HUMANE TREATMENT AND PROPORTIONALITY pdf

1: University of Minnesota Human Rights Library

Humane treatment is the minimum standard for ALL detained personnel regardless of status. Let trained interrogators conduct interrogations -- Torture is not only unlawful, but produces unreliable information.

Though we are unable to express a position regarding the specific events mentioned in the petition â€¦ we see fit to emphasize that our combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill and bodies of the deceased. Report on the Practice of Israel, , Chapter 5. The manual further states: The basic point of departure for our discussion is the balancing point between the liberty of the individual and the security of the public. On the one hand are the rights of the individual who enjoys the presumption of innocence and desires to live as he wishes. Detention laws â€¦ reflect this balance. Here we find the position that detainees should be treated humanely and in recognition of their human dignity. Israel is a member of this covenant. Article 10 of this covenant is generally recognized as reflecting customary international law. All persons deprived of their liberty shall be treated with human dignity and with respect for the inherent dignity of the human person. Israel acts according to this principle with regard to all prisoners and detainees. Cohen expressed this principle in Darvish: Any person in Israel, who has been sentenced to imprisonment, or lawfully detained, is entitled to be held under humane and civilized conditions. It is not significant that this right has yet to be explicitly stated in legislation: Indeed, the nature of detention necessitates the denial of liberty. Even so, this does not justify the violation of human dignity. It is possible to detain persons in a manner which preserves their human dignity, even as national security and public safety are protected. Compare Yosef, at How could we consider ourselves civilized if we did not guarantee civilized standards to those in our custody? Such is the duty of the commander of the area under international law, and such is his duty under our administrative law. Such is the duty of the Israeli government, in accord with its fundamental character: Jewish, democratic and humane. In addition to these principles, we must consider the principles and regulations set forth in the Fourth Geneva Convention. Article 27 of the Fourth Geneva Convention sets out the point of departure for the convention: Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof against and against insults and public curiosity â€¦ However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war. It is appropriate to open this discussion with the normative framework of this case, as was done by Justice Shamgar in Sajadia. This is in response to the possible claim that, since the detainees being held in Kziot Camp are terrorists who have harmed innocent people, we should not consider their detention conditions. This argument is fundamentally incorrect. Those being detained in the Kziot Camp have not been tried; needless to say, they have not been convicted. They still enjoy the presumption of innocence. Justice Shamgar expressed this notion in Sajadia: An administrative detainee has not been convicted, nor is he carrying out a sentence. He is detained in accordance with a decision made by an administrative-military authority, as an exceptional emergency means due to security reasons â€¦ The aim of the detention is to prevent security hazards, which arise from actions that the detainee is liable to commit, where there is no reasonable possibility of preventing such hazards through standard legal action, such as criminal proceedings, or by taking administrative steps with milder consequences â€¦ The difference between a convicted prisoner and a detainee being held in order to prevent security hazards, is manifest in the status of the administrative detainee and his detention conditions. In the same spirit Justice Bach noted: With all due respect for security considerations, we must not forget that we are talking about detainees deprived of liberty without their having been convicted of any crime in standard criminal proceedings. We must not be satisfied with a situation in which the detention conditions of these detainees are poorer than the conditions of prisoners who have been sentenced to imprisonment after being convicted. In a different context, Justice Zamir indicated that: Administrative detention deprives an individual of his liberty in the most severe fashion. Liberty is denied, not by the court, but rather by an administrative authority; not by a judicial proceeding, but

rather by an administrative decision. These detainees continue to enjoy the presumption of innocence. The security considerations that led to the detention of these people do not justify holding them under unsatisfactory conditions. The detainees were lawfully deprived of their liberty. They were not, however, stripped of their humanity. In an affair that occurred more than twenty years ago, prior to the legislation of the Basic Law: Human Dignity and Liberty, I remarked: Every person in Israel enjoys the basic right to bodily integrity and the protection of his dignity as a human being â€¦ Convicts and detainees are also entitled to the protection of their bodily integrity and human dignity. Prison walls do not come between the detainee and his human dignity. This is especially true after the enactment of the Basic Law: Therefore, the army must ensure that the detainees be treated humanely, and in recognition of their human dignity. See The Center for the Defense of the Individual, at par. The detention conditions must guarantee civilized and humane life. Human dignity, which constitutes the foundation of the Basic Law: Human Dignity and Liberty, together with the values of Israel as a Jewish and democratic state, forms the normative lens through which we examine the dentition [sic] conditions of detainees. This framework is not one-sided. Human liberty is not its sole consideration. Nor is national security its sole consideration. The framework attempts to achieve a balance â€” at times delicate â€” between the need to guarantee conditions of detention as humane as possible and the need to guarantee national security. An important legal source with regard to detention conditions is the Emergency Powers Detention Law The Detention Regulations were set out pursuant to the grant of authority contained in this law. These regulations set forth the standards that govern the detention conditions of those who are administratively detained in Israel. They also apply to whoever is detained in the area pursuant to security legislation. Where an arrest warrant or detention order has been issued against any person in the area, pursuant to the proclamation or the order of a commander, such a warrant or order may be executed in Israel in the same manner that arrest warrants and detention orders are executed in Israel; and that person may be transferred, for detention, to the area where the crime was committed. In Sajadia the court held, based on this regulation, that Kziot Camp must heed the Detention Regulations as well. The General Defense Service. We shall now turn to the provisions of international law regarding detention conditions. Israel is not an isolated island. She a member of an international system, which has set out standards concerning conditions of detention. The most significant of these may be found in article 10 1 of the International Covenant on Civil and Political Rights , which states: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This rule, which has the force of customary international law, see The Center for the Defense of the Individual, at par. Human Dignity and Liberty, which protects the dignity of all persons, including detainees. These principles were endorsed by the United Nations General Assembly in They establish principles for all forms of detention, including administrative detention. These principles, even if they are not directly binding in internal Israeli law, set forth standards by which any reasonable government authority should act. This convention sets forth comprehensive arrangements concerning conditions of detention. The validity of the convention with regard to the detention conditions at Kziot is not a subject of dispute before us, as Israel sees itself as bound by the humanitarian provisions of the convention. We have reviewed the details of these provisions in The Center for the Protection of the Individual, at par. Israeli common law provides an additional legal source concerning this matter. Our common law includes a long list of judgments concerning the conditions of detention in Israel. These judgments are founded on the need to strike a proper balance between the liberty of the individual and the security needs of the public. Elon explained the guiding principle of this balance: It is an important principle that every civil right to which a person is entitled is preserved even when he is imprisoned or detained. The Minister of the Interior, at In the same spirit Justice Matza wrote: The Prison Services, at Justice Matza continued, at We do not allow the deprivation of basic human rights, which the prisoners require. These decisions and others like them, whether directly or indirectly, provide standards by which we can examine the detention conditions in Kziot. Furthermore, Israeli administrative law applies to the actions of every government authority in Israel. Thus, these principles apply to the actions of respondents, including the establishment and maintenance of detention conditions. As such, the detention conditions must be reasonable and proportional. See Center for the Defense of the Individual. One may learn about the standards of

reasonableness and proportionality from the Standard Minimum Rules for Treatment of Prisoners, which were adopted by the United Nations in See Droish, at ; Sajadia, at These standards apply to all forms of imprisonment, including detention. We reviewed the details of these instructions in Center for the Defense of the Individual, at par. The ministry further stated:

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2: Immigration in the US: Detention and Due Process

Ensures humane treatment for persons who fall into the hands of the enemy, particularly prisoners of war, military wounded, sick, and shipwrecked and civilians Protects innocent civilians from unnecessary suffering and limits damage to civilian property.

Drape ourselves in fur? Many people view us as certifiable, grade-A, top of the class nut cases. Reduced to its essentials, however, what we believe is just plain common sense. We believe the animals killed for food, trapped for fur, used in laboratories or trained to jump through hoops are unique somebodies, not generic somethings. We believe what happens to them matters to them. Because what happens to them makes a difference to the quality and duration of their life. In these respects, we believe humans and animals are the same, are equal. And so it is that all animal rights advocates share a common moral outlook: We should not do to them what we would not have done to us. Not experiment on them. Not train them to jump through hoops. Part of the answer concerns our disparate beliefs about how often animals are treated badly. We believe this is a tragedy of incalculable proportions. Non-activists believe mistreatment occurs hardly at all. That they think this way seems eminently reasonable. After all, we have laws governing how animals may be treated and a cadre of government inspectors who make sure these laws are obeyed. What do our laws require? In the language of our most important federal legislation, the Animal Welfare Act, animals must receive "humane care and treatment. If things were as bad as advocates say they are, there would be an enormous amount of inhumane treatment brought to light by government inspectors. Yet this is precisely what government inspectors do not find. Of that total, only sites were reported for possible violations because of improper handling of animals. That works out to a compliance rate of almost 99 percent. No wonder the general public believes that, with rare exceptions, animals are treated with mercy and kindness, with sympathy and compassion. Consider some examples of what happens to animals in research laboratories. Cats, dogs, non-human primates and other animals are drowned, suffocated, and starved to death. They are burned, subjected to radiation, and used as "guinea pigs" in military research. Their eyes are surgically removed and their hearing is destroyed. They have their limbs severed and organs crushed. Invasive means are used to give them heart attacks, ulcers and seizures. They are deprived of sleep, subjected to electric shock, and exposed to extremes of heat and cold. Everyone of these procedures and outcomes complies with the Animal Welfare Act. Per annum, the number of animals used in research laboratories subject to APHIS inspections is estimated to be 20 million. This figure, though large, is dwarfed by the 10 billion animals annually slaughtered to be eaten, just in the United States. Remarkably, farmed animals are explicitly excluded from the legal protection provided the Animal Welfare Act. Here is what the AWA says: And what treatment might the rules allow? Here are some examples. Laying hens live a year or more in cages the size of a filing drawer, seven or more per cage, after which they routinely are starved for two weeks to encourage another laying cycle. Female hogs are housed for four or five years in individual barred enclosures "gestation stalls" barely wider than their bodies, where they are forced to birth litter after litter. Until the recent "Mad Cow" scare, beef and dairy cattle too weak to stand "downers" were dragged or pushed to their slaughter. Geese and ducks are force-fed the human equivalent of 30 pounds of food per day to enlarge their liver, the better to meet the demand for foie gras. In the newspeak of the Animal Welfare Act, more than "food" animals fail to qualify as animals. The same is true of any whatcha-ma-call-it "used or intended for fiber. This is fact, not fiction. Fur bearing animals, whether trapped in the wild or raised on fur mills, are exempt from the legal protection, scant though it is, provided by the AWA. As is true of animal agriculture, the fur industry gets to set its own rules and regulations of "humane care. On fur mills, mink, chinchilla, raccoon, lynx, foxes and other fur bearing animals are confined in wire-mesh cages for the duration of their life. Waking hours are spent pacing back and forth, or rolling their heads, or jumping up the sides of their cages, or mutilating themselves, or cannibalizing their cage mates. Death is caused by breaking their necks, or by asphyxiation using carbon dioxide or carbon monoxide , or by shoving electric rods up their anus to "fry" them from the inside out. Animals trapped in the wild take 15 hours on average to die. Trapped fur-bearers frequently chew themselves apart in a futile attempt to save their

life. All perfectly legal; every bit of it in keeping with industry standards for kindness and mercy, sympathy and compassion. Those of us of a certain age remember the immortal words of the television announcer Howard Beale, in the film Network. Things are crazy, Beale says. The world is a mess. People need to get mad. They need to get mad as hell for two reasons. First, they need to get mad as hell because of how they have been abused. All is well at the lab, on the farm, in the wild. Animals are being treated humanely. Not any more, one hopes. Second, people need to get mad as hell because of how animals are being abused. When the organs of animals are crushed and their limbs are severed; when they are made sick by the food they are forced to eat and spend their entire life alone, in isolation; when they are gassed to death or have their neck broken: No propaganda machine in the world can turn these appalling facts into something they are not. If the day comes when the general public does get mad as hell, the ranks of animal rights advocates will begin to grow in unprecedented numbers. When this day comes, but not until this day comes, our shared hope for a world in which animals truly are treated humanely finally will have realistic legs to stand on. Regan will be reading from his most recent book, Empty Cages: Facing the Challenge of Animal Rights see tomregan-animalrights.

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3: principles of distinction, proportionality and precautions - Spanish translation â€“ Linguee

- Established standards for humanitarian treatment of war - Applies at time of war and armed conflict to governments who have ratified its terms, states are a party.

Right to Humane Treatment and Terrorism In the context of state responses to terrorist violence, the above-mentioned guarantees governing the right to humane treatment are particularly relevant in several potential situations, including the treatment and interrogation of suspected terrorists during and after their capture by state agents, and, as discussed in Part III H , the detention and removal of aliens, including women and children. As with other categories of human rights, where individuals fall under the authority and control of the state in situations outside of armed conflict, their treatment is governed exclusively by international human rights law. Where an armed conflict is underway, however, the treatment of detainees and others is also subject to international humanitarian law. Further, in the context of international armed conflicts, a preliminary issue arises concerning the status of detainees under the Geneva Conventions, which has implications for the nature of the treatment to which the individuals may be entitled, including in particular distinct treatment to be afforded to prisoners of war and civilians subject to internment. Accordingly, when individuals have committed belligerent acts and have fallen into the hands of the enemy in the context of an international armed conflict and a doubt arises as to their entitlements to prisoner of war status, a competent tribunal should determine the status of the detainees. Until the status of the detainees has been determined by a competent tribunal, they should be afforded prisoner of war status[ ] or a similar protection. On this matter, it should be recalled that a prisoner of war is immune from criminal prosecution under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war. This immunity does not, however, extend to acts that transgress the rules of international law applicable in armed conflict. Notwithstanding the importance of ascertaining the status of persons falling into the hands of an adversary in international armed conflict situations, however, it is also significant to recognize that the regimes of human rights law and of international humanitarian law each provides for minimal and non-derogable requirements dealing with the humane treatment of all persons held under the authority and control of the state. While the humanitarian law protections governing international armed conflicts in particular provide for a specific and detailed lex specialis that must inform the right to humane treatment of victims of such conflicts, it is notable that many of the fundamental rules and principles under this regime are similar to those applicable outside of international armed conflicts, particularly with respect to the conditions under which individuals may be detained and interrogated. A discussion of these similar requirements and their corresponding sources under international human rights and humanitarian law is provided below. Specifically with regard to conditions of detention, as individuals may be detained either before any criminal charges have been brought against them, untried prisoners should be kept separate from convicted prisoners. The facilities in which detainees are kept must also respect minimum physical attributes. Under no circumstances may detainees be held in locations that would endanger their lives or physical and mental health. The detainees are to have suitable bedding and blankets considering the climate, and the personal characteristics of the detainees. They should have access to sanitary conveniences sufficiently hygienic and clean. While civilian courts are charged with supervising human rights protections in times of peace and states of emergency, the Third and Fourth Geneva Conventions provide the Protecting Powers[ ] and, with the consent of the Detaining Power concerned, the International Committee of the Red Cross, with roles in supervising the detention and treatment of prisoners of war and civilian internees during international armed conflict. The ICRC may also play a similar role in the context of a non-international armed conflict. Where this occurs, the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum standards of treatment of detainees, and the supervisory mechanisms under international human rights law, including habeas corpus and amparo remedies, may necessarily supercede international humanitarian law in order to ensure at all times effective protection of the fundamental rights of detainees. Detainees who are subject to disciplinary or penal sanctions are to be afforded similar detention conditions, treated humanely at all times and never subjected to

torture or inhumane treatment. The interrogation of individuals suspected of having committed terrorist activities is also strictly limited by both international human rights and humanitarian law standards relative to the right to humane treatment and the absolute prohibition of torture. Accordingly, all methods of interrogation that may constitute torture or other cruel, inhuman or degrading treatment are strictly prohibited. This could include severe and deliberate mistreatment causing very serious and cruel suffering, such as severe beatings,[ ] suspending prisoners in humiliating and painful ways,[ ] rape[ ] and sexual aggression,[ ] electric shocks, [ ] suffocation, [ ] burns[ ] and the extraction of fingernails or teeth. In addition, while each case must be evaluated on its own circumstances, torture or other cruel, inhumane or degrading treatment could include more subtle treatments that have nevertheless been considered sufficiently cruel, such as exposure to excessive light or noise, administration of drugs in detention or psychiatric institutions, prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance, total isolation and sensory deprivation. Acts constituting other cruel, inhuman or degrading punishment or treatment are also strictly prohibited. As discussed above, conduct of this nature could include death threats,[ ] prolonged incommunicado detention,[ ] and deprivation of sleep. Finally, it should be emphasized that although detainees may be interrogated, they may not be compelled to be a witness against themselves, to plead guilty or to confess. Applicable international law norms may also have implications with respect to the detention and removal of immigrants, including those suspected of terrorist activity. Further discussion in this regard is provided in Part III H below concerning the situation of migrant workers, asylum seekers, refugees and other non-nationals. It should be emphasized that notwithstanding the threat or gravity of a situation of terrorist violence, and regardless of whether it arises in the context of armed conflict, the right to humane treatment is a non-derogable right under Article 27 2 of the American Convention and Article 5 of the Inter-American Torture Convention. International Human Rights Law Every 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. Every accused person is presumed to be innocent until proved guilty. Every 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, and not to receive cruel, infamous or unusual punishment. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom. As is evident from the above texts, which mirror protections provided for in other regional and international human rights instruments,[ ] these provisions guarantee fundamental substantive and procedural protections in the determination of accusations of a criminal nature. As discussed in further detail below, these protections are defined to encompass certain fundamental principles of criminal law, including the right to be presumed innocent, and the nullum crimen sine lege, nulla poena sine lege, and non-bis-in-idem principles. Also guaranteed are the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, and a non-exhaustive enumeration of due procedural guarantees that are considered essential to a fair hearing. The rules and principles embodied in the above protections are relevant not only to criminal proceedings, but also, mutatis mutandis, to other proceedings through which rights and obligations of a civil, labor, fiscal or other nature are determined. It should also be observed at this stage that certain multilateral conventions that address efforts to combat

terrorism and its various manifestations specifically provide that individuals accused of crimes relating to terrorism must be afforded the legal guarantees of due process in any proceedings taken against them. According to the jurisprudence of the inter-American human rights system, as articulated through opinions and judgments of the Inter-American Court of Human Rights and special and individual case reports of the Commission, the components of the requirements of fair trial and to due process of law entail certain essential requirements and restrictions. Several of the most pertinent of these attributes are discussed below. Fundamental Principles of Criminal Law Among the most fundamental principles governing criminal prosecutions that are afforded protection under international human rights law are the presumption of innocence, the non-bis-in-idem principle, and the nullum crimen sine lege and nulla poena sine lege principles, as well as the precept that no one should be convicted of an offense except on the basis of individual penal responsibility. The Commission has long emphasized the axiomatic nature of the presumption of innocence to criminal proceedings, and has called upon states to ensure that it is expressly provided for in their domestic laws. Also central to fair criminal processes is the non-bis-in-idem principle, which has been described by the Inter-American Court in the context of Article 8 4 of the American Convention as intending to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause. The nullum crimen sine lege and nulla poena sine lege principles, often referred to jointly as the principle of legality, prohibit states from prosecuting or punishing persons for acts or omissions that did not constitute criminal offenses, under applicable law, at the time they were committed. The human rights organs of the inter-American system have also interpreted the principle of legality as requiring crimes to be defined in unambiguous terms. This in turn requires a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable by other penalties. These principles are particularly significant in the context of domestic laws that prescribe crimes relating to terrorism. Some states have endeavored to prescribe a specific crime of terrorism based upon commonly-identified characteristics of terrorist violence. In order to ensure that punishments imposed for crimes relating to terrorism are rational and proportionate, member states are also encouraged to take the legislative or other measures necessary to provide judges with the authority to consider the circumstances of individual offenders and offenses when imposing sentences for terrorist crimes. Finally, criminal prosecutions must comply with the fundamental requirement that no one should be convicted of an offense except on the basis of individual penal responsibility, and the corollary to this principle that there can be no collective criminal responsibility. Much of the existing inter-American jurisprudence in this area has developed through the consideration and condemnation of certain specific practices by which member states have endeavored to respond to terrorist and other threats and which have been found to fall short of these conditions and standards. Underlying this aspect of the right to a fair hearing are the fundamental concepts of judicial independence and impartiality, which, like the principles of criminal law canvassed above, are broadly considered indispensable to the proper administration of justice and the protection of fundamental human rights. These requirements in turn require that a judge or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias. In the context of these fundamental requirements, the jurisprudence of the inter-American system has long denounced the creation of special courts or tribunals that displace the jurisdiction belonging to the ordinary courts or judicial tribunals and that do not use the duly established procedures of the legal process. The basis of this criticism has related in large part to the lack of independence of such tribunals from the Executive and the absence of minimal due process and fair trial guarantees in their processes. It has been widely concluded in this regard that military tribunals by their very nature do not satisfy the requirements of independent and impartial courts applicable to the trial of civilians, because they are not a part of the independent civilian judiciary but rather are a part of the Executive branch, and because their fundamental purpose is to maintain order and discipline by punishing military offenses committed by members of the military establishment. In such instances, military officers assume the role of judges while at the same time remaining subordinate to their superiors in keeping with the established military hierarchy. This is not to say that military tribunals have no place within the military justice systems of member states. The Inter-American Court and this Commission have

recognized in this connection that military courts can in principle constitute an independent and impartial tribunal for the purposes of trying members of the military for certain crimes truly related to military service and discipline and that, by their nature, harm the juridical interests of the military, provided that they do so with full respect for judicial guarantees. Article 84 of the Third Geneva Convention, for example, expressly provides that [a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offense alleged to have been committed by the prisoner of war. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article In any event, the standards of due process to which unprivileged combatants are entitled may in no case fall below those under Article 75 of Additional Protocol I. Indeed, states are obliged to take all necessary measures to prevent violence against judges, lawyers and others involved in the administration of justice. Right to Trial within a Reasonable Time The fundamental components of the right to due process and to a fair trial also include the right to a hearing within a reasonable time. While the concept of reasonable time is not easy to define, certain prerequisites have been articulated in this and other human rights systems that are considered necessary to give proper effect to this right. It has been held in particular that the concept of reasonable time encompasses the entire proceeding at issue, from the first act of the process until a final and firm judgment is delivered, including any appeals that may be filed. Right to Due Guarantees of a Fair Trial International human rights law requires that a hearing before a competent, independent and impartial tribunal, in order to be fair, must be accompanied by certain due guarantees that afford a person a proper and effective opportunity to defend against any charges levied against him or her. While the governing principle in any proceeding must always be fairness, and while additional guarantees may be necessary in specific circumstances to ensure a fair hearing,[] the most essential protections have been articulated as including the right of the accused to prior notification in detail of the charges against him or her, the right to defend himself or herself personally or to be assisted by legal counsel of his or her own choosing or free of charge where the requirements of fairness so require, and the right to communicate freely and privately with counsel. These protections also include the right to adequate time and means for the preparation of his or her defense, to examine witnesses present in the court, and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts. Further, a defendant must not be compelled to be a witness against himself or herself or to plead guilty, and must be afforded the right to a public trial and the right to appeal the judgment to a higher court. In cases where the defendant does not understand or speak the language of the court or tribunal he or she must be assisted without charge by a translator or interpreter. Certain aspects of these protections warrant further comment. Among the factors that bear on the determination of whether free legal representation is necessary for a fair hearing are the significance of a legal proceeding, its legal character, and its context in a particular legal system. The right to assistance of counsel is in turn intimately connected with the right of a defendant to adequate time and means for the preparation of his or her defense,[] which requires that all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. The effective conduct of a defense additionally encompasses the right of the person concerned to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf, under the same conditions as opposing witnesses. This requirement has been interpreted to prohibit the failure to provide a defendant with the right to cross-examine the witnesses whose testimony is the basis of the charges brought against him or her. Once an unfavorable decision is rendered at first instance, the right to appeal that judgment to a higher court must also be granted in compliance with fundamental fair trial protections. Civil and other Proceedings While compliance with the protections discussed above has most frequently been evaluated by the Inter-American Commission and Court in the context of criminal proceedings, the requirements of a fair trial and due process of law are not, as indicated previously, limited to such proceedings. Inter-State Cooperation in Criminal Matters Also subject to the due process and other

requirements of international human rights protections are methods of inter-state cooperation in the investigation, prosecution and punishment of international, transnational and domestic crimes. Processes of this nature include the extradition of criminal suspects for criminal prosecution,[] inter-state transfer of witnesses and prisoners in the context of criminal proceedings, and various modes of mutual legal assistance in criminal matters. Also as properly recognized in the Inter-American Convention against Terrorism,[] the manner in which states implement or otherwise participate in these methods of cooperation must comply with minimal standards of human rights law, including in particular the right to liberty and security, the rights to due process of law and to a fair trial, and the right to privacy. As with all acts and omissions attributable a state and its agents, these human rights protections oblige states to refrain from supporting or tolerating methods of inter-state cooperation that fail to conform with their international human rights commitments.

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4: Basic Documents

The last true proportionality discussed is a consideration of hostile action taking during a conflict, or jus in bello proportionality. This consideration weighs the expected military gain of a particular action against the collateral damage and injuries that are expected from the act.

It is a violation of the laws of war to engage in combat without meeting certain requirements, among them the wearing of a distinctive uniform or other easily identifiable badge, and the carrying of weapons openly. Later additions[edit] International humanitarian law now includes several treaties that outlaw specific weapons. These conventions were created largely because these weapons cause deaths and injuries long after conflicts have ended. Unexploded land mines have caused up to 7, deaths a year; unexploded bombs, particularly from cluster bombs that scatter many small "bomblets", have also killed many. For these reasons, the following conventions have been adopted: Combatants who break specific provisions of the laws of war lose the protections and status afforded to them as prisoners of war , but only after facing a "competent tribunal". Spies and terrorists are only protected by the laws of war if the "power" which holds them is in a state of armed conflict or war, and until they are found to be an "unlawful combatant". Depending on the circumstances, they may be subject to civilian law or a military tribunal for their acts. In practice, they have often have been subjected to torture and execution. The laws of war neither approve nor condemn such acts, which fall outside their scope. After a conflict has ended, persons who have committed any breach of the laws of war, and especially atrocities, may be held individually accountable for war crimes through process of law. Key provisions and principles applicable to civilians[edit] The Fourth Geneva Convention focuses on the civilian population. The two additional protocols adopted in extend and strengthen civilian protection in international AP I and non-international AP II armed conflict: A "civilian" is defined as "any person not belonging to the armed forces", including non-nationals and refugees. Luis Moreno Ocampo, chief prosecutor of the international criminal court, wrote in A crime occurs if there is an intentional attack directed against civilians principle of distinction It requires parties to an armed conflict to distinguish at all times, and under all circumstances, between combatants and military objectives on the one hand, and civilians and civilian objects on the other; and only to target the former. It also provides that civilians lose such protection should they take a direct part in hostilities. Under IHL, a belligerent may apply only the amount and kind of force necessary to defeat the enemy. Further, attacks on military objects must not cause loss of civilian life considered excessive in relation to the direct military advantage anticipated. Civilians are entitled to respect for their physical and mental integrity, their honour, family rights, religious convictions and practices, and their manners and customs. Adverse distinction based on race, sex, nationality, religious belief or political opinion is prohibited in the treatment of prisoners of war, [46] civilians, [47] and persons hors de combat. Women must be protected from rape and from any form of indecent assault. Children under the age of eighteen must not be permitted to take part in hostilities. Protections should be provided "without any adverse distinction founded on sex". For example, with regard to female prisoners of war, women are required to receive treatment "as favourable as that granted to men". A study of the 42 provisions relating to women within the Geneva Conventions and the Additional Protocols found that almost half address women who are expectant or nursing mothers. UN Security Council Resolutions and , which aim to enhance the protection of women and children against sexual violations in armed conflict; and Resolution , which aims to improve the participation of women in post-conflict peacebuilding. In addition, international criminal tribunals like the International Criminal Tribunals for the former Yugoslavia and Rwanda and mixed tribunals like the Special Court for Sierra Leone have contributed to expanding the scope of definitions of sexual violence and rape in conflict. They have effectively prosecuted sexual and gender-based crimes committed during armed conflict. There is now well-established jurisprudence on gender-based crimes. Nonetheless, there remains an urgent need to further develop constructions of gender within international humanitarian law. Although the modern codification of IHL in the Geneva Conventions and the Additional Protocols is relatively new, and European in name, the core concepts are not new, and laws relating to warfare can be found in all cultures. ICRC studies

on the Middle East, Somalia, Latin America, and the Pacific, for example have found that there are traditional and long-standing practices in various cultures that preceded, but are generally consistent with, modern IHL. It is important to respect local and cultural practices that are in line with IHL. Relying on these links and on local practices can help to promote awareness of and adherence to IHL principles among local groups and communities. There are areas in which legal norms and cultural practices clash. Violence against women, for example, is frequently legitimised by arguments from culture, and yet is prohibited in IHL and other international law. In such cases, it is important to ensure that IHL is not negatively affected.

HUMANE TREATMENT AND PROPORTIONALITY pdf

5: Customary IHL - Practice Relating to Rule Humane Treatment

The myth of 'humane' treatment. by Tom Regan. Feb. 04, We believe this is a tragedy of incalculable proportions. Non-activists believe mistreatment occurs hardly at all.

The United States has an obligation to ensure the human rights of all immigrants, documented and undocumented alike; this includes the rights to personal liberty, to humane treatment, to the minimum guarantees of due process, to equality and nondiscrimination and to protection of private and family life. Right to personal liberty In general, the paramount principle where the right to personal liberty is concerned is that pre-trial detention is an exceptional measure. For cases involving criminal proceedings, the Inter-American Commission has developed the criteria that must be met in order for preventive detention or detention pending trial to be compatible with the right to personal liberty. The precautionary measures are established only when they are necessary for the proposed objectives. The pre-trial detention is not an exception to this rule. In compliance with the principle of exceptionality, the pre-trial detention will be appropriate when it is the only way to ensure the purposes of the process and when it has been demonstrated that less damaging measures would be unsuccessful to such purposes. Therefore, if possible, the pre-trial detention has to be replaced for a lower severity measure. Similarly, the Inter-American Commission has held that the principle of necessity that must regulate preventive detention implies that the authority that ordered the measure must sufficiently prove the reasons why the existence of indications of criminal responsibility has any bearing on the efficient course of the investigations in the case in question. It also implies establishing the reasons why it is appropriate to impose preventive detention rather than a less severe measure. No one shall be subjected to arbitrary arrest or detention. In the case of immigration detention, the standard for the exceptionality of pre-trial detention must be even higher because immigration violations ought not to be construed as criminal offenses. In effect, to be in compliance with the guarantees protected in Articles I and XXV of the American Declaration, member States must enact immigration laws and establish immigration policies that are premised on a presumption of liberty --the right of the immigrant to remain at liberty while his or her immigration proceedings are pending-- and not on a presumption of detention. The existence of a criminal record is not sufficient to justify the detention of an immigrant once he or she has served his or her criminal sentence. Whatever the case, the particular reasons why the immigrant is considered to pose a risk have to be explained. The arguments in support of the appropriateness of detention must be set out clearly in the corresponding decision. Specifically, in the case of immigrants the Human Rights Committee observed that illegal entry by itself would not justify detention for a period. It was felt that States should be reminded that detention shall be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible. Grounds for detention must be clearly and exhaustively defined and the legality of detention must be open for challenge before a court and regular review within fixed time limits. Provisions should always be made to render detention unlawful if the obstacle for identifying immigrants in an irregular situation or carrying out removal from the territory does not lie within their sphere, for example, when the consular representation of the country of origin does not cooperate or legal considerations - such as the principle of non-refoulement barring removal if there is a risk of torture or arbitrary detention in the country of destination - or factual obstacles - such as the unavailability of means of transportation - render expulsion impossible. Apart from the basic right to personal liberty that all immigrants enjoy, various international instruments have established specific restrictions regarding the detention of certain persons who are members of more vulnerable groups. The IACHR will now summarize the specific international standards on the right to personal liberty with respect to some of these groups. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is

regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. The right to communicate with these representatives in private, and the means to make such contact should be made available. Migrant families and unaccompanied children Given the intrinsic protection of family life recognized in Articles V, VI and VII of the American Declaration, it is possible to conclude that families and pregnant women who seek asylum ought not to be detained; and if they are detained, they ought not to be subjected to prison-like conditions. Under international standards, unaccompanied minors ought not to be detained either. Only in the most extreme cases could such a measure be justified. The UNHCR also concluded that unaccompanied children who are detained should benefit from the same minimum procedural guarantees of due process that asylum seekers enjoy and a legal guardian or adviser should be appointed for them. Right to due process and access to justice As the Inter-American Commission wrote: To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages. Right to judicial protection and to a habeas corpus petition 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. Right to seek asylum The right to humane treatment during detention Thus far, the IACHR has established that immigration detention must be the exception and must be applied in conformity with certain requirements. The Inter-American Commission has also underscored the relevant guarantees of due process and access to justice. In this section, the IACHR will focus on the detention conditions that must be present in those exceptional cases in which deprivation of liberty is necessary, taking into consideration general criteria regarding humane treatment as well as those special guarantees that must be afforded to ensure that immigration detentions, which are civil in nature, do not become punitive. The Inter-American Principles on Detention offer specific guidelines on basic provisions â€”such as the rights to food, drinking water, sleeping quarters, hygiene, clothing and educational activities, recreation, religious freedom and visits- so as to ensure that all persons held in the custody of a state receive humane treatment. Article 7 reads as follows: When determining whether the obligation to provide humane treatment has been observed, consideration must be given to the question of whether the conditions of detention to which immigrants deprived of their liberty are subjected take into account their status and needs. Australia, the Human Rights Committee concluded that Article 7 had been violated because a person seeking asylum had been detained for such a prolonged period as to cause him mental illness. The next sections describe the specific rights that follow from the obligation to provide humane treatment. Where necessary, the special needs of immigrants are explained. Right to medical care All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by qualified medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture. The medical or psychological information shall be entered into the respective official register, and when necessary taking into account the gravity of the findings, it shall be immediately transmitted to the competent authority 94] Principle X sets out guidelines on the range of medical, psychiatric and dental services to which immigration detainees should have access, from basic care to prolonged, ongoing treatment in the case of the most serious afflictions. The Inter-American Principles also spell out specific requirements on involuntary seclusion and solitary confinement in the case of persons with mental disabilities: Persons with mental disabilities who are secluded shall be under the care and supervision of qualified medical personnel. When examining the specific medical needs of immigration detainees, the United Nations Special Rapporteur on the Human Rights of Migrant Workers recommended the following to the States: Ensuring the presence in holding centres of a doctor with appropriate training in psychological treatments. Migrants should

have the possibility of being assisted by interpreters in their contacts with doctors or when requesting medical attention. Detention of migrants with psychological problems, as well as those belonging to vulnerable categories and in need of special assistance, should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance. Right to be separated from criminal inmates In keeping with the legal obligations on humane treatment set forth in Article XXV of the American Declaration, Principle XIX of the Inter-American Principles on Detention requires strict separation of the various categories of persons deprived of their liberty: In particular, arrangements shall be made to separate men and women; children and adults; the elderly; accused and convicted; persons deprived of liberty for civil reasons and those deprived of liberty on criminal charges. In cases of deprivation of liberty of asylum or refugee status seekers, and in other similar cases, children shall not be separated from their parents. Asylum or refugee status seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges. Right to be notified of transfer to other detention establishments The transfers of persons deprived of liberty shall be authorized and supervised by the competent authorities, who shall, in all circumstances, respect the dignity and fundamental rights of persons deprived of liberty, and shall take into account the need of persons to be deprived of liberty in places near their family, community, their defense counsel or legal representative, and the tribunal or other State body that may be in charge of their case. The transfers shall not be carried out in order to punish, repress, or discriminate against persons deprived of liberty, their families or representatives; nor shall they be conducted under conditions that cause physical or mental suffering, are humiliating or facilitate public exhibition. When transfer is ordered, special consideration is to be given to the impact that transfer will have on the right to protection of the family and the right to due process. When an immigrant has been in a country for some time, he or she should be held in custody in a place close to his or her habitual place of residence, in order to safeguard those rights.

HUMANE TREATMENT AND PROPORTIONALITY pdf

6: The myth of 'humane' treatment - INDY Week

One may learn about the standards of reasonableness and proportionality from the Standard Minimum Rules for Treatment of Prisoners, which were adopted by the United Nations in See Droish, at ; Sajadia, at

See for example the allegations regarding Gaza University. I understand that it is unlawful to purposefully put your own civilians in harms way to try to shield an otherwise legitimate target. To clarify, I understand that even in this situation Israel should still try to minimize civilian causalities. As I argued in my Ariel F. I was just speaking in shorthand â€" but the war crimes I mention all permit attacks on civilian objects that are military objectives. That position seems right to me. Involuntary human shields, by contrast, are clearly civilians and thus protected from disproportionate attack regardless of the bad faith of the military forces that use them. That may seem unfair, for the reasons you mention, and some scholars believe that the proportionality calculus should be relaxed in such situations. But I disagree, because â€" again â€" the involuntary human shields should not be punished for the bad faith of the military forces that use them. Moreover, their use does not prevent an attack, although it may require the side lawfully defending itself to change its tactics in order to minimize collateral damage. If so, we might want to discuss, in the framework of international law and politics, the following issues neatly summarized by Dallas Darling in a piece on Middle East Online: It is about Israel becoming a state after the Second World War and the displacement of hundreds of thousands of Palestinians into makeshift UN refugee camps. It is about years of Palestinians living in humiliation and experiencing five major Israeli-Arab Wars. It is about a generational Nakba, or Palestinian catastrophe, in which hundreds of thousands of Palestinians for decades have experienced dispossession. The Gaza crisis is about a punitive and fatal economic blockade initiated and maintained by Israeli Defense Forces. It is about checkpoints and how innocent Palestinian civilians have been detained, imprisoned, and accidentally shot and killed. One of the difficulties of engaging in discussion on this topic is similar to difficulties involved in the dispute over Kosovo: It is difficult for cosmopolitan intellectuals who possess means of exit to appreciate how such beliefs make debate problematic. A second condition for movement beyond stasis is to help parties deal with real, present day fears, without seeking solace in illusory claims about prior ownership of land from pre-modern times. And then you accuse me of being selective and ends-driven. Many people often cite the Israeli-Palestinian problem as the key to the Middle East. Yet, Patrick and all too many only see one problem â€" Israel. If you want to start citing Liechtenstein, then go ahead. Past that we have, Israel, Pakistan, various countries in Africa, and the like. If we go to history, say WW2, the proportionality analysis titled much further against civilians. So once again, state practice currently, by most of the actors, and probably by all actors in the past strongly point in one direction. Kevin, I cited the US because it provides by far the biggest example of state practice. The others actors are known well-enough. Carrie McDougall HLS, Putting aside your petty sarcastic digs at the British and at me, perhaps you can explain why state practice is more relevant to determining proportionality than opinio juris. Nor do the problems that concern me add up to one. Always enjoy reading them. Bear in mind, though, that many of the legal concepts have moral analogues, and often those reacting to the events in Gaza are making moral, not legal, judgments, though they often conflate them. This article by Robert Fisk is instructive on the point: That position at least has the advantage of being forthright, if stupid. Hiding behind international law when you are really just anti-Israel is both stupid and dishonest. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations. First, I invite David to explain the conception of morality according to which the Israeli actions in Gaza are proportional to the harm inflicted by Hamas rockets. Does David think Palestinians are human beings, whose life is of equal value with that of Israelis or not? Did the RAF bomb churches and tankers and police stations and zap civilians to teach the Irish a lesson? Israeli Bombardment of Gaza, etc. I agree entirely that the legal focus on the whole proportionality business takes away from the larger picture of the Israeli-Palestinian conflict, and of the Gaza situation in particular. The law can only do so much. It of course cannot provide a solution to the Israeli-Palestinian conflict. It can only attempt to manage some of its

aspects, through at times vague and abstract rules that apply in all conflicts, and that are agreed upon beforehand. Once a conflict starts, it is generally impossible to find any agreement on what is moral, just or legitimate. But that does not translate into some sort of immediate condemnation of Israeli actions as war crimes, no matter what the facts on the ground are. Fisk and implicitly Prof Leiter to claim a moral superiority of the British is quite foolish â€" you just need to look at the targeted bombings of civilian areas in WW2 or the concentration camps in the Boer War to realize what the British reaction was or would be to a real threat. And you should spend your time attacking the far worse, from this perspective, NATO action in Afghanistan. A government is the agent of its citizens, not the whole world. Brian, I assume you fed your children today. Did you feed all the starving children in Bangladesh? Then how do you justify feeding your children while letting others starve? I came to that conclusion largely after many extended discussions with Palestinians mostly, to be fair, from the West Bank. Prior to that, I had always assumed a two-state solution would be best. Rather, the reason I always, always emphasize my Palestinian friends when discussing Israel, particularly when people like David Bernstein are involved, is simply to emphasize that, just like Israelis, Palestinians are human beings. Neither has superior claim to humanity. A point I think David Bernstein, and others on both sides, frankly , often lose sight of. Ergo, let David Bernstein eat cake. A Theory of Intuition and Intrinsic Value You seem sympathetic to the Palestinians. You must think the Israelis lack humanity. See how stupid that is? Would the Palestinians be better or worse off? Supporting Hamas, implicitly or explicitly, is hardly the way to further the interests of the Palestinian public. Maybe if I put it this way: Hamas is even more religious, more theocratic, less tolerant, and more apocalyptic in its ideology than George W. Perhaps those are misperceptions. But they are not mine alone. It would be reasonable, then, to believe that perhaps there is something beyond my far-left ideological bias as you perceive it creating those impressions. As it happens, I think Bush was an epically terrible President. From all my very distant observations, he seems like a relatively nice guy aside from the creepy shoulder-love given to Angela Merkel that one time. I believe he deeply belives in and is committed to his faith and that he tries to do what he thinks is right. This is the nature of public debate.

7: International humanitarian law - Wikipedia

[Additional Protocol I] provides that all persons in the power of a party to the conflict are entitled to at least a minimum of humane treatment without adverse discrimination on grounds of race, gender, language, religion, political discrimination or similar criteria.

In the "Introduction" to his book, Introduction to Animal Rights, Francione says that granting other animals one right, the right not to be property, would mean that we could no longer justify our institutional exploitation of animals for food, clothing, amusement, or experiments. If we mean what we say and regard animals as having morally significant interests, then we really have no choice: This position that I am proposing in this book is radical in the sense that it would force us to stop using animals in many of the ways that we now take for granted. In another sense, however, my argument is quite conservative in that it follows from a moral principle that we already claim to accept â€" that it is wrong to impose unnecessary suffering on animals. If the interest of animals in not suffering is truly a morally significant interest, and if animals are not merely things that are morally indistinguishable from inanimate objects, then we must interpret the prohibition against unnecessary animal suffering in a way similar to the way that we interpret the prohibition against unnecessary human suffering. In both cases, suffering cannot be justified because it facilitates the amusement, convenience, or pleasure of others. Humans and animals ought to be protected from suffering at all as the result of their use as the property or resources of others. Francione traces the humane-treatment principle back to Jeremy Bentham, a utilitarian philosopher who also influenced Peter Singer. And both Singer and Francione rely on the principle of equal consideration. I agree with Francione that his argument, based as it is in the principle of humane treatment, is "quite conservative. But I also believe there are significant limitations to the rights position he promotes. We hear the calls for humane treatment of people in war zones, refugees, noncitizens, immigrants, detainees, prisoners, small children, disabled people particularly those with mental disabilities , people living in poverty, and so on. The status of human prisoners in the United States gives us good cause to doubt that simply abolishing the property status of other animals will radically reframe the humane-treatment principle. For instance, reforms that oppose torture, overcrowding, and neglect, as well as calls for adequate food, water, and shelter are all considered in "the way that we interpret the prohibition against unnecessary human suffering" in the context of the prison-industrial complex. However, under the humane-treatment principle the imprisonment of other humans is also taken for granted. Abolishing the property status and insisting on equal consideration in applying the humane-treatment principle does not mean the structure of oppression will be eliminated. For instance, the abolition of human slavery in the United States led to the creation of Black Codes, which specifically criminalized Black people and fueled the with the growth of the prison-industrial complex. Similarly, Francione assures us that human supremacy can still exist under the rights position. In the essay "Animals â€" Property or Persons? Essays on the Abolition of Animal Exploitation, he writes, "Moreover, recognition of this right [not to be treated as property] would not preclude our choosing humans over animals in situations of genuine conflict. If we consider criminalization in the US after the Emancipation Proclamation, we see the abolition of human slavery has not precluded choosing Whites citizens over people of color and noncitizens in situations defined by the system of criminalization as genuine conflicts. Likewise, under the rights position, the structure of human supremacy can still exist. Consider how free-living animals are likely be affected by the rights position. In "Animals â€" Property or Persons? If we stopped treating animals as resources, the only remaining human animal conflicts would involve animals in the wild. Deer may nibble our ornamental shrubs; rabbits may eat the vegetables we grow. The occasional wild animal may attack us. In such situations, we should, despite the difficulty inherent in making interspecies comparisons, try our best to apply the principle of equal consideration and to treat similar interests in a similar way. This will generally require at the very least a good-faith effort to avoid the intentional killing of animals to resolve these conflicts, where lethal means would be prohibited if the conflicts involved only humans. I am, however, not suggesting that the recognition that animals interests have moral significance requires that a motorist who unintentionally strikes an animal be prosecuted for an animal

equivalent of manslaughter. This is cause for real concern. Francione leaves the door wide open for controlling deer for as little as nibbling on ornamental shrubs. There is no suggestion that these ornamental shrubs are part of the colonization of land inhabited by deer. Counter to Francione, I would also argue that the system of transportation needs to be considered an issue. Not a criminal issue as he suggested whereby motorists are charged with manslaughter, but as an anti-oppression issue. The system of transportation does great damage to other animal populations by colonizing, fragmenting, polluting, and otherwise harming the land, air, and water that they depend on. The rights position seems to favor the status quo on these issues. After all, such controls are rooted in the humane-treatment principle and they do not require treating other animals as property. However, as discuss at greater length in the article " Putting Other Animals on the Pill ," these reproductive controls are very oppressive. Furthermore, the rights position is likely to bolster human oppression under the prison-industrial complex. He then argues that the anticruelty laws fail because of the property status of other animals. That is, we cannot be expected to fairly apply the equal-consideration principle when we interpret the humane-treatment principle that these laws are based on as long as other animals are legally considered property. No doubt under the rights position it will be easier to convict people under anticruelty laws when other animals are no longer considered property. However, given the oppression inherent in the existing criminal punishment system is this really an improvement? Radical feminists of color in the antiviolence movement question the effectiveness of criminalization in ending violence against women, how can we expect increasing criminalization suggested under the rights position to do any better for other animals?

HUMANE TREATMENT AND PROPORTIONALITY pdf

8: Table of contents for War crimes and just war

"Proportionality was the hallmark of the Vietnam War, where it was called 'escalation.' Disproportionate response, a.k.a. the 'Powell Doctrine' Å“ inflicting massive, decisive, aggression- reversing damage at a scale of our choosÅ“ ing was the hallmark of the Gulf War.

Oxford Manual Article 7 of the Oxford Manual provides: Agreement between Representatives of Mr. With regard to non-international armed conflict, the manual restates the provisions of common Article 3 of the Geneva Conventions. The person, honour, family rights, religious conventions and practices, and manners and customs of protected persons must in all circumstances be respected. They must be humanely treated and protected against all acts or threats of violence, and against insults and public curiosity. In its chapter on rights and duties of occupying powers, the manual further states in a paragraph dealing with the rights of inhabitants of occupied territory: In its chapter on non-international armed conflicts, the manual restates the provisions of common Article 3 of the Geneva Conventions: By Common Article 3, the parties to a non-international armed conflict occurring in the territory of a party to the Conventions are obliged to apply, as a minimum, the following provisions: Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, gender, birth or wealth, or any other similar criteria. The Code of Conduct further explains: Rule 4 deals with the protection of civilians in the theatre of operations â€¦ As mentioned, civilians who do not take part in hostilities must not be targeted. They should also be respected and treated humanely in all circumstances â€¦ In general, civilians should be treated the way you would like you and your family to be treated in the same circumstances. Standard of treatment 2. Military operations in foreign lands expose CF personnel to civilian populations that differ markedly from our own. However different or unusual a foreign land may appear, these civilians are in all circumstances entitled to respect for their persons and property, their honour, their family rights, their religious convictions and practices, and their manners and customs. In your daily interaction with the civilian population, they must at all times be humanely treated and shall not be subjected to acts of violence, threats, or insults. Women and children in particular must not be subjected to rape, enforced prostitution, and any form of indecent assault. All civilians, subject to favourable considerations based on sex, health or age, must be treated with the same consideration and without any adverse distinction based in particular on race, religion or political opinion. In Volume 3 Instruction for non-commissioned officers studying for the level 1 and 2 certificates and for future officers of the criminal police , the manual states: The person, honour, â€¦ of all persons must be respected.

HUMANE TREATMENT AND PROPORTIONALITY pdf

9: Customary IHL - Rule Humane Treatment

But War Crimes and Just War is on shaky ground when it proposes replacing the existing legal principles of distinction, proportionality, and military necessity with a new comprehensive "baseline" principle of humane treatment. According to May, this new principle would require "minimal suffering on the part of others who are affected by our.

The Charter provides statutory protection for civil and political rights, and imposes obligations in relation to rights-compatible statutory interpretation section 32 and public decision-making compatible with rights section These are novel enforcement mechanisms within the Victorian legal system. However, there has been a distinct under-utilisation of the Charter in the courts. There are examples of judicial avoidance and minimisation of Charter-based arguments and findings, as well as judicial misunderstanding of the relevant Charter issues. This article explores Charter jurisprudence in Victoria through a case study on the rights of prisoners. This article begins by exploring the impediments to rights realisation in prisons, highlighting the rights vulnerabilities of persons held in closed environments. The article will consider cases concerning: The article concludes by identifying challenges facing Charter litigation. To better protect rights, [11] the Charter must become a source of reliance in litigation and jurisprudence, not merely a source of inspiration. Where the balance is against the prisoner, the reasons for that decision must be fully articulated against the standards of reasonableness and justifiability, providing transparency of and accountability for decision-making. Despite the risk features and tensions, consistent and effective engagement with the Charter has failed to materialise. It includes the right to open-air exercise, adequate food and clothing, take part in educational programmes, make complaints about prison management, and send letters to and receive letters from various public officials without those letters being opened by prison staff; [26] as well as religious rights and visiting rights. She would not be released from prison before turning 46, [32] and so needed to resume treatment during her period of imprisonment. By contrast, there are numerous examples of indirect recognition of rights that are not directly recognised in international jurisprudence. Whether greater flexibility regarding the indirect recognition of rights will permeate the jurisprudence as the Charter ages remains to be seen. Regarding the stand-alone section 13 a privacy and family argument, Castles relied on Dickson v United Kingdom, [54] which considered a corrections policy that restricted access to IVF treatment. There is, however, one difficulty. Justice Emerton does not explain why indirect protection under an instrument that could provide direct protection, is any different to indirect protection under an instrument that would have provided direct protection but for the timing of the VLRC reference. Public interest factors in Dickson v United Kingdom included: This analysis conflates two distinct questions: For example, the Supreme Court of Canada pursues broad, purposive interpretations of rights, [78] given that section 1 [79] allows reasonable limits to be placed on rights. Ascertain the meaning of the relevant provision by applying s 32 1 of the Charter in conjunction with common law principles of statutory interpretation and the Interpretation of Legislation Act Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter. If so, apply s 7 2 of the Charter to determine whether the limit imposed on the right is justified. Section 57A of the Corrections Act allows the Secretary to issue permits to leave the prison for health purposes, but section 57D requires the Secretary to be satisfied that the safety and welfare of the prisoner and the public is assured, and that suitable escorts and transport are arranged. Regarding the former, Castles highlights the multitude of competing interests in prison. There are competing interests of: First, section 22 creates a positive right and, if interpreted broadly and purposively, the obligations on the public authority may have been more considerable, including priority being given to IVF treatment amid all other competing demands when allocating scarce resources. Secondly, if limitations to section 22 had to be justified under section 7 2 , the reasonableness test under section 47 1 of the Corrections Act and permission under section 57D of the Corrections Act to leave would be filtered through proportionality under section 7 2 of the Charter, potentially producing a more favourable outcome. A correct rights-limits analysis would have balanced these against the nature of the rights at stake. Regarding the latter, because Castles was a Charter-inspired decision, Emerton J was able to defer to the judgment of corrections management, and rely on security and resource allocation issues. Her Honour

made explicit reference to VCA Momcilovic when construing the necessity aspect of section 47 1. The section 7 2 test of reasonableness and justifiability, and the relevant factors that shape the proportionality analysis, are not meant to be considered when interpreting section 47 1 under step one of the VCA Momcilovic method. The section 7 2 factors ensure the consistent application of limitations, and provide transparency and accountability for rights-limiting decisions, which the VCA Momcilovic method tends to undermine and mask respectively. In case it is doubted, I have considered the impact, if any, of the human right of humane treatment for persons deprived of liberty [under the Charter]. The interpretation of the rights in s 47 of the Corrections Act , compatibly with that human right, does not alter my analysis in the particular circumstances of this case. A discussion of why section 22 of the Charter did not alter the limitations analysis in the particular case would have been illuminating. It is impossible to divine why the Charter was cursorily dismissed, particularly given its thorough consideration in Castles. Weaven post-dates the Momcilovic decisions: Charter rights are relevant to decisions about placement. However, the Charter has had little impact on such decisions. There are numerous rights-based arguments that should have attracted Charter analysis but did not. Courts and practitioners should consult comparative jurisprudence to identify the most pertinent rights in issue and seek guidance on balancing competing interests with those rights under the Charter. I will act in accordance with s Moreover, minimum impairment under section 39 of the CMIUTA addressed only one aspect of section 7 2 being s 7 2 e , which also required analysis of the importance of the right section 7 2 a , the purpose of the limitation section 7 2 b , the nature and extent of the limitation section 7 2 c , and the relationship between the limit and its purpose section 7 2 d. All five factors are relevant when properly assessing section 39 of the CMIUTA against the overarching section 7 2 considerations of reasonableness and justification. Let us explore how section 7 2 might have influenced the decision. Section 7 2 a requires an examination of the importance of the right, which requires consideration of the section 22 right to humane treatment in detention â€" in particular, segregating convicted detainees from unconvicted detainees. Moreover, failure to identify the correct right at risk skews the limitations analysis. The overarching balancing exercise under section 7 2 requires an assessment of the reasonableness that is, a legitimate legislative objective and justifiability that is, proportionality between the harm done to the right in pursuit of the legitimate legislative objective, compared to the importance, nature and extent of the limitation of the limit, with sub-paragraphs a â€" e informing this overarching test. In the Percy Review, this analysis was nonsensical because the correct right was not identified and not part of the balancing matrix. The question was not about balancing autonomy and freedom against the limitation, but rather balancing humane treatment by way of segregated detention against the limitation. Secondly, one must then query the section 7 2 e assessment. The variation of the custodial order should have centred on the humanity of not segregating the convicted from those not convicted while in detention, not on freedom and personal autonomy. This case was not about whether a custodial or non-custodial order was preferred, which would impact on freedom and autonomy; but rather the place of detention under a custodial order, which impacts on humane treatment in detention, including the right of those not convicted to be segregated from those convicted. Reference to section 39 did not address the crux of the issue. Thirdly, no consideration was given to the purpose of the limitation section 7 2 b as it impacted on section 22 2. Without identifying the purpose underlying the limitation, many aspects of section 7 2 analysis cannot proceed: In the absence of other indicators, the purpose must be drawn from the provisions themselves. Section 40 clarifies by requiring the court to have regard to: The section 40 factors clearly elaborate on section 39 and the underlying purpose of the limitation, yet the factors were not expressly considered by Coghlan J when assessing whether rights under section 22 2 of the Charter were justifiably violated. The underlying purposes expressed in sections 40 c and d of the CMIUTA â€" whether Percy was a danger to another person and other people generally, and the need to protect others from such danger â€" were relevant factors to his place of detention. Whether these factors would have swayed the balancing process in favour of detaining Percy with those convicted of offences, or in favour of detaining him in a secure therapeutic environment, was never assessed. With no clear direction in the legislation, Coghlan J had few restrictions on the matters that his Honour could have considered relevant under section 40 f â€" particularly, factors that were germane to the place of custody, rather than the custodial

versus non-custodial factors that dominate in section 40 a â€" e. Fourthly, the nature and extent of the limitation on the right section 7 2 c were not assessed by Coghlan J. Nothing in sections 39 and 40 of the CMIUTA addresses the placement of a detainee if subject to a custodial supervision order. Detention in a prison totally undermined the right not to be segregated from convicted persons, but the nature and extent of this limitation was not considered. Many of the difficulties with assessing the section 7 2 reasonableness and justification of violating section 22 2 of the Charter stem from the fact that sections 39 and 40 of the CMIUTA did not address the crux of the issue; and yet the provision that did address the place of custody was ignored in the statutory interpretation process. Based on section 26 4 , it was argued that if Percy had been found not guilty on the basis of mental impairment today, he would be admitted to Thomas Embling Hospital. If the link between section 26 4 of the CMIUTA and section 22 2 of the Charter were made, more weight could have been given to these two factors. Indeed, section 22 2 required segregation of the convicted from the non-convicted, and section 26 4 supported this. Justice Coghlan balanced the advantages [] and disadvantages [] of the competing places of detention. Since his arrest in , White had been held in custody. Despite the intention to detain White at the Thomas Embling Hospital, no bed would be available for 8â€"10 weeks, such that White continued to be detained in prison. Although this case pre-dates the judicial powers under the Charter, Bongiorno J held: It is not appropriate for people who have been found not guilty on the ground of mental impairment to be imprisoned. He is ill and should be treated as such. It is not insignificant that his continued incarceration in a prison would appear to be contrary to the spirit, if not the letter of the Charter There is useful comparative jurisprudence relating to violations of article 3, [] both in relation to torture, [] and inhuman and degrading treatment. This comparative jurisprudence could have influenced the Percy Review and R v White, and ought to benefit future cases. It can be reasonably assumed that such an environment would be more suited for motivating these persons to participate in treatment aimed at changing their condition. First, Percy was not found to be criminally responsible whereas Glien was. Secondly, Percy was willing to undertake treatment and had demonstrated progress during treatment, whereas Glien was not willing or cooperative with treatment. Both of these differences suggest that Percy was more suited to detention in a non-prison setting than Glien. This difference is inconsequential because the basis of the article 5 1 e violation was the place of detention, not its duration. Percy relied on the right of the unconvicted to be segregated from those convicted under section 22 2 of the Charter. Sections 21 1 and 3 are equivalent to article 5 1 of the ECHR and its sub-paragraph e exception. Article 5 1 states the broad right to liberty like section 21 1 , and the article 5 1 sub-paragraphs list the exceptions to the right to liberty like section 21 3. Secondly, the ECtHR distinguishes between preventative detention and its aim for correction and prevention, and imprisonment which aims at punishing for criminal guilt. Percy had been in prison for 40 years, with little sustained progress toward correction and prevention of his behaviours. Equivalently, if the grounds for and place of detention are not linked, the detention cannot be considered lawful under section 21 3 of the Charter. The immediate ground for continued custody was that Percy did not satisfy the test under section 35 3 of the CMIUTA regarding seriously endangering members of the public. Two lines of reasoning follow. We can consider the application of the test per se, focusing on sections 39, 40 and 26 4. Whether one approaches Percy as having a mental impairment or other condition, it was agreed that a therapeutic environment was best given the nature of his condition section 40 1 a. Moreover, considering the relationship between the mental impairment or condition and the offending conduct, Percy had been found not guilty because of insanity section 40 1 b. This supports placement in a therapeutic rather than penal environment. Another factor concerns the adequacy of resources for treatment and support in a non-custodial environment section 40 1 e , with a catch-all factor allowing consideration of any other matters the court thinks relevant section 40 1 f. Reading sections 40 1 e and f together, consideration of the adequacy of resources for treatment and support within a custodial environment ought to be relevant, with the expert evidence supporting treatment in a therapeutic environment.

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