s Detention Centre

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

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


227. See generally id.

228. Although the U.S. claims that because “[t]he law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities,” detention of GTMO detainees is justified for security and military necessary and is not an act of punishment. United Nations Economic and Social Council, Situation of Detainees at Guantanamo Bay at 12 (Feb. 27, 2006) http://www1.umn.edu/humanrts/OathBetrayed/United%20Nations%20Working%20Group.pdf. The U.S. applied the law of armed conflict authority to detain, therefore, it is arguable that customary international law regarding detention of “unlawful combatants” is applicable given the lack of authority on “unlawful combatants.” Id.

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

230. Id.

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

232. Kersten, supra note 224.
235. Id.; see Understanding the International Criminal Court, supra note 231, at 20.
236. Id.
237. Understanding the International Criminal Court, supra note 231, at 20.
240. Id.
241. Id.
242. See generally Id.; see also United States of America Cruel and Inhuman, supra note 62, at 5.
B. Distinction Between the ICC and GTMO

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

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

244. The ICC Detention Centre, supra note 195.
245. See generally Id.; see also United States of America Cruel and Inhuman, supra note 62, at 5.
246. Id.
248. Id.
249. Id. at 1291.
250. Rome Statute, supra note 222, at art. 103(3).
251. Koh, supra note 36, at 1288.
252. Id. at 1287.
on the minimum protections that are afforded to all persons in detention or imprisonment. While individuals who have not yet been convicted are deemed innocent and thus afforded additional guarantees of protection, the principles and guidelines addressed in this article are applicable irrespective of different detention classifications.\footnote{254}{See generally The ICC Detention Centre, supra note 229, at 2.}

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

As discussed in Part III, the absence of parameters and procedures in international law, ensuring that individuals are not subjected to cruel, inhumane and degrading treatment, turns the focus onto customary international law. From a historical standpoint, customary international law has played a vital role in the changing practices of international humanitarian and human rights laws.\footnote{255}{See generally Understanding the International Criminal Court, supra note 231, at 1.} In this sense, the ICC is an archetypal entity that seeks to adhere to international standards of detention.\footnote{256}{Rome Statute, supra note 222.}

If the U.S. continues to operate the GTMO detention facility, the facility should be retrofitted to comply with customary international standards of confinement. By doing so, the U.S. government will ensure detainees’ rights are not violated and that it is adhering to prevailing international norms.\footnote{257}{The ICC Detention Centre, supra note 229.} The U.S. should look to the ICC Detention Centre’s practice of implementing the Standard Minimum Rules.\footnote{258}{See generally Wikipedia, European Prison Rules, http://en.wikipedia.org/wiki/European_Prison_Rules (last visited Dec. 13, 2014).} Additionally, although not binding, the European Prison Rules may provide the U.S. with further guidance, as they offer a more detailed text capturing the principles behind the Standard Minimum Rules.\footnote{259}{Id.} While the availability of amenities at the Detention Centre may seem exceedingly generous, the facility demonstrates the level of care that international institutions deem appropriate;\footnote{260}{The ICC Detention Centre, supra note 229.} more importantly, it illuminates the vast discrepancy between the international standard and the level of care the U.S. presently provides.

If the U.S. does not retrofit GTMO to comply with international standards, GTMO detainees should be released or transferred and the facility should be shut down. The Committee against Torture called for
the closure of GTMO since indefinite detention without a charge is a violation of the Convention Against Torture.\textsuperscript{261} If the violations of international standards are not alleviated, the only proper remedy is to release or transfer detainees and close the facility.

VII. CONCLUSION

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

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

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

\textsuperscript{261} Conclusions and recommendations of the Committee against Torture on the USA (July 25, 2006), http://www.refworld.org/docid/453776c60.html.
\textsuperscript{262} No trial, transfer or release: Gitmo’s ‘indefinite detainees’ identified, RT (June 19, 2013), http://rt.com/usa/gitmo-indefinite-detainees-identified-845/.
\textsuperscript{263} Fact Sheet: Camp Echo and Camp Five, supra note 96.
\textsuperscript{265} Fact Sheet: New Actions on Guantanamo and Detainee Policy, supra note 172.
\textsuperscript{266} United States of America Cruel and Inhuman, supra note 62, at 8, 14
\textsuperscript{267} Standard Minimum Rules, supra note 177.
its influence. In order for the GTMO facility to comply with customary standards of detention, the facility requires retrofitting, and the U.S. should look to the ICC Detention Centre as a model for that process. Alternatively, if the U.S. maintains GTMO in its current state — in violation of international standards — GTMO detainees should be transferred or released, and the facility shut down.

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

268. Understanding the International Criminal Court, supra note 231, at 20.
269. See generally Guantánamo Bay, supra note 264.
272. Id.