

I. Introduction

This Declaration examines the status of three norms under international law: (1) the prohibition against arbitrary detention; (2) the prohibition on cruel, inhuman, or degrading treatment; and (3) the right to consular notification and assistance. Each of these norms is well-established under international law. They are: universal (subject to consensus in the international community); definable (clear and articulable content); and obligatory (establish binding obligations). I submit this declaration on behalf of myself and international legal scholars Philip Alston, Naomi Roht-Arriaza, Ralph G. Steinhardt, Jon M. Van Dyke and David Weissbrodt. Our qualifications and affiliations are described in Appendix A.

II. The Prohibition against Arbitrary Detention

Few concepts are more fundamental to the principle of ordered liberty than the right to be free from arbitrary detention. This basic human right is recognized by almost every multilateral and regional human rights agreement of the twentieth century. It has also been affirmed in both national and international fora.

A. Arbitrary Detention is Prohibited by International Law

1. The prohibition against arbitrary detention can be traced to the seminal document on personal liberty and democratic governance – the Magna Carta. Drafted in 1215 to check abuses of power by the English monarchy, the Magna Carta proclaimed that “[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” Since its affirmation in the Magna Carta, the prohibition against arbitrary detention

has limited the unfettered power of governments to detain individuals. It has been affirmed in national constitutions throughout the world, including the United States Constitution. See generally R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999).

2. The prohibition against arbitrary detention has also been recognized by virtually every multilateral and regional human rights instrument of the twentieth century. Numerous sources of international law – multilateral and regional treaties, U.N. General Assembly resolutions, statements of U.N. agencies, and decisions of international and regional tribunals – are uniform in their condemnation of arbitrary detention.

3. The Universal Declaration of Human Rights (“Universal Declaration”) is one of the most well-recognized and respected elaborations of international human rights norms. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). It is acknowledged to embody rules of customary international law in the realm of human rights. See generally LOUIS HENKIN ET AL., HUMAN RIGHTS 286 (1999). Article 8 of the Universal Declaration provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The *travaux préparatoires* suggest that Article 8 was designed, in part, to serve the function of a *habeas corpus* provision. But for this right to have any meaning, there must be some access to a competent tribunal. Hence, “[i]f there exists no ‘competent tribunal,’ Article 8 requires the establishment of such a tribunal so that an effective remedy can be provided.” DAVID WEISSBRODT, THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 33 (2000). Article 9 adds that “[n]o one shall be subjected to arbitrary arrest, detention or exile.”

According to the *travaux préparatoires*, the term “arbitrary” was meant to protect individuals against both illegal and unjust laws. Parvez Hassan, *The Word ‘Arbitrary’ As Used in the Universal Declaration of Human Rights: ‘Illegal’ Or ‘Unjust?’*, 10 HARV. INT’L L.J. 225 (1969). Therefore, even an arrest or detention implemented pursuant to an existing but unjust law could be categorized as “arbitrary.” In addition, Article 10 provides that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

4. The International Covenant on Civil and Political Rights (“Civil and Political Covenant”) formally codifies the prohibition against arbitrary detention.¹ See International Covenant on Civil and Political Rights, entered into force March 23, 1976, 999 U.N.T.S. 171. Article 9(1) provides that “[e]veryone has the right to liberty and security of the 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.” According to the *travaux préparatoires*, the term “arbitrary” meant far more than “illegal.” Cases of deprivation of liberty provided for by law must not be disproportionate, unjust, or unpredictable. Hence, “[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 172 (1993).

5. To protect against arbitrary deprivations of liberty, Article 9 of the Civil and Political Covenant provides several safeguards. Article 9(2) provides that anyone who is

¹ As of January 1, 2005, there are 154 States Parties to the Civil and Political Covenant. The United States has ratified the Civil and Political Covenant.

arrested shall be informed “of the reasons for his arrest and shall be promptly informed of any charges against him.” Article 9(3) indicates that “[a]nyone 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.” Article 9(4) adds that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The *travaux préparatoires* indicate that the purpose of this provision was to codify the right of *habeas corpus*. This right exists regardless of whether the underlying detention is lawful. “Article 9(4) may thus be violated even when a person is lawfully detained.” *Id.* at 178.

6. Other Civil and Political Covenant provisions are also relevant in determining whether an individual has been arbitrarily detained. For example, Article 14(1) provides, in pertinent part, that “[a]ll 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 public hearing by a competent, independent and impartial tribunal established by law.” Article 14(2) acknowledges the presumption of innocence in all criminal proceedings. Article 14(3) then sets forth a set of minimum guarantees, to be applied in full equality, in criminal proceedings. These include:

- (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.

Finally, Article 14(5) provides that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

7. Several U.N. organizations have affirmed the prohibition against arbitrary detention. For example, the United Nations established the Working Group on Arbitrary Detention in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards. See U.N. Commission on Human Rights, Res. 1991/42 (1991). The Working Group has established the following three categories for considering cases of arbitrary detention:

(A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (Category I);

(B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II)

(C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the

Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character. (Category III).

See Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

8. The U.N. General Assembly has identified a set of principles that apply to protect all persons under any form of detention or imprisonment. U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988). For example, Principle 2 provides that “[a]rrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.” The right to judicial review is acknowledged in several provisions. Principle 4 states that “[a]ny form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.” Principle 11(1) provides that “[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.” Principle 32(1) reiterates this obligation by providing that “[a] detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.” Significantly, these principles must be applied to all persons within the territory of any state and without distinction or discrimination of any kind. Id. at Principle 5(1).

9. In addition to U.N. practice, each of the regional human rights systems recognizes the prohibition against arbitrary detention. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) provides at Article 5(1) that “[e]veryone has the right to liberty and security of the person.”² European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, art. 5(1), 213 U.N.T.S. 221. Article 5(1) places strict limits on the right of the state to detain individuals. Accordingly, no one should be deprived of their liberty except in the following cases:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 5(3) indicates that “[e]veryone arrested or detained . . . shall be brought promptly before

² As of January 1, 2005, there are 45 States Parties to the European Convention.

a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.” Article 5(4) adds that “[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” Article 6 of the European Convention establishes the right to a fair trial and provides numerous rights to detainees, including the presumption of innocence, the right to counsel, and the right to a public hearing within a reasonable time.

10. The American Convention on Human Rights contains similar provisions and protections.³ American Convention on Human Rights, entered into force July 18, 1978, 1144 U.N.T.S. 123. Article 7(3) provides that “[n]o one shall be subject to arbitrary arrest or imprisonment.” Article 7(5) adds that “[a]ny person detained 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 be released with prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.” Article 7(6) provides that “[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.”

11. In addition, the American Declaration of the Rights and Duties of Man, which expresses the obligations of the United States as a member of the Organization of American States, also recognizes the prohibition against arbitrary detention. American Declaration of the

³ As of January 1, 2005, there are 25 States Parties to the American Convention. The United States has signed (but not ratified) the American Convention.

Rights and Duties of Man, May 2, 1948, OAS Doc. OEA/Ser.L/V/II.65, Doc. 6. Article XXV provides that “[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. . . . Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released.” In addition, Article XVIII adds that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” Finally, Article XXVI provides that “[e]very person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws,”

12. Finally, the African Charter on Human and Peoples’ Rights prohibits arbitrary detention.⁴ African Charter on Human and Peoples’ Rights, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3/Rev. 5. Article 6 provides that “[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.” Article 7(1) adds that “[e]very individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;”

13. The decisions of national tribunals affirm the universal, definable, and obligatory

⁴ As of January 1, 2005, there are 53 States Parties to the African Charter.

nature of the international prohibition against arbitrary detention. In A (FC) and others (FC) v. Secretary of State for the Home Department, 2004 UKHL 56, for example, the British House of Lords recently struck down legislation authorizing the indefinite detention of foreign nationals, finding such detention to be inconsistent with the prohibition against arbitrary detention.⁵ According to Lord Nicholls, “[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford.” Id. at para. 74. Lord Hoffman was equally emphatic in rejecting arbitrary detention.

This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.

Id. at para. 86. This decision by the House of Lords is particularly significant because it cites the rulings of several courts, including the United States Supreme Court and the Supreme Court of Canada.

14. Finally, the United States has recognized the prohibition against arbitrary detention in various executive statements and legislative pronouncements. For example, Congress has adopted legislation recognizing the prohibition against arbitrary detention. See,

⁵ The House of Lords also noted that the legislation was discriminatory because it permits detention of suspected international terrorists in a way that discriminates on the grounds of nationality or immigration status. A (FC) and others (FC) v. Secretary of State for the Home Department, 2004 UKHL 56, at para. 73. In support, the House of Lords cited several international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the International Convention on the Elimination of All Forms of Discrimination.

e.g., 22 U.S.C. § 2151n(a) (No assistance may be given to “the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including . . . prolonged detention without charges.”). See also 7 U.S.C. § 1733, 22 U.S.C. § 262d, 22 U.S.C. § 2304.

15. In its own statements before international tribunals, the United States has argued that arbitrary detention is a violation of international law. For example, the United States argued before the International Court of Justice that arbitrary detention is contrary to fundamental international norms. Significantly, the International Court of Justice agreed. “[T]o deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.” United States Diplomatic and Consular Staff in Tehran, (United States v. Iran), 1980 ICJ 3, at para. 91.

16. In its annual Country Reports on Human Rights Practices, the U.S. Department of State has identified numerous instances of arbitrary detention throughout the world. The State Department defines arbitrary detention as those cases where detainees “are held in official custody without being charged or, if charged, are denied a public preliminary judicial hearing within a reasonable period.” U.S. Department of State, Country Reports on Human Rights Practices (2004), at Appendix. In 2004, for example, the State Department criticized numerous countries for arbitrary detention practices, including China (finding that arbitrary arrest and detention remains a serious problem), Turkey (noting the existence of arbitrary detention), and Russia (finding lengthy pre-trial detention remains a serious problem). Similar statements

condemning the use of arbitrary detention are found in reports on Bangladesh, Bolivia, Egypt, Panama, Paraguay, and Uzbekistan.

17. In sum, the prohibition against arbitrary detention covers a wide range of treatment. Determinations of whether arbitrary detention has occurred require an assessment of all the circumstances in the case, including the form and duration of detention, the reasons for detention, the conditions of, and treatment during, detention, and the existence of judicial review to challenge detention.

B. The Right to Judicial Review is an Integral Component of the Prohibition against Arbitrary Detention

1. The prohibition against arbitrary detention provides several forms of protection, including the right to seek judicial review. This right has been recognized by numerous international and regional institutions.

2. In A. v. Australia, the Human Rights Committee, which was established to monitor implementation of the Civil and Political Covenant, considered whether Australia's blanket policy of detaining aliens without the right to judicial review was a violation of the Civil and Political Covenant. A. v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997). The Committee indicated that a blanket detention policy can be considered arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence" Id. at para. 9.2. Illegal entry alone does not provide sufficient justification for the existence of such a policy. In short, individualized review

is necessary to determine the justification for detention. Moreover, detention “should not continue beyond the period for which the State can provide appropriate justification.” *Id.* at para. 9.4. In addition, judicial review of such detention is mandated by the Civil and Political Covenant. In this respect, judicial review of the lawfulness of detention is not limited to a mere determination of compliance with the provisions of domestic immigration law; judicial review must also consider whether the detention is unjust. Moreover, the court must have the power to order release. Because Australia’s immigration policy provided no opportunity for a determination of the lawfulness of the detention, the Committee found a violation of Article 9(4). See also *Hammel v. Madagascar*, Communication No. 155/1983, U.N. Doc. Supp. No. 40 (A/42/40) at 130 (1987).

3. The U.N. Working Group on Arbitrary Detention has also recognized the unique role of judicial review in protecting fundamental rights. In *Ocalan v. Turkey*, the Working Group considered a communication brought by Abdullah Öcalan, the leader of Turkey’s militant Kurdish Worker’s Party (PKK). *Ocalan v. Turkey*, U.N. ESCOR, Comm’n on Human Rights, Opinions Adopted by the Working Group on Arbitrary Detention, 57th Sess., Item 11(a), U.N. Doc. E/CN.4/2001/14/Add.1 (2000), at 46. The communication alleged that Öcalan was detained incommunicado without access to counsel for ten days in a “state security” case. During his detention, Öcalan was never brought before a judge who could rule on the legality of his detention. In its decision, the Working Group indicated that incommunicado detention and denial of counsel for ten days is of “particular gravity” because access to counsel is of a determinatory character for the defendant during the detention period. *Id.* at 51. Accordingly, the Working Group found Öcalan’s detention was contrary to the safeguards set forth in Article

10 of the Universal Declaration of Human Rights and, therefore, arbitrary. Id.

4. The U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has recognized the essential nature of judicial review and its status under international law. See Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002). According to the Special Rapporteur, “[j]udicial control of interference by the executive power with the individual’s right to liberty is an essential feature of the rule of law.” Id. at para. 15. Canvassing various sources of international law, including U.N. instruments and the work of regional bodies, the Special Rapporteur concluded that the right to judicial review applies to all forms of deprivation of liberty, including administrative detention and immigration control measures. Id. at para. 17.

5. The Inter-American Commission on Human Rights, which was established to monitor compliance with the American Convention and the American Declaration, has recognized the essential role of judicial review in the protection of fundamental rights. In Coard v. United States, for example, the Inter-American Commission considered the detention of several persons by the U.S. military during the U.S. invasion of Grenada. Coard v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR (1999). The petitioners were held incommunicado by the United States military for several days. Despite their purported status as military personnel and their capture during military operations, the United States refused to classify the detainees as prisoners of war; they were accordingly treated as civilians. While the Commission noted that detention of civilians for reasons of security is permissible, such detention must comply with international law. For example, decisions on

detention must include the right of the detainee to be heard and to appeal their detention. “These are the minimal safeguards against arbitrary detention.” Id. at para. 54. According to the Commission, the need for judicial review is evident.

Supervisory control over detention is an essential safeguard, because it provides effective assurance that the detainee is not exclusively at the mercy of the detaining authority. This is an essential rationale of the right of habeas corpus, a protection which is not susceptible to abrogation.

Id. at para. 55.

6. The European Court of Human Rights, which is authorized to issue binding rulings on the interpretation and application of the European Convention, has determined that detention based solely on the order of the Executive branch and with no judicial review renders such detention incompatible with human rights law. In Aksoy v. Turkey, 23 E.H.R.R. 553 (1997), a Turkish law permitted the detention of persons suspected of involvement in terrorism offences for up to 30 days without any form of judicial review. Pursuant to this legislation, Turkish authorities detained a Turkish citizen for two weeks. As a preliminary matter, the European Court noted the importance of judicial review.

The Court would stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law. Furthermore, prompt judicial review intervention may lead to the detection and prevention of serious ill-treatment

Id. at 588. While detention schemes may be permissible under certain scenarios, ample

safeguards must be present. In the Aksoy case, however, such safeguards were lacking. According to the Court, the denial of access to a lawyer, doctor, relative, or friend, and the absence of any realistic possibility of being brought before a court to test the legality of the detention, meant that the applicant “was left completely at the mercy of those holding him,” which was incompatible with the prohibition against arbitrary detention. Id. at 590. Accordingly, the Court found Turkey in violation of the European Convention and its obligation to provide judicial review.

7. In Al-Nashif v. Bulgaria, the European Court considered whether Bulgaria’s mandatory detention of aliens in cases of national security constituted arbitrary detention under Article 5(4) of the European Convention. Al-Nashif v. Bulgaria, Application No. 50963/99, Eur. Ct. H.R. Under Bulgaria’s immigration law, judicial review was unavailable to such detainees. As a preliminary matter, the Court noted that “everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement.” Id. at para. 92. Judicial review is necessary for “both the protection of the physical liberty of individuals as well as their personal liberty.” Id. Accordingly, individuals “should have access to a court and the opportunity to be heard either in person or through some form of representation.” Id. Significantly, the Court indicated that national authorities cannot simply dismiss the right of judicial review. “National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.” Id. at para. 94. The Court thus found that the Bulgarian mandatory detention scheme was inconsistent with the prohibitions against arbitrary detention set forth in European Convention.

8. Given its important role in protecting fundamental rights, international law has placed limits on a state's ability to restrict judicial review, even in time of public emergency. For example, the Human Rights Committee has indicated that there are significant restrictions on a state's ability to limit judicial review. In General Comment No. 29, for example, the Committee considered whether restrictions on judicial review were derogable in time of public emergency. Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). The Committee noted the important role played by judicial review in ensuring compliance with other fundamental norms. *Id.* at paras. 15, 16. While Article 4 of the Civil and Political Covenant allows derogation from certain rights, the Committee determined that the provisions of Article 9 with respect to judicial review must be respected even in time of public emergency. "In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." *Id.* at para. 16. See also Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add.93 (1998), at para. 21 ("[A] State party may not depart from the requirement of effective judicial review of detention.").

9. The Inter-American Court on Human Rights, which is authorized to issue binding rulings on the interpretation and application of the American Convention and the American Declaration, has also stressed the importance of judicial review and the relevance of this fundamental right even in time of public emergency. In Advisory Opinion OC-9/87, the Inter-American Court addressed the importance of judicial guarantees during states of emergency. See

Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) (October 6, 1987). The Court noted that the American Convention allows states to derogate from certain obligations. It concluded, however, that states cannot derogate from judicial guarantees, including the right to *habeas corpus* and any other effective judicial remedy. In Advisory Opinion OC-8/87, the Court was even more emphatic about the importance of *habeas corpus* protection and its relevance in times of public emergency. Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights) (January 30, 1987).

In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.

Id. at para. 35. Accordingly, the Court concluded that the right of judicial review, including *habeas corpus*, cannot be suspended, even in time of war, public danger, or other emergency that threatens the independence or security of the state. See also Castillo Petruzzi, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999).

10. In sum, few international human rights norms are more clear and fundamental than the prohibition against arbitrary detention and the concomitant right to seek judicial review. They are universal, definable, and obligatory norms. Determinations of whether arbitrary detention has occurred in a particular case require an assessment of all the circumstances in the case, including the form and duration of detention, the reasons for detention, the conditions of,

and treatment during, detention, and the existence of judicial review to challenge detention.

III. The Prohibition on Cruel, Inhuman, or Degrading Treatment

The prohibition against cruel, inhuman, or degrading treatment is firmly established in international law. See generally NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (2d ed. 1999); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (1988).

A. Cruel, Inhuman, or Degrading Treatment is Prohibited by International Law

1. The prohibition against cruel, inhuman, or degrading treatment is recognized in all of the major multilateral human rights instruments. See, e.g., Universal Declaration, supra, at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); Civil and Political Covenant, supra, at art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, art. 16, 1465 U.N.T.S. 85 (“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of

or with the consent or acquiescence of a public official or other person acting in an official capacity.”).⁶

2. The U.N. Committee against Torture, which was established to oversee implementation of the Convention against Torture, has indicated that the prohibition against cruel, inhuman, or degrading treatment is a fundamental principle of international law. It has also indicated that this norm applies at all times. Following the attacks of the September 11th, the Committee against Torture stated that the prohibition allows for no derogation and must be observed in all circumstances. See U.N. Committee against Torture, Statement of the U.N. Committee against Torture, U.N. Doc. CAT/C/XXVII/Misc.7 (2001).

3. The United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment prohibits cruel, inhuman, or degrading treatment, and no circumstances may be invoked as justification for such acts. See Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 298, U.N. Doc A/43/49 (1988). The Body of Principles contains the following description of cruel, inhuman, or degrading treatment.

The term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Id. at Principle 6.

⁶ As of January 1, 2005, there are 139 States Parties to the Convention against Torture. The United States has ratified the Convention against Torture.

4. The prohibition against cruel, inhuman, or degrading treatment is also recognized in all of the regional instruments. For example, the American Convention on Human Rights provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” American Convention, supra, at art. 5. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention, supra, at art. 3. Finally, the African Charter on Human and Peoples’ Rights provides that “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” African Charter, supra, at art. 5.

5. Finally, the United States has recognized the prohibition against cruel, inhuman, or degrading treatment in various executive statements and legislative pronouncements. For example, Congress has adopted legislation that recognizes the prohibition against cruel, inhuman or degrading treatment as a human right. See, e.g., 7 U.S.C. § 1733 (prohibiting provision of agricultural commodities to countries that practice cruel, inhuman or degrading treatment); 22 U.S.C. § 262d(a)(1) (stating U.S. policy is to channel international assistance away from countries that practice cruel, inhuman or degrading treatment); 22 U.S.C § 2151n (prohibiting development assistance to countries that practice cruel, inhuman or degrading treatment); 22 U.S.C. § 2304 (prohibiting security assistance to countries that practice cruel, inhuman or degrading treatment).

6. In its Initial Report to the U.N. Committee against Torture, the United States affirmed its obligations under Article 16 of the Convention against Torture, which prohibits

cruel, inhuman, or degrading treatment. See U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Reports of States Parties: Addendum: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000). According to the United States, “Article 16 embodies an important undertaking by which States Parties to the Convention must act to prevent cruel, inhuman and degrading treatment or punishment not amounting to torture within territories under their jurisdiction.” Id. at 64. The United States also noted that the prohibition against cruel, inhuman or degrading treatment is consistent with the prohibition against cruel, unusual, and inhumane treatment as set forth in the United States Constitution. Id. at 65. Among the acts characterized in the Initial Report as cruel, inhuman or degrading treatment were: police brutality, substandard prison conditions, improper segregation of prisoners, sexual abuse of detainees, abuse of the mentally retarded and mentally ill in public facilities, discrimination against inmates with disabilities, and non-consensual medical and scientific experiments. Id. at 65-70.

7. In its annual Country Reports on Human Rights Practices, the U.S. Department of State has identified numerous instances of cruel, inhuman, or degrading treatment. See U.S. Department of State, Country Reports on Human Rights Practices (2004). In 2004, for example, the State Department indicated that detainees in Kuwait were subjected to various forms of abuse, including blindfolding, verbal threats, and physical abuse. Moreover, police were more likely to inflict such abuse on noncitizens than on citizens. In Egypt, the State Department indicated that prison conditions remained poor and tuberculosis was widespread. Prisoners suffered from overcrowding of cells, the lack of proper hygiene, food, clean water, proper

ventilation, and recreational activities, and medical care. The State Department identifies similar instances of cruel, inhuman, or degrading treatment in many other countries.

8. In sum, the prohibition against cruel, inhuman, or degrading treatment covers a wide range of treatment and is firmly prohibited by international law.

B. Numerous Acts Have Been Found to Constitute Cruel, Inhuman, or Degrading Treatment

1. International law does not attempt to enumerate every form of conduct that would violate the prohibition against cruel, inhuman, or degrading treatment. History has revealed too many new forms of atrocities to permit such enumeration.

2. Determinations of whether cruel, inhuman, or degrading treatment have occurred require an assessment of all the circumstances in the case, including the form and duration of mistreatment, the level of suffering, the physical and mental status of the victim, and the purpose of the perpetrator. For example, acts are considered cruel if they “cause[] serious mental or physical suffering or injury or constitute[] a serious attack on human dignity.” Kordic and Cerkez, Case No. IT-95-14/2, ICTY (Trial Chamber), February 26, 2001, para. 265. See also Blaskic, Case No. IT-95-14-T, ICTY (Trial Chamber), March 3, 2000, paras. 186, 700; Jelusic, Case No. IT-95-10, ICTY (Trial Chamber), December 14, 1999, paras. 34, 41. Inhuman treatment covers treatment that “deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.” The Greek Case, 12 Y.B. Eur. Conv. on H.R. 1, 186 (1969). See also Prosecutor v. Delalic, Case No. IT-96-21, ICTY (Trial Chamber). Nov. 16,

1998, para. 543. Inhuman treatment also covers conduct that “constitutes a serious attack on human dignity.” *Id.* at para. 543. Degrading treatment includes actions meant “to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.” Ireland v. United Kingdom, Eur. Ct. H.R., No. 5310/71 (1978), para. 167. Degrading treatment also covers conduct which grossly humiliates a person before others or forces the person to act against his/her will or conscience. The Greek Case, *supra*, at 186.

3. It is well-established that the unnecessary use of force can constitute cruel, inhuman, or degrading treatment. In Ribitsch v. Austria, for example, the European Court held that “in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 . . . of the Convention.” Ribitsch v. Austria, Eur. Ct. H.R., No. 18896/91 (1995), para. 38. The Inter-American Court has made similar findings. In Loayza-Tamayo v. Peru, the Court indicated “[a]ny use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person . . . in violation of Article 5 of the American Convention.” Loayza-Tamayo v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), para. 57.

4. It is important to recognize, however, that cruel, inhuman, or degrading treatment is not limited to physical harm. Mental harm may be sufficient. In The Greek Case, for example, the European Commission of Human Rights found that the proscription against inhuman or degrading treatment covered “the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault.” The Greek Case, *supra*, at 461-465

(describing cases where political detainees were subjected to acts of intimidation, humiliation, threats of reprisal against relatives, presence during the torture of another individual, and interference with family life). See also East African Asians v. United Kingdom, 3 E.H.R.R. 76, 80 (1973) (“It follows that an action, which lowers a person in rank, position, reputation or character, can only be regarded as ‘degrading treatment’ in the sense of Article 3, where it reaches a certain level of severity.”).

5. It is also well-established that the prohibition on cruel, inhuman, and degrading treatment is non-derogable. See Civil and Political Covenant, supra, at art. 4 (prohibition against cruel, inhuman, or degrading treatment is non-derogable); European Convention, supra, at art. 15 (no derogation is available from the prohibition against inhuman or degrading treatment); American Convention, supra, at art. 27 (no suspension from the right to humane treatment). The U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “[n]o circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.” U.N. Body of Principles, supra, at Principle 6. This principle of non-derogation has been recognized in countless cases. In Selmouni v. France, for example, the European Court stressed that the prohibition against inhuman or degrading treatment is non-derogable even in the most difficult circumstances, including the fight against terrorism. Selmouni v. France, Eur. Ct. H.R., No. 25803/94 (1999), para. 95. The Inter-American Court has made a similar determination. See Loayza-Tamayo v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), para. 57 (“The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity.”).

6. Numerous examples of cruel, inhuman, or degrading treatment have been documented by international institutions. For example, the Human Rights Committee has categorized various acts as cruel, inhuman, or degrading treatment. The Committee has found that physical beatings constitute cruel and inhuman treatment. See Henry v. Trinidad and Tobago, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (1999) (detainee beaten on the head, requiring stitches). See also Hylton v. Jamaica, Communication No. 407/1990, U.N. Doc. CCPR/C/51/D/407/1990 (1994); Linton v. Jamaica, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987. But the prohibition against cruel, inhuman, or degrading treatment is not limited to physical abuse. See, e.g., Tshishimbi v. Zaire, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993 (1996) (abduction and incommunicado detention constitute cruel and inhuman treatment); Mukong v. Cameroon, Communication No. 458/1991, U.N. Doc. Supp. No. 40 (A/49/40) (1994) (incommunicado detention, depriving petitioner of food, and threatening with torture and death constitute cruel, inhuman, and degrading treatment); Valentini de Bazzano v. Uruguay, Communication No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40 (1984) (detention of prisoner in conditions that pose a threat to his health constitute cruel, inhuman, or degrading treatment).

7. Each of the regional human rights institutions has identified various acts as constituting cruel, inhuman, or degrading treatment. For example, the Inter-American Commission on Human Rights has found several acts to constitute cruel, inhuman or degrading treatment. See, e.g., McKenzie v. Jamaica, Case No. 12.023 (2000) (keeping prisoners in overcrowded conditions for 23 hours a day with inadequate sanitation, poor lighting and ventilation constitutes cruel, inhuman, and degrading treatment); Valladares v. Ecuador, Case

No. 11.778 (1998) (holding petitioner incommunicado for more than 22 days constitutes cruel, inhuman or degrading treatment); Congo v. Ecuador, Case No. 11.427 (1998) (holding detainee in a small isolated cell constitutes inhuman and degrading treatment). The Inter-American Court of Human Rights has made similar findings. *See, e.g., Urrutia v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 103 (2003) (conditions of confinement including threats of physical harm constitute cruel, inhuman, or degrading treatment); Cantoral Benavides v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 69 (2000) (poor conditions of confinement and inadequate medical treatment constitute cruel, inhuman, or degrading treatment); Loayza-Tamayo v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997) (blows and maltreatment constitute cruel, inhuman, or degrading treatment); Suarez-Rosero v. Ecuador, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997) (detention for more than 36 days during which the victim was deprived of communication with the outside world constitutes cruel, inhuman, or degrading treatment); Godinez-Cruz v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989) (physical threats and threats with weapons constitute cruel, inhuman, or degrading treatment); Velasquez-Rodriguez v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) (prolonged isolation and deprivation of communication constitute cruel and inhuman treatment).

8. The European Court of Human Rights has recognized that determinations of whether inhuman or degrading treatment has occurred depend on the unique circumstances of the case and the status of the individual victim. *See, e.g., Tyrer v. United Kingdom*, 2 E.H.R.R. 1 (1978). The European Court has found various acts to constitute inhuman or degrading treatment. *See, e.g., Lorse and Others v. The Netherlands*, Eur. Ct. H.R., No. 52750/99 (2003) (weekly strip searches of detainee constituted a violation of Article 3); Van der Ven v.

Netherlands, Eur. Ct. H.R., No. 50901/99 (2003) (same); Elci and Others v. Turkey, Eur. Ct. H.R., No. 23145/93 (2003) (dire conditions of detention, including inadequate bedding and unsanitary food and bathroom facilities, constitutes cruel, inhuman or degrading treatment); Kalashnikov v. Russia, Eur. Ct. H.R., No. 47095/99 (2002) (sleep deprivation, overcrowding, and unsanitary conditions are factors in determining the existence of inhuman or degrading treatment); Valasinas v. Lithuania, Eur. Ct. H.R., No. 44558/98 (2001) (forcing a male detainee to strip naked in presence of a female prison guard who then touched his sexual organs constitutes degrading treatment); Tekin v. Turkey 31 E.H.R.R. 95 (2001) (blindfolding a prisoner, threatening him with death, providing no bed or blankets, denying food and liquids, stripping him naked and hosing him with cold water, and beating him with a truncheon constitutes inhuman and degrading treatment); Assenov v. Bulgaria, 28 E.H.R.R. 652 (1998) (bruises received from beating would have been sufficient for an Article 3 violation if petitioner had proved state action); Ribitsch v. Austria, 21 E.H.R.R. 573 (1996) (beatings and abuse administered by police constitutes inhuman and degrading treatment); Tomasi v. France, 15 E.H.R.R. 1 (1992) (finding inhuman and degrading treatment when detainee was slapped, punched, kicked, and made to stand for long periods of time even though his physical injuries were relatively slight); Ireland v. United Kingdom, *supra*, at para. 165, 167 (use of five interrogation techniques consisting of wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and water constitutes inhuman and degrading treatment).

9. Finally, the African Commission on Human and Peoples' Rights has found various actions to constitute cruel, inhuman, or degrading treatment. *See, e.g., Media Rights Agenda v. Nigeria*, Comm. No. 224/98 (2000) (chaining detainee to the floor day and night in

solitary confinement constitutes cruel, inhuman or degrading treatment); Huri-Laws v. Nigeria Comm. No. 225/98 (2000) (detaining petitioner in a dirty cell without charge and without access to medical attention constitutes cruel, inhuman or degrading treatment).

10. In sum, international law firmly prohibits cruel, inhuman, or degrading treatment. While international law does not enumerate every form of conduct that would violate this fundamental prohibition, it remains a universal, definable, and obligatory norm. Determinations of whether cruel, inhuman, or degrading treatment have occurred require an assessment of all the circumstances in the case, including the form and duration of mistreatment, the level of suffering, the physical and mental status of the victim, and the purpose of the perpetrator. Any act of cruel, inhuman, or degrading treatment violates international law, and no circumstances whatsoever may be invoked to allow derogation from this fundamental norm.

IV. The Right to Consular Notification and Assistance

The importance of consular practice has long been recognized, and its roots can be traced to antiquity. While consular practice is firmly established under customary international law, it was formally codified in the Vienna Convention on Consular Relations (“Vienna Convention”).⁷ Vienna Convention on Consular Relations, entered into force March 19, 1967, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. The Vienna Convention codifies the right to consular notification and assistance. This right has been affirmed by the International Court of Justice and other international tribunals on several occasions.

⁷ As of January 1, 2005, there are 166 States Parties to the Vienna Convention. The United States has ratified the Vienna Convention.

A. The Vienna Convention on Consular Relations

1. The adoption of the Vienna Convention has been referred to as “undoubtedly the single most important event in the entire history of the consular institution.” LUKE LEE, *CONSULAR LAW AND PRACTICE* 27 (1991). The Vienna Convention provides that foreign nationals must be informed of their right to communicate with consular officials when they are arrested or detained in any manner. Article 36(1) of the Vienna Convention provides “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State:”

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Article 36(2) provides that the laws and regulations of the receiving state must allow full effect to be given to these rights:

The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.⁸

Essentially, Article 36 serves two functions. It serves the needs of foreign nationals by allowing them to communicate with consular officials when they are detained. It also serves the needs of sending states by allowing them to monitor the fair treatment of their nationals abroad.

2. The Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes (“Optional Protocol”) provides that any dispute arising out of the interpretation or application of the Vienna Convention shall be subject to the compulsory jurisdiction of the International Court of Justice. Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, entered into force March 19, 1967, 21 U.S.T. 325.⁹ The Optional Protocol has been used on several occasions to establish the ICJ’s jurisdiction in cases involving Vienna Convention violations.

3. In addition to the Vienna Convention, countries often enter bilateral agreements with respect to consular practice. See, e.g., Convention Regarding Consular Officers, entered into force Sept. 7, 1952, U.S.-U.K., 3 U.S.T. 3426; Agreement on Consular Relations, entered into force Jan. 31, 1979, U.S.-P.R.C., 30 U.S.T. 17. These bilateral agreements complement the provisions of the Vienna Convention and extend its protections. For example, some of these agreements require the sending state to notify consular officials that their nationals have been

⁸ This obligation is reiterated in Article 14 of the Vienna Convention, which declares that the receiving state shall “ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention.”

⁹ As of January 1, 2005, there are 46 States Parties to the Optional Protocol. The United States has ratified the Optional Protocol.

detained, regardless of whether the foreign nationals make such a request. Other international agreements also address consular practice. See, e.g., Treaty of Amity, Economic Relations, and Consular Rights, entered into force June 16, 1957, U.S.-Iran, 8 U.S.T. 899, 284 U.N.T.S. 93; Treaty of Friendship, Commerce, and Navigation, entered into force March 12, 1860, U.S.-Para., 12 Stat. 1091. While these agreements are important, the Vienna Convention remains the principal framework for addressing consular practice.

4. As the U.S. Department of State has indicated, consular notification is a universally accepted, basic obligation. U.S. Department of State, Consular Notification and Access 44 (2004). It is also an obligation that is binding on federal, state, and local governments. Moreover, the State Department has indicated that “[i]mplementing legislation is not necessary . . . because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.” Id.

B. The Right to Consular Notification and Assistance Has Been Recognized By Several International Tribunals

1. In recent years, the right to consular notification and assistance has been subject to several proceedings before international tribunals, including the International Court of Justice, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights. These proceedings have helped to clarify the status of consular rights and the application of the Vienna Convention in domestic legal systems.

In the United States Diplomatic and Consular Staff in Tehran, the International Court of

Justice first addressed the status of the Vienna Convention under international law. The United States brought the case before the ICJ to challenge the seizure of U.S. diplomatic and consular officers in Iran. The United States also challenged the refusal of Iran to allow U.S. consular officials to communicate with the hostages. The United States alleged that these actions violated the Vienna Convention and other international agreements addressing diplomatic and consular rights. In its pleadings to the ICJ, the United States underscored the importance of consular practice and its role in international relations. “If our international institutions, including this Court, should even appear to condone or tolerate the flagrant violations of customary international law, State practice, and explicit treaty commitments that are involved here, the result will be a serious blow not only to the safety of the American diplomatic persons now in captivity in Tehran, but to the rule of law within the international community.” INTERNATIONAL COURT OF JUSTICE: PLEADINGS, ORAL ARGUMENTS, DOCUMENTS, CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN IRAN (UNITED STATES V. IRAN) 21 (International Court of Justice 1982) (*quoting* U.S. Attorney General Benjamin Civiletti, Argument to the International Court of Justice). In a Provisional Measures Order, the ICJ acknowledged the integral role played by consular officials in protecting their nationals. “Whereas the unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States;” United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1979 ICJ 7, at para. 40. In its final Judgment, the ICJ found that Iran had violated the Vienna Convention and other international obligations regarding diplomatic and consular practice through its conduct and owed reparations to the United States.

See United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 ICJ 3, at para. 95.

2. In recent years, the ICJ has provided a more thorough analysis of the right to consular notification and assistance as set forth in the Vienna Convention. In the LaGrand case, for example, Germany instituted proceedings before the ICJ against the United States, alleging violations of the Vienna Convention in the case of two German nationals who had been sentenced to death in Arizona. These German nationals had never been informed of their right to contact German consular officials. Indeed, the United States did not dispute that the Vienna Convention had been violated in this case.

3. On June 27, 2001, the ICJ issued its decision on the merits. See LaGrand (Germany v. United States), 2001 ICJ 104. In its ruling, the Court noted that Article 36(1) of the Vienna Convention “establishes an interrelated regime designed to facilitate the implementation of the system of consular protection.” Id. at para. 74. If a sending state is unaware that its nationals are detained, it will be unable to exercise its rights under Article 36(1)(a) and (c).

4. The Court observed that the United States did not deny that it violated Article 36(1)(b) of the Vienna Convention. As a consequence of the Article 36(1)(b) violation, the Court found that Germany was also prevented from exercising its rights under Article 36(1)(a) and (c), and that the United States had therefore also violated those provisions.

It is immaterial . . . whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

Id. at para. 74.

5. Significantly, the ICJ considered whether a breach of Article 36(1) might constitute a violation of the individual rights of the LaGrand brothers. Reviewing the language of Article 36(1)(b) and (c), the Court found that “the clarity of these provisions, viewed in their context, admits of no doubt,” and that “the Court must apply these as they stand.” Id. at para. 77. Based on these provisions, the Court determined that Article 36(1) creates individual rights that the United States had violated.

6. Three years later, the ICJ revisited the right to consular notification and assistance in an action filed by Mexico against the United States. The Mexican government alleged that numerous Mexican nationals had been arrested, detained, tried, and convicted in proceedings in which the United States had failed to comply with its obligations under the Vienna Convention. These violations prevented Mexican nationals from seeking consular assistance. They also prevented Mexico from exercising its rights and performing its consular functions pursuant to Articles 5 and 36 of the Vienna Convention.

7. On March 31, 2004, the Court issued its judgment on the merits. See *Avena and Other Mexican Nationals* (Mexico v. United States) 2004 ICJ 128. The Court noted that Article 36(1)(b) of the Vienna Convention requires a state to act “without delay” in notifying foreign nationals of their rights under the Vienna Convention. It also requires consular communications to be forwarded to foreign nationals without delay. The Court indicated that the term “without delay” means “as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.” Id. at para. 88. Accordingly, the

Court held that the United States breached its obligations by failing to inform, without delay, the Mexican nationals of their rights under Article 36(1)(b) of the Vienna Convention. Id. at para. 106(1). It also found the United States breached its obligations by failing to notify, without delay, the appropriate Mexican consular post of the detention of 49 Mexican nationals, thereby depriving Mexico of the right to render assistance to these individuals. Id. at para. 106(2).

8. The Court also found that Article 36(1)(c) requires a state to allow consular officials to have access to their nationals and to visit them in detention in a timely fashion. This obligation extends to providing consular officials with the right to render assistance in a timely fashion, including allowing them to arrange for legal representation. According to the Court, the reason for allowing such action in a timely fashion is evident.

Mexico has laid much emphasis in this litigation upon the importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide to defence counsel, *inter alia* for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 (c), depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national.

Id. at para. 104. On this issue, the Court held that the United States breached its obligations under Article 36(1)(a) and (c) by depriving Mexico of the right to communicate with, and have access to, 49 Mexican nationals in a timely fashion. Id. at para. 106(3). It also held that the

United States breached its obligations under Article 36(1)(c) by depriving Mexico of the right to arrange for legal representation of 34 Mexican nationals in a timely fashion. *Id.* at para. 106(4).

9. Accordingly, the Court found that the United States had breached its obligations to Mexico under the Vienna Convention in the following manner: (1) by failing to inform, without delay, detained Mexican nationals of their rights under the Vienna Convention; (2) by failing to notify, without delay, the appropriate Mexican consular post of the detention of Mexican nationals, thereby depriving Mexico of the right to render assistance to its nationals; (3) by depriving Mexico of the right to communicate with, and have access to, detained Mexican nationals in a timely fashion; and (4) by depriving Mexico of the right to arrange for legal representation of detained Mexican nationals in a timely fashion.

10. In addition to the decisions of the International Court of Justice, the Inter-American Court of Human Rights has also examined the status of consular notification and assistance. On October 1, 1999, the Inter-American Court issued an advisory opinion concerning the right to consular notification and its role in the protection of fundamental rights. See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-American Court of Human Rights, Advisory Opinion No. OC-16/99 (1999). In its opinion, the Inter-American Court examined several issues.

11. First, the Court examined whether Article 36 of the Vienna Convention confers rights upon individuals and, if so, whether such rights carry with them correlative obligations for the receiving state. The Court noted that Article 36 of the Vienna Convention serves a dual purpose: “that of recognizing a State’s right to assist its nationals through the consular officer’s actions and, correspondingly, that of recognizing the correlative right of the national of the

sending State to contact the consular officer to obtain that assistance.” *Id.* at para. 80. Based on the Vienna Convention’s text and its *travaux préparatoires*, the Court concluded that Article 36 “endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties.” *Id.* at para. 84.

12. Second, the Court addressed whether Article 36 of the Vienna Convention concerns the protection of human rights. The Court identified several ways in which consular officials can assist a detained national – for example, by securing a lawyer, obtaining evidence in the country of origin, verifying the conditions under which legal assistance is provided, and observing the conditions under which the foreign national is incarcerated or otherwise detained. For these reasons, the Court found that the right to seek consular assistance as set forth in Article 36 of the Vienna Convention concerns the protection of human rights and is part of the body of international human rights law.

13. Third, the Court examined the meaning of the phrase “without delay” as set forth in Article 36(1) (b) of the Vienna Convention. According to the Convention's *travaux préparatoires*, the phrase “without delay” was added to Article 36 in order to ensure that a foreign national was aware of his right to consular access, thus facilitating such assistance. The Court reasoned that its interpretation of the phrase “without delay” should therefore serve this *effet utile*. *Id.* at para. 104. To ensure that consular assistance is effective, a foreign national must be informed of his rights at a time that will allow him to prepare an effective defense. “Accordingly, notification must be prompt; in other words, its timing in the process must be appropriate to achieving that end.” *Id.* at para. 106. For these reasons, the Court interpreted the phrase “without delay” to mean that foreign nationals should be notified of their right to consular

assistance at the moment they are deprived of liberty and, in any case, before they make their first statements to the authorities.

14. Fourth, the Court considered whether the rights and obligations set forth in Article 36 of the Vienna Convention require a protest on the part of the sending state. According to the text of Article 36, the right to consular notification is conditioned only upon the will of the detained foreign national. Similarly, the *travaux préparatoires* do not indicate any requirements or conditions that the sending state must fulfill in order for the detained foreign national to receive consular assistance. Accordingly, it is unnecessary for the sending state to issue a prior protest. Indeed, “it would be illogical to make exercise of these rights or fulfillment of these obligations subject to protests from a State that is unaware of its national’s predicament.” *Id.* at para. 92. For these reasons, the Court held that the observance of the individual rights recognized by the Vienna Convention is not conditioned upon the protests of the sending state.

15. In addition to the Inter-American Court’s Advisory Opinion, the Inter-American Commission on Human Rights has considered the right of consular notification and its status as a protected right under the American Declaration on the Rights and Duties of Man.

16. In Ramon Martinez Villareal v. United States, a Mexican national challenged his criminal conviction and death sentence on the grounds that he was never informed of his right to communicate with Mexican consular officials during his state court proceedings. See Ramon Martinez Villareal v. United States, Case No. 11.753, Report No. 52/02 (Oct. 10, 2002). In 1997, he filed a petition against the United States before the Inter-American Commission, alleging several violations of the American Declaration. He argued, *inter alia*, that the United

States had violated his rights by failing to provide notice of consular assistance as required by the Vienna Convention.

17. The Inter-American Commission found that developments in international human rights law, including the right to consular assistance, were relevant when interpreting and applying the American Declaration. Hence, the Commission found it appropriate to consider the Vienna Convention when interpreting the provisions on due process and the right to a fair trial set forth in the American Declaration.

[T]he Commission considers that compliance with the rights of a foreign national under the Vienna Convention on Consular Relations is particularly relevant to determining whether a state has complied with the provisions of the American Declaration pertaining to the right to due process and to a fair trial as they apply to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state.

Id. at para. 62. The Commission noted that the many due process provisions in the American Declaration – the presumption of innocence, the right to prior notification of charges, the right to counsel, the right to be tried by a competent, independent and impartial tribunal, the right not to be compelled to be a witness or to plead guilty – would have little value to a foreign national in the absence of consular assistance.

The Commission considers that these protections in turn are of such a nature that, in the absence of access to consular assistance, a foreign national may be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. This could arise, for example, by virtue of foreign national's inability to speak the language of the state, a lack of familiarity with its legal system, or an inability to gather relevant information, such as mitigating evidence, from his or her home country. Disadvantages of this nature could in turn undermine the

effectiveness of the foreign national's due process rights to, for example, understand the charges against him and to adequately prepare his or her defense. It is also apparent that access to consular assistance could potentially mitigate such disadvantages by such means as the provision of linguistic and legal assistance as well as the identification and collection of pertinent information from the defendant's state of nationality.

Id. at para. 64. In support, the Commission cited the Advisory Opinion of the Inter-American Court and the LaGrand opinion of the International Court of Justice. It also noted the significance given to the Vienna Convention by the U.N. Commission on Human Rights and the OAS General Assembly.

18. The Commission then determined that the United States had failed to comply with the provisions of the Vienna Convention and that this failure could have had a significant effect on the fairness of the criminal proceedings in Villareal's case. It went on to note that the failure to provide consular assistance constituted a serious violation of the due process and fair trial rights set forth in the American Declaration. See also Cesar Fierro v. United States, Case No. 11.331, Report No. 99/03 (Dec. 29, 2003).

19. In sum, the right to consular notification and assistance is firmly established under international law. Specifically, the Vienna Convention requires that: (1) foreign nationals must be informed of their right to communicate with consular officials without delay when they are arrested or detained in any manner; (2) consular officials must be notified of such detention without delay if the foreign national so requests; and (3) consular officials must be allowed to visit their nationals, to communicate with them, and to arrange for their legal representation. These obligations are universal, definable, and obligatory.

V. Conclusion

This Declaration has examined the status of three norms under international law: (1) the prohibition against arbitrary detention; (2) the prohibition on cruel, inhuman, or degrading treatment; and (3) the right to consular notification and assistance. Each of these norms is well-established under international law and constitutes a universal, definable, and obligatory norm.

Respectfully Submitted,

William Aceves

A handwritten signature in black ink, appearing to read "William Aceves", with a large, stylized flourish extending to the right.

1-11-05

APPENDIX: Qualifications and Affiliations of Experts

WILLIAM J. ACEVES is a Professor of Law and Director of the International Legal Studies Program at California Western School of Law. Professor Aceves teaches Human Rights Law, Comparative Law, Foreign Affairs and the Constitution, and Law and International Relations. He was previously a Ford Foundation Fellow in International Law at the UCLA School of Law. Professor Aceves has published numerous articles on international law and human rights in law reviews throughout the country, including those at Berkeley, Chicago, Columbia, Fordham, Harvard, Hastings, Michigan, Pennsylvania, Pepperdine, and Vanderbilt. He has also written several essays for the prestigious *AMERICAN JOURNAL OF INTERNATIONAL LAW*. He was the principal author of the 2002 Amnesty International USA report on torture and impunity. Professor Aceves has appeared before the Inter-American Commission on Human Rights and the United Nations Special Rapporteur on Migrants.

PHILIP ALSTON is a Professor of Law and Faculty Director of the Center for Human Rights and Global Justice, at New York University Law School, and External Professor of International Law, European University Institute, Florence. In 2004, Professor Alston was appointed Special Rapporteur of the United Nations Commission on Human Rights on the subject of Extrajudicial, Summary or Arbitrary Executions, and has also served as Special Advisor to the UN High Commissioner for Human Rights on development issues, a post to which he was appointed by Sergio Vieira de Mello in 2002. Previously Professor Alston chaired the United Nations Committee on Economic, Social and Cultural Rights from 1991 to 1998 and was the Committee's Rapporteur from its inception in 1987 until 1990. He was elected to chair the Meeting of Chairpersons of United Nations Human Rights Treaty Bodies in 1990, 1993, and

1997-98, and in 1989 he was appointed as an Independent Expert by the UN Secretary-General, at the request of the General Assembly, to report on measures to ensure the long-term effectiveness of the UN human rights treaty bodies, a mandate which ended in 1997. He is also President of the Board of Directors of the Center for Economic and Social Rights (based in Brooklyn) and Editor-in-Chief of the EUROPEAN JOURNAL OF INTERNATIONAL LAW.

Professor Alston is the co-author, with Prof. Henry Steiner of Harvard Law School, of a textbook entitled INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, the third edition of which will be published by Oxford University Press in 2005.

NAOMI ROHT ARRIAZA is a Professor of Law at the University of California, Hastings College of Law, where she teaches international human rights and international environmental law. She received her undergraduate, M.P.P. and J.D. degrees from the University of California at Berkeley, where she graduated first in her law school class. She clerked for the Honorable James Browning of the Ninth Circuit Court of Appeals in San Francisco, held the Riesenfeld Fellowship in International Law at Berkeley, and was a Fulbright Senior European Research Scholar in Barcelona, Spain. She is the author of IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Oxford University Press, 1995) and THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (University of Pennsylvania Press, 2004), and of numerous publications on human rights and humanitarian law issues in legal and international relations journals. She is a member of the American Society of International Law, the International Criminal Law Network, and the International Law Association. She has written on international criminal law, the relationship of human rights and the environment, and corporate accountability issues.

RALPH G. STEINHARDT is the Arthur Selwyn Miller Research Professor of Law at the George Washington University Law School, in Washington, D.C. He is also the co-founder and -director of the Programme in International Human Rights Law, at New College, Oxford University, where he has taught courses on Human Rights Lawyering and the International Law of Criminal Procedure. Professor Steinhardt has been active in the domestic litigation of international human rights norms, having represented *pro bono* various human rights organizations, as well as individual human rights victims, before all levels of the federal judiciary including the U.S. Supreme Court. Professor Steinhardt is the author of numerous books and articles, including INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW (2002), THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (1999) (with Tony D'Amato), and INTERNATIONAL LAW AND SELF-DETERMINATION (1994). Professor Steinhardt received his B.A. *summa cum laude* from Bowdoin College, where he was elected to Phi Beta Kappa. He was then awarded a Henry Luce Foundation Scholarship and appointed Visiting Scholar at the University of the Philippines Law Center. He received his J.D. from Harvard Law School, where he served as Articles Editor of the HARVARD INTERNATIONAL LAW JOURNAL and won the Jessup Moot Court Competition. He then practiced law in Washington, D.C., for five years, before joining the faculty at the George Washington University Law School.

JON M. VAN DYKE has been Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa, since 1976, where he teaches International Law and International Human Rights Law. Previously he taught at the Hastings College of Law, University of California, in San Francisco, from 1971 to 1976 and at the Catholic University School of Law, from 1967 to 1969. Professor Van Dyke earned his B.A. at Yale University in

1964 and his J.D. at Harvard University in 1967. He has written widely on issues related to international human rights law. His publications concerning international law include INTERNATIONAL LAW AND LITIGATION IN THE U.S. (co-author 2000), and CHECKLISTS FOR SEARCHES AND SEIZURES IN PUBLIC SCHOOLS (co-author 2002) and edited CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION (1985), INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? (1988) and FREEDOM FOR THE SEAS IN THE 21ST CENTURY (1993), which was awarded the Harold and Margaret Sprout Award for 1994 by the International Studies Association. He has also written numerous articles. He previously taught at the Hastings College of Law, University of California, and at the Catholic University Law School, Washington, D.C. He was law clerk for Chief Justice Roger Traynor of the California Supreme Court and a Visiting Fellow at the Center for Democratic Institutions in Santa Barbara, California. Professor Van Dyke served as the University's representative on the Executive Board of the Law of the Sea Institute from 1982 to 1988 and has been an Adjunct Research Associate at the East-West Center. From 1988 to 1990, he served as Director of the Spark M. Matsunaga Institute for Peace.

DAVID WEISSBRODT is the Fredrikson & Byron Professor of Law at the University of Minnesota. He received a J.D. from the University of California School of Law (Boalt Hall) in 1969. Professor Weissbrodt has served as an officer, counsel, delegate, or member of the board of directors of several human rights organizations. For example, he presently serves as legal counsel of the Center for Victims of Torture and the Minnesota Advocates for Human Rights. Over the past 28 years he has served 12 years on the Board of Directors of Amnesty International (AI) U.S.A. and has been an AI delegate to the U.N. Commission on human rights and on AI factfinding visits to Canada, Congo, Guinea, Guyana, Haiti, Hong Kong, Kenya, Malaysia,

Qatar, and Rwanda. Professor Weissbrodt was the founder of the International Human Rights Internship Program and served the program for 15 years as its chair; he continues to sit on its advisory board. During the period 1996-2003 he served as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities). In 2001 Professor Weissbrodt was the first U.S. citizen elected Chairperson of the Sub-Commission and he also served as the U.N. Special Rapporteur on the Rights of Non-Citizens 2001-03. He has written over 150 articles and several books, many of which relate to human rights, including: *United States Ratification of the Human Rights Covenants*, 63 Minn. L. Rev. 35 (1978); *The 1980 U.N. Commission on Human Rights and the Disappeared*, 1 Human Rights Q. 18 (1981); *Strategies for the Selection and Pursuit of International Human Rights Objectives*, 8 Yale J. World Public Order 62 (1981); *International Mechanisms Against Arbitrary Killings by Governments*, 77 Proc. Am. Soc. Int'l L. 378 (1983); *The Three "Theme" Rapporteurs of the U.N Commission on Human Rights*, 80 AJIL 685 (1986); THE U.N. COMMISSION ON HUMAN RIGHTS (1988) (coauthored with Penny Parker); THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2001). He is also co-author of a leading casebook on international human rights, David Weissbrodt, Joan Fitzpatrick, and Frank Newman, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS (3d ed. 2001).