

# **Guantánamo Bay - Trials of Suspected Taliban - Breaching Standards of International Human Rights Law and International Humanitarian Law**

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## ABSTRACT

There are at least two regimes of international law that lobby for the benefit of those detained in Guantánamo Bay. Yet it would seem that the Geneva Convention is the sole favorite of the print, television and radio journalists reporting on Guantánamo Bay. The ICCPR barely rates a mention.

This article applies both regimes of law to the question of the legalities of holding the *alleged* Taliban at Guantánamo Bay. The regimes applied are International Human Rights Law in the form of the ICCPR and International Humanitarian Law (IHL) in the form of the Third Geneva Convention. The author, Jason D. Söderblom argues that a fair reading of the ICCPR rebuts the possibility that the public emergency provision in the ICCPR has limited the rights contained therein. The validity of the ICCPR thus renders the extraordinary narrow United States' interpretation of the Third Geneva Convention less devastating to those at Guantánamo Bay. Or to be more exact, less devastating in legal possibility.

In predicting the response of the George W. Bush administration, the author predicts the rebuttal and retorts with legal counter-argument.

## INTRODUCTION

The September 11, 2001 terrorist attacks in the United States (U.S.) have resulted in alleged Taliban and Al Qaeda fighters being imprisoned at the U.S. Naval Base in Guantánamo Bay, Cuba (aka Camp X-ray). Since then, the decision of *Coalition of Clergy v. Bush et al* Case No. CV 02-570 AHM (2002) has declared a lack of standing to seek *habeas corpus* on behalf of the detainees at Guantánamo Bay. The reasoning is that Guantánamo Bay is not considered to be a part of U.S. territory. This is despite the U.S. holding legal rights to locate a naval base at Guantánamo Bay since July 1903 - an agreement ultimately approved in October 1903 by President Roosevelt - and virtually a perpetual agreement that is still operational today.

To be fair, the *Coalition of Clergy case* is consistent with the ruling in *Bird v United States* 9 23 F.Supp. 338 (D.Conn. 1996), where the Plaintiff (a civilian wife of a member in the U.S. Navy) alleged a misdiagnosis of a brain tumour. She argued that the unique territorial status of the naval base, and the fact that the U.S. effectively had *de facto* sovereignty over the lease area, brought injuries occurring at Guantánamo Bay within the terms of Federal Tort Claims Act. The U.S. District Court rejected the plaintiff's argument, holding that the 1903 Lease of Lands Agreement clearly established Cuba as the *de jure* sovereign over Guantánamo Bay. They held that, nothing less than *de jure* sovereignty, including *de facto* sovereignty, attracts the operation of the Federal Tort Claims Act.

Where then does this leave Guantánamo Bay detainees? This thesis examines what relevant international humanitarian and human rights laws assist Guantánamo Bay detainees. By reading this thesis you can conclude that even overt patriots like the comic hero Captain America would be outraged at the disregard of justice in “The American Way”. You may also conclude that the media attention of breaches of the Geneva Conventions at Guantánamo Bay is too narrow, and in fact should also include grave ICCPR breaches.

## **International Law Applicable to Guantánamo Bay Detainees**

Assessing the applicable laws at Guantánamo Bay requires an assessment of the legal status of the terrorist attacks on September 11, 2001 and of the “war on terrorism”. In accordance, the international laws applied in this thesis are predominantly the International Covenant of Civil and Political Rights (ICCPR)<sup>1</sup>, and the Third Geneva Convention of 1949<sup>2</sup>. I also consider the Convention against Torture and Other Cruel or Degrading Treatment or Punishment<sup>3</sup>, the Convention for the Elimination of All Forms of Racial Discrimination (CERD)<sup>4</sup>, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>5</sup>, the Standard Minimum Rules for the Treatment of Prisoners<sup>6</sup>, and the U.N. Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.<sup>7</sup>

### **Detainees and the International Covenant of Civil and Political Rights (ICCPR)**

The U.S. ratified the ICCPR in 1992.<sup>8</sup> The ICCPR contains derogable and non-derogable rights. Derogable rights are those which *may* be avoided by relying on the public emergency provision in Article 4 of the ICCPR when (i) the public emergency collectively threatens life, (ii) the reaction to the emergency is proportionate to the circumstances, (iii) the reaction is non-discriminatory, (iv) the public emergency is officially proclaimed, and (v) the U.N. Secretary General is notified.<sup>9</sup>

If a public emergency is made out then the Article 17(1) arbitrary or unlawful interference with privacy, family, home, or correspondence provision *may* be limited. Likewise, Article 20(1) propaganda for war; Article 12(1) liberty of movement and freedom to choose residence; Article 12(2) freedom to leave the country; and Article 14(1) persons shall be equal before the courts and tribunal; *may* all be limited in times of a public emergency. Importantly, derogation does not allow a state to contradict other obligations under

international law such as Article 55 and Article 56 of the U.N. Charter, for the promotion and protection of human rights is a key aim of the U.N.<sup>10</sup>

### **The ICCPR “Public Emergency” Provision and Military Tribunals**

An application of the provisions in Article 4 demonstrates that the requirements in the public emergency provision which allow a departure from the standards in the ICCPR, are not satisfied.<sup>11</sup> For the U.S.’ reaction is both manifestly discriminatory and lacking in proportionality. The act of detaining foreign Taliban outside of the U.S. legal system is discriminatory given the differential treatment of the American citizens also accused of being ‘Taliban’ fighters.<sup>12</sup> John Walker Lindh and Yasser Esam Handi are American citizens accused of identical offences as many other Guantánamo Bay detainees. Yet Lindh and Handi have been tried by U.S. courts, and detained inside the U.S., whereas non-citizens remain detained without trial at Guantánamo Bay.<sup>13</sup> A military trial with its biases and lower standard of proof are discriminatory and disproportionate in impact upon non-U.S. Guantánamo Bay detainees.<sup>14</sup> Such discrimination of itself can prevent the public emergency provision in the ICCPR from taking effect.<sup>15</sup>

Ari Fleischer in a White House Press briefing, has inadvertently acknowledged this discrimination by stating “the military tribunals are exclusively for non-citizens of this country; Mr. Walker is an American citizen”.<sup>16</sup> Of course, the Bush administration will argue that the public emergency provision has easily been satisfied. Bush would cite the unique threat of retaliatory terrorist attacks to free those detained by the U.S. as a case in point. Thus the Bush administration would predictably argue that such discrimination is proportionate. This argument would however be easily defeated, for it could not explain why a “public emergency” needs to discern nationality when all the Taliban on trial are accused of similar crimes, regardless of their nationality. Isn’t there also a potential of retaliatory attacks to free Lindh and Handi?

Relying on references to national security in Article 12 of the ICCPR will not assist the Bush administration either. Article 12 must be consistent with the other rights recognised in the Covenant. The Human Rights Committee's General Comment 27 has stated that it would be a clear violation of the rights enshrined in the Articles 12(1) and 12(2) if there were distinctions based on nationality.<sup>17</sup>

The seriousness of this discrimination is articulated by the U.N. Working Group on Arbitrary Detention.

The Working Group has stated:

*“One of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the ICCPR, the Working Group has none the less found by experience that virtually none of them respects the guarantees of a right to a fair trial enshrined in the Universal Declaration of Human Rights and the Covenant”.*<sup>18</sup>

Article 5 of CERD, which the U.S. ratified in 1994 requires that *“State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”*, including the *“right to equal treatment before the tribunals and all other organs administering justice”*.

Principle 5 of the Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment, and Rule 6(1) of the Standard Minimum Rules for the Treatment of Prisoners both prohibit discriminatory treatment, including on the basis of nationality.

Article 5 of CERD, Principle 5 and Rule 6(1) all explicitly cover discrimination based on nationality. It seems certain therefore that the U.S. is in breach of a myriad of international laws. The arbitrary use of

military tribunals over domestic courts based on nationality should render any decision made by the military commission illegal, for being *ultra vires* of such international law. The arbitrariness of the U.S. is clearly demonstrated by their own criticisms of the use of military tribunals (such as the Egyptian, Colombian, Burmese, Turkish and Peruvian use of military courts) to try Americans accused of terrorism!<sup>19</sup> The U.S. State Department has stated that “*military courts do not ensure civilian defendants due process before an independent tribunal*”.<sup>20</sup> By endorsing a departure from international norms the U.S. will be setting a dangerous standard when other nations return to trying U.S. citizens before their own military tribunals.

This analysis demonstrates that in praxis the public emergency provision has not been satisfied. And, regardless of whether the ICCPR derogable rights can be set aside, there are non-derogable rights in the ICCPR, which the U.S. may not set aside: Article 4(2) ICCPR.<sup>21</sup>

### **Non-Derogable Rights - Torture or Degrading Treatment or Punishment**

Torture and ill treatment of prisoners is prohibited by international human rights law in Article 7 of the ICCPR. Article 7 is a non-derogable right which states “*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”. Some claims of torture at Guantánamo Bay are difficult to verify. The International Committee of the Red Cross (ICRC) does not comment publicly on the situation in Guantánamo Bay, and holds to the general rule that the ICRC discusses all matters concerning its visits to places of detention exclusively with the authorities concerned.<sup>22</sup>

Yet *Errol Johnson v. Jamaica, Communication No. 588/1994, U.N. Doc. CCPR/C/56/D/588/1994 (1996)* talks of extended periods in jail whilst awaiting the death sentence (with no execution date being set) as constituting torture.<sup>23</sup> The facts that there are long delays (years) without trial, that a fair trial is unlikely in a

military tribunal<sup>24</sup>, and given that the death penalty is authorised under Bush's military order<sup>25</sup>, there is a robust argument that 'torture' similar to Errol Johnson's case will eventually arise at Guantánamo Bay.

## **The Presumption of Innocence and the ICCPR**

On January 28, 2002, President G.W. Bush referred to Guantánamo Bay detainees as "*these killers – these are killers*". Bush then went on to explain that he would not grant them Prisoner of War status, adding "*These are killers. These are terrorists*".<sup>26</sup> Given that a competent tribunal is yet to decide on the innocence or guilt of the detainees, Bush's statements disregard any notion of the presumption of innocence contained in Article 14 of the ICCPR. The Bush administration may argue that Article 14 is derogable. Yet as explained earlier, the U.S. compliance with the Article 4 public emergency provision is doubtful. Article 14 is active.

The issue of the presumption of innocence can be resolved by the following analysis. Firstly, the Human Rights Committee has identified the presumption of innocence in the ICCPR as non-derogable.<sup>27</sup> Secondly, the presumption of innocence is detailed in Article 75(3)(d) of the First Additional Protocol to the Geneva Conventions. Article 75(3)(d) expressly provides that "*anyone charged with an offence is presumed innocent until proved guilty according to law*". Whilst the U.S. has not ratified the Additional Protocols it can well be argued that it has formed customary international law. The U.S. would thus be bound by the presumption of innocence and no public emergency can set aside this provision.

## **ICCPR and the Right to a Court to Decide on the Lawfulness of Detention**

Article 14(3)(c) states that a person with a criminal charge against him (or her) is to be tried without undue delay. This Article *may or may not* be successfully set aside by a state of public emergency. You now know my view. Yet in any event, Article 9(4) of the ICCPR states:

*“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 (my emphasis) on the lawfulness of his detention and order his release if that detention is not lawful.”*

The Human Rights Committee has decided that this right applies to all prisoners and detainees, and is non-derogable even in times of emergency.<sup>28</sup>

Despite Article 14(3)(c) and the supposed non-derogable status of Article 9(4) of the ICCPR, the Military Order signed by President Bush on November 13, 2001 allows for detention without trial.<sup>29</sup> Some detainees have been imprisoned for years without trial.<sup>30</sup> This constitutes an ICCPR breach.

## **The Application of the Geneva Conventions to the Guantánamo Bay Detainees**

The U.S. ratified the four Geneva Conventions on February 2, 1955. Their only reservation was to reject the reservations made by other states.<sup>31</sup> The U.S. has not however ratified the Additional Protocol I relating to the Protection of Victims of International Armed Conflicts nor Additional Protocol II for the Protection of Victims of Non-International Armed Conflicts (1977). This does not however pose a substantial problem.

The Third Geneva Convention details Prisoner of War (POW) status. For the Taliban to qualify for POW status they must be categorised as either Article 4(1) Members of armed forces of a party to the conflict, or Article 4(2) Members of other militias or volunteer corps forming part of such armed forces *if* (a) they were commanded by a person responsible for subordinates, (b) they have a fixed and distinctive symbol recognisable at a distance, (c) they carry arms openly, and (d) they conduct operations in accordance with the laws and customs of war.

Article 4(1) is a *preferred* category for a fighter, as it affords automatic POW status. The Bush administration has decided (before a competent tribunal has even heard argument) that suspected Taliban fighters do not qualify for Article 4(1) status as both the U.S. and U.N. were yet to formally recognise the Taliban as the government of Afghanistan.<sup>32</sup> This retort is hard to reconcile with international law such as the rule in *Royal Bank of Canada v Costa Rica* (1923) 1 R.I.A.A 371, especially so, given that the U.S. had negotiated with the Taliban in a way which suggested recognition of a Taliban Government.<sup>33</sup>

The Article 4(2) (irregular forces) four-part test has been interpreted by the U.S. to preclude POW status of the Taliban detainees. The Bush administration claims that the Taliban are militias who (a) were *not* commanded by a person responsible for subordinates; (b) *do not* have a fixed and distinctive symbol recognisable at a distance, (c) *do not* carry arms openly; and (d) *do not* conduct operations in accordance with the laws and customs of war. By this logic, the U.S. decided that no *alleged* Taliban are legal POWs.

POW status is valuable. Article 105 of the Third Geneva Convention offers certain procedural protections in the trials of POWs.<sup>34</sup> These include the right of the POWs to be represented by a counsel of their choice. Chapter V also accords religious rights (Article 34-37), intellectual rights (Article 38) and physical activity

rights (Article 38) to POWs.<sup>35</sup> By failing to convene a competent tribunal, and holding the accused in the way they are, the Bush administration is infringing upon rights contained in the Third Geneva Convention.

## Conclusion

The Bush administration's approach to Guantánamo Bay's Taliban detainees suffers from a myopic interpretation of treaty obligations. In this thesis I make reference to the United Nations Human Rights Committee. It is often said that the Committee is not a court and therefore can only offer a non-binding opinion. Yet the retort to this claim is mostly pointless and does not allow the conclusion to be drawn that ICCPR obligations need not be complied with. For the U.S. are obliged to afford ICCPR rights to detainees. Such obligations do not stem from the Committee's decision (especially so, given that the U.S. have not ratified the Optional Protocol); such rights do however directly stem from the U.S. obligations under Article 2 of the ICCPR. Even without the Committee's decision, the U.S.' treatment of detainees at Guantánamo Bay continues to be in breach of the ICCPR. The Committee's view, I believe, will merely clarify this.

Whilst the ICRC have a policy of not publishing their reports on breaches of the Geneva Conventions, it seems certain that there are grave breaches. Article 118 states clearly that after the cessation of hostilities, prisoners should be released.<sup>36</sup> Given as I have shown, that the Taliban should qualify for POW status, and given that the Taliban government has been overthrown, now the *alleged* Taliban detainees must be released. In any interim, the Taliban must be accorded the POW rights in the Third Geneva Convention.

The Bush administration takes a very broad view of Article 51 (self defense) in the U.N. Charter by claiming pre-emptive self defence. Yet it selectively takes a narrow view on the scope of human rights and IHL to facilitate dubious intelligence gathering enterprises.<sup>37</sup> They do this under the rubric of a response to an eternal "public emergency" and in a war against an ideology rather than against a belligerent state.

Yet ICCPR rights must apply, as the public emergency provision has not been persuasively made out. The case of Juan Carlos Abella v. Argentina, Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1997), and the Report on Terrorism and Human Rights by the Inter-American Commission on Human Rights demonstrate that any attempt at a *lex specialis* argument, which would advocate that IHL law blindly trumps the ICCPR, is incorrect.<sup>38</sup> After all, Article 1(3) of the U.N. Charter itself talks of solving international problems of an [...] humanitarian character, and in promoting and encouraging a respect for human rights. Both IHL and International Human Rights can and should run in parallel. If the international community were to push for rule of law compliance at Guantánamo Bay how would the U.S. retort? My suspicion is they would claim that the ICCPR does not apply. They would claim that the Geneva Conventions are *lex specialis* to it. They may also claim that they have applied the POW test in the Third Geneva Convention and the alleged Taliban failed to meet the criteria in Article 4(1) and 4(2). Yet such an application of law is dubious at its best.

The U.S. approach to trials of detainees is thus flawed on many legal levels. Delays in bringing the detainees before a competent tribunal breach non-derogable rights and may amount to torture and degrading treatment. The action of George W. Bush, personally corrupting the presumption of innocence by making public declarations on the guilt of those held at Guantánamo Bay (before a competent tribunal has assessed their guilt) demonstrates the fractured respect for rule of law. Such high profile belligerence to the notions of the rule of law by a permanent Security Council member will effectively poison international human rights law and IHL for generations to come.

## ENDNOTES

- <sup>1</sup> ICCPR Ratified by the US in 1992.
- <sup>2</sup> Third Geneva Convention ratified by the US in 1955.
- <sup>3</sup> Convention Against Cruel and Other Degrading Treatment or Punishment, Ratified by the US in 1994.
- <sup>4</sup> CERD Ratified by the US in 1994.
- <sup>5</sup> Adopted by consensus by the UN General Assembly in 1988.
- <sup>6</sup> Adopted by the First Nations Congress on the Prevention of Crime and Treatment of Offenders, 1955. Approved by the UN Economic and Social Council in 1957 and 1977. In 1971 the UN GA called on all states to implement these rules and to incorporate them into national legislation.
- <sup>7</sup> Approved by the UN Economic and Social Council resolution 1984/50 of 25 May 1984.
- <sup>8</sup> United Nations Treaty Series, *Multilateral treaties deposited with the Secretary General*, - US signed the ICCPR on 5<sup>th</sup> October 1977, ratified on 8<sup>th</sup> June, 1992.
- <sup>9</sup> Article 4 of the ICCPR reproduced in Appendix.
- <sup>10</sup> Amnesty International, *Rights at Risk: Amnesty International's Concerns Regarding Security Legislation and Law Enforcement Measures*, AI Index: ACT 30/001/2002, 7.
- <sup>11</sup> George Lardner Jr, Peter Slevin, *Military To Try Terrorism Cases: Bush Cites 'Emergency'*, <http://foi.missouri.edu/secretcourts/milcourts1.html>, TheFOI Centre, accessed 27/04/2003.
- <sup>12</sup> Amnesty International, as above n10, 25.
- <sup>13</sup> *USA v Lindh*, Eastern District Court, Eastern District of Virginia, CR No. 02-37-A. 22 March 2002.  
Amnesty International, *Military Commissions: Second-class Justice*, <http://www.amnestyusa.org/news/2002/usa03222002.html>, AI Index: AMR 51/049/2002, accessed 11/5/2003.
- <sup>14</sup> Amnesty International, *USA: Mémorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay*, AI Index: AMR 51/053/2002, 51.  
Daryl A. Mundis, *Agora: Military Commissions: The Use of Military Commissioners to Prosecute Individuals Accused of Terrorist Acts*, April, 2002, 96 A.J.I.L., 322-5.  
- Conviction and sentencing require the concurrence of two-thirds of the members of the military commission.
- <sup>15</sup> Amnesty International, *Mémorandum*, as above n14, 48.
- <sup>16</sup> Press Briefing, 17 December 2001.  
Department of Defence news briefing, 26 Feb 2002.  
Amnesty International, *Mémorandum*, as above n14, 49.
- <sup>17</sup> United Nations, *International Covenant on Civil and Political Rights: Freedom of Movement (Art.12): 02/11/99*, CCPR/C/21/Rev.1/Add.9, CCPR General Comment 27. para 18.
- <sup>18</sup> UN Doc. E/CN.4/1996/40 at 26.  
Amnesty International, *Mémorandum*, as above n14, 58.
- <sup>19</sup> Amnesty International, *Mémorandum*, as above n14, 61.  
Ruth Wedgwood, *Agora: Military Commissions*, American Journal of International Law, v96 #2, April 2002, 341.
- <sup>20</sup> 2001 State Department Country Reports on Human Rights.
- <sup>21</sup> Article 4(2) ICCPR. No derogation from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
- <sup>22</sup> International Committee of the Red Cross, *Guantánamo Bay: One Year On*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5G2GT7?OpenDocument>, accessed 14/03/2003.
- <sup>23</sup> *Errol Johnson v. Jamaica*, Communication No. 588/1994, U.N. Doc. CCPR/C/56/D/588/1994 (1996). <http://www1.umn.edu/humanrts/undocs/html/VWS58856.htm> accessed 10/05/2003.
- <sup>24</sup> Amnesty International, As above n14.
- <sup>25</sup> Daryl A. Mundis, *Agora: Military Commissions: The Use of Military Commissioners to Prosecute Individuals Accused of Terrorist Acts*, April, 2002, 96 A.J.I.L. 322.
- <sup>26</sup> White House. *President Meets with Afghan Interim Authority Chairman.*, 28<sup>th</sup> of January 2002.  
Amnesty International, as above n14, 41.
- <sup>27</sup> Amnesty International, as above n10, p24. – General Comment on Article 4 of the ICCPR.  
UN Document CCPR/C/21/Rev/Add.11, 24 July 2001 para 11.
- <sup>28</sup> Human Rights Committee, *General Comment no29*, CCPR/C/21/Rev.1/Add.11. 31 August 2001.  
Amnesty International, *Memorandum*, as above n14, 6.
- <sup>29</sup> Amnesty International, *Memorandum*, as above n14, 45.
- <sup>30</sup> Duncan Macfarlane, *Deane attacks Howard 'untruths'*, 30 May 2003, <http://www.news.com.au/common/printpage/0,6093,6516407,00.html>, accessed 03/06/2003.
- <sup>31</sup> United Nations Treaty Database, No 972, *Geneva Convention Relative to the Treatment of Prisoners of War*, <http://157.150.195.3/LibertyX::Jz33awz5QPMRNYCgP60HGj4CG>, accessed 20/03/2003.
- <sup>32</sup> George W. Bush, *The White House: Fact Sheets: Status of Detainees at Guantanamo*, <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>; 16/03/2003.
- <sup>33</sup> Stratfor.com, *Hunt for Osama bin Laden intensifies*, <http://www.atimes.com/ind-pak/AJ13Df01.html>, accessed 4/06/2003.
- <sup>34</sup> Michael J. Matheson, *U.S Military Commissions: One of Several Options*, April, 2002, 96 A.J.I.L. 355.
- <sup>35</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950, <http://193.194.138.190/html/menu3/b/91.htm>, accessed 4/06/2003.
- <sup>36</sup> Michael J. Matheson, as above n34, 355.  
Article 118, Third Geneva Convention, - Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.  
Geneva Convention relative to the Treatment of Prisoners of War, Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950, <http://193.194.138.190/html/menu3/b/91.htm>, accessed 4/06/2003.
- <sup>37</sup> Harold Hongju Koh, *The Case Against Military Tribunals*, April, 2002, 96 A.J.I.L. 344. – Rebutting Professor Wedgwood's views on classified information, in footnote 35.
- <sup>38</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, <http://www.cidh.org/terrorism/eng/part.e.htm>, accessed 30/03/2004

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# APPENDIX

## ARTICLE 4 OF THE ICCPR

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

## ARTICLE 7 OF THE ICCPR

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

## ARTICLE 9 OF THE ICCPR

1. 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.

2. 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.

3. 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 judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## **ARTICLE 14 OF THE ICCPR**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

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

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

## **ARTICLE 4 OF THE 3RD GENEVA CONVENTION**

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.