HABEAS CORPUS IN INTERNATIONAL LAW

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August 2013

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Declaration Regarding the Work

I certify that this thesis is my own work, and that I have not obtained a degree from this University, or anywhere else, based on this work.

CASES CITED

United Nations Human Rights Committee

African Commission on Human and Peoples' Rights

European Court of Human Rights

European Commission on Human Rights

Inter-American Court of Human Rights

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International Court of Justice

International Criminal Tribunals

Domestic Courts

India

United Kingdom

United States

ACKNOWLEDGEMENTS

First and foremost, thank you to my advisor, Dr. Kathleen Cavanaugh, for her encouragement, expertise, and persistence as I wrote this thesis. I am indebted to my mentors and friends from the Irish Centre for Human Rights for their inspiration and advice throughout this process, in particular Dr. Shane Darcy, Dr. Edel Huges, and Dr. Michael Kearney. I am grateful for the support I have received from Dean Gail Agrawal and my colleagues at the University of Iowa College of Law, and am fortunate that its law library is one of the finest in the world. Much work on the latter portions of this thesis was completed during time spent as a Fulbright Senior Lecturer at Sofia University, and I am obliged to the Bulgarian-American Commission for Educational Exchange for that opportunity. Finally, I must thank my family and friends – above all, my wife, Dr. Sara Farrell, and my daughter, Eleanor – for their love, inspiration, and patience.

INTRODUCTION

A month after the terrorist attacks of September 11, 2001, six Algerian men were arrested by authorities in Bosnia and Herzegovina for their alleged involvement in a plot to bomb the United States embassy in Sarajevo.[1] A Bosnian court investigating the claim determined the charges were unfounded and ordered their release.[2] The men were released from prison on January 17, 2002. Immediately after their release, they were detained by Bosnian and U.S. authorities[3] and transferred to a U.S. Naval Station at Guantánamo Bay on the island of Cuba on January 20[4] where they were held in a makeshift detention center known as Camp X-Ray which had opened the week before.[5]

The United States held Guantánamo Bay under a 1903 lease agreement under which Cuba retained ultimate sovereignty.[6] Less than a month before the Algerian men arrived at Guantánamo Bay, lawyers with the U.S. Department of Justice had written a memorandum concluding that "the great weight of legal authority" indicated U.S. federal courts would not have jurisdiction over aliens detained there.[7] The government's decision to house detainees at Guantánamo Bay was a deliberate one, intended to place them in "the legal equivalent of outer space."[8]

The Algerian men were detained on the basis that they were "enemy combatants."[9] They were not charged with any crime. They were not given an opportunity to challenge the basis of their detention before a court. They faced indefinite detention on an island purported

1. Boumediene v. Bush, 579 F. Supp. 2d 191, 193 (D.D.C. 2008).

2. Lakhdar Boumediene, *My Guantánamo Nightmare*, N.Y. TIMES, Jan. 8, 2012, at SR9.

3. *Boumediene*, 579 F. Supp. 2 at 194.

4. *Id*.

5. MIAMI HERALD, A PRISON CAMPS PRIMER, http://www.miamiherald.com/2011/12/22/2558413/web-extra-a-prison-camps-primer.html.

6. *See* Agreement between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16-23, 1903, T.S. No. 418.

7. *See* Memorandum from Patrick Philbin and John Yoo, Dep. Asst. Att'ys Gen., U.S. Dep't of Justice, to William Haynes II, Gen. Counsel, Dep't of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf.

8. David Bowker, NYU Law & Security Colloquium: Unwise Counsel in the Wake of 9/11: How Bad Legal Advice and the Avoidance of Process Led to Unlawful Conduct in the War on Terrorism (Nov. 17, 2008), http://www.law.nyu.edu/news/BOWKER_COLLOQUIUM.

9. Boumediene v. Bush, 579 F. Supp. 2d 191, 196 (D.D.C. 2008).

to be beyond the reach of the law. Over seven years after their ordeal began, a United States district court judge in a courtroom a thousand miles away filed a fourteen-page order.[10] It ended with this phrase: "it is, this 20th day of November, 2008, hereby . . . ORDERED that [the] petition for habeas corpus is GRANTED."[11] The petitioners were released in 2009.[12]

Habeas corpus is a simple process by which a court determines the lawfulness of a person's detention. Habeas corpus was the vehicle that Guantánamo Bay detainees first utilized to seek access to the civilian courts in the United States. It was a vehicle that the United States Supreme Court determined capable of reaching even to the legal equivalent of outer space.[13] It was the vehicle by which a trial judge in Washington, D.C., set five Algerian men free from a prison run by the world's most powerful government on a piece of land that had previously been called a "rights free zone."[14] The saga of these Guantánamo Bay detainees provides a pointed illustration of the power of habeas corpus. It reached across the sea and cut through legal obstructions. It restored the liberty of five men. It brought the conduct of the government within legal constraints and the scrutiny of the judiciary.[15]

At the same time, this story shows the lengths to which a state will go to resist the reach of habeas corpus. The decision to hold detainees at Guantánamo Bay was motivated by the desire to avoid habeas corpus review. The Justice Department memorandum provided the legal argument against the availability of habeas corpus at Guantánamo Bay. After that argument was rejected by the U.S. Supreme Court,[16] the U.S. Congress passed a law that attempted to statutorily circumvent habeas corpus review.[17] Relief only came to the Algerians after this law was declared unconstitutional.[18]

The court decisions in the Guantánamo Bay case were made by domestic courts interpreting domestic constitutional guarantees of habeas corpus. The right to habeas corpus

10. *See Boumediene*, 579 F. Supp. 2.

11. *Id*. at 198. The application of the sixth petitioner's was denied.

12. Boumediene, *supra* note 2, at SR9.

13. *See* Rasul v. Bush, 542 U.S. 466 (2004).

14. Harold Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 140-41 (1994).

15. Boumediene v. Bush, 553 U.S. 723, 765 (2008).

16. *See* Rasul, 542 U.S.

17. Military Commissions Act of 2006, 120 Stat. at 2635.

18. *See Boumediene* , 553 U.S. 723.

is widely protected in domestic legal systems throughout the world.[19] Habeas corpus guarantees are also found in international human rights law; the Universal Declaration of Human Rights,[20] the International Covenant on Civil and Political Rights,[21] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[22] American Declaration of the Rights and Duties of Man,[23] and the American Convention on Human Rights[24] each contain a habeas corpus guarantee. These provisions guarantee every individual the right to a determination of the lawfulness of his or her detention by a domestic court.

The right to habeas corpus developed as a way for the king, through his courts, to regulate the detention of one of his subjects by another of his subjects.[25] The international guarantee of habeas corpus serves the same function, but to protect a different interest. It is a way for the international community, through domestic courts potentially subject to international review, to regulate the detention of one subject of international law by another subject of international law. The international law of habeas corpus is the subject of this thesis, which seeks to determine its location, scope, application, and significance.

Defining Habeas Corpus

The Latin term *habeas corpus* was used to describe a number of ancient English writs, or judicial commands.[26] Over time, it became associated with the form most commonly used to inquire into detention, known as *habeas corpus ad subjiciendum.*[27] Habeas corpus was well established in English law as a check against unlawful detention by the end of the

19. *See infra* § 7.1.1.

20. U.N. G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71, Dec. 10, 1948 [hereinafter "UDHR" or "Universal Declaration"].

21. 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR" or "Covenant"].

22. 213 U.N.T.S. 222 (entered into force on September 3, 1953) [hereinafter "European Convention"].

23. O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter "American Declaration"].

24. 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter "American Convention"].

25. PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 41 (2010).

26. *Id.* at 39-41.

27. *Id.*

seventeenth century[28] and spread to other legal systems.[29] When the idea of a right guaranteeing judicial review of detention was introduced in international human rights law following World War II, drafters recognized that habeas corpus was an unfamiliar term in some legal systems.[30] Each of the human rights treaties therefore employed a similar approach, using descriptive language without using the term habeas corpus. The International Covenant provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[31]

The corresponding articles of the European Convention and American Convention track this language very closely, with only slight differences in the choice of words.[32]

These provisions are commonly referred to as habeas corpus guarantees. The use of the term *habeas corpus* to describe these international guarantees, admittedly, has its shortcomings. While commonplace in many legal systems, the term *habeas corpus* is not familiar in others, and even when it is recognized it carries a particular Anglo-American connotation which can be seen as running contrary to the idea of a universal right. At the same time, lawyers in the Anglo-American tradition sometimes think that the term can only describe *their* version of the remedy.[33] Using the term can also lead to confusion as to what is being described. The process guaranteed by international instruments is fairly simple, while domestic varieties of habeas corpus may be much broader in their scope or usage.[34] A 1993 United Nations report noted that the International Covenant "does not specifically

28. *See infra* § 1.1.3 (discussing the Habeas Corpus Acts).

29. *See infra* § 1.2 (explaining the spread of habeas corpus).

30. Comm'n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 8 (May 10, 1948) (remarks of China's representative).

31. ICCPR art. 9(4)

32. *See* European Convention art. 5(4); American Convention art. 7(6).

33. "There is currently no right to habeas corpus in international law…." Eric Posner, *"Global Justice and Due Process" by Larry May*, 25 ETHICS & INT'L AFF. 481, 482 (2011) (book review).

34. In the United States, for example, habeas corpus is often thought of primarily as a post-conviction remedy.

guarantee the right to habeas corpus . . . because those precise procedures are not available in some countries."[35]

Still, compelling reasons exist to use this term to describe the international guarantees. Although it is historically associated with a particular legal tradition, the term is widely used in a generic sense by international institutions to describe the right to have a court review the lawfulness of a person's detention. The U.N. General Assembly has indicated that Article 9(4) is fulfilled by "*amparo, habeas corpus* or other legal remedies to the same effect."[36] *Amparo* is a general remedy to enforce constitutional rights common in Latin American domestic legal systems.[37] In some states *amparo* encompasses the review of detention, while in others it enforces all rights except for the judicial review of detention, which is exclusively conducted through habeas corpus. Habeas corpus, then, tends to be specifically associated with the review of detention, while *amparo* is much broader.[38]

In a 1992 resolution, *Habeas Corpus*, the U.N. Commission on Human Rights called on states to "establish a procedure such as habeas corpus by which" a person can have a court determine the lawfulness of his or her detention.[39] In 2008, the Inter-American Court of Human Rights wrote,

> In situations of deprivation of liberty, such as those of the instant case, among the essential judicial guarantees, *habeas corpus* represents the appropriate means for guaranteeing the liberty and controlling respect for the life and integrity of the person, and also for protecting the personal integrity of the individual. Obviously the name, procedure, regulation and scope of the domestic recourses that allow the lawfulness of a deprivation of liberty to be reviewed may vary from one State to another.[40]

35. The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening, Fourth Report Prepared by Mr. Stanislav Chernichenko and Mr. William Treat, U.N. Doc. E/CN.4/Sub.2/1993/24, ¶ 103 (June 29, 1993).

36. G.A. Res. 34/178, U.N. Doc. A/RES/34/178 (Dec. 17, 1979).

37. *See infra* § 1.2.1 (discussing the relationship between *amparo* and habeas corpus).

38. The Inter-American Court of Human Rights has explained that *amparo* consists of a wide series of remedies, of which habeas corpus is one component. Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 34 (Jan. 30, 1987).

39. Comm'n on Hum. Rts. Res. 1992/35, U.N. Doc. E/CN.4/RES/1992/35 (Feb. 28, 1992).

40. Neptune v. Haiti, Merits, Reparations, and Costs, 2008 Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 115 (May 6, 2008).

To paraphrase the Court, the remedy may be called something other than habeas corpus in a particular system, but we are still talking about habeas corpus.

The term also conveys a certain gravitas. It has been long known as the "Great Writ."[41] It has been described as the "stable bulwark of our liberties."[42] During the drafting of the International Covenant, Charles Malik, the delegate from Lebanon, argued for use of the specific term because it is "a milestone in the history of human liberty."[43]

Finally, and not insignificantly, the term habeas corpus is succinct. It is less cumbersome than repeating the full text of the international guarantees, or even an abbreviated version. For the purposes of this thesis, then, the term habeas corpus is used in a generic manner to describe the right of a detained person to take proceedings before a court to determine the lawfulness of his or her detention and to order his or her release if it is unlawful.

In its classic form, the habeas corpus process is initiated by the person deprived of his or her liberty, or someone acting on his or her behalf, petitioning a court to review the lawfulness of his or her detention.[44] The petition must demonstrate, on its face, cause to believe that the detention is unlawful, or it will be dismissed by the court.[45] If the petition meets this standard, the court issues a judicial decree (known as a "writ of habeas corpus") ordering the custodian to bring the petitioner physically before the court and to explain the lawfulness of his or her detention.[46] If the court determines that the petitioner is not lawfully held, the court can order his or her release.[47]

As this process requires the personal appearance of each detainee, an alternative intermediate step was developed and was in use by the early 19th Century.[48] Known as the

41. *Ex Parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1869)

42. 1 WILLIAM BLACKSTONE, COMMENTARIES *133.

43. Comm'n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 8 (May 10, 1948).

44. Donald Wilkes, *The Writ of Habeas Corpus, in* 2 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, CULTURAL, AND SOCIAL ENCYCLOPEDIA 645-47 (Herbert Kritzer ed. 2002).

45. *Id*.

46. *Id*.; Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 33 (Jan. 30, 1987).

47. Wilkes, *supra* note 44, at 645; *Habeas Corpus*, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 33.

48. George Longdorf, *Habeas Corpus – A Protean Writ and Remedy*, 10 OHIO ST. L.J. 301, 310-11 (1949).

"show-cause procedure," it allows the court considering the habeas corpus petition to order the custodian to show why the detention is legal in writing.[49] The custodian's written response, known as the "return," is then examined by the court to determine whether the writ of habeas corpus should issue.[50] Essentially, show-cause procedures provide a way for courts to rule on legal issues about the basis for detention without holding a full, in-person hearing. Based on its examination of the petition and return, the court may dismiss the petition, order the custodian to bring the detainee before the court for a hearing, or order the release of the detainee based on the written pleadings alone.

Objectives

"The writ of habeas corpus has long been the sword and shield in the long struggle for freedom and constitutional government. It is a potent weapon against tyranny in every form and guise."[51] The right to habeas corpus is an important right, and much has been written about its place in domestic law, dating back to William Blackstone's Commentaries in the 18th Century.[52] More recent monographs examine the history and use of the remedy within particular domestic systems in the Anglo-American tradition. William Duker traces the history of habeas corpus in England as the basis for his discussion of habeas corpus in contemporary American law.[53] Likewise, R.J. Sharpe details the origins of the right as he examines its place in modern English, Australian, Canadian, and New Zealand law.[54] David Clark and Gerald McCoy engage the topic through an examination of habeas corpus guarantees and case law throughout the Commonwealth.[55] Eric Freedman traces the development of habeas corpus in the American legal system.[56] Most recently, Paul Halliday provides a fresh look at the historical development of habeas corpus in English law.[57] There

49. *See id*.; HALLIDAY, *supra* note 25, at 46-49; Wilkes, *supra* note 44, at 645-46;

50. Longsdorf, *supra* note 48, at 310-11.

51. Montgomery v. Regan, 86 F. Supp. 382, 288 (N.D. Ill. 1949).

52. 3 WILLIAM BLACKSTONE, COMMENTARIES 129-37.

53. WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

54. R.J. SHARPE, THE LAW OF HABEAS CORPUS (1989).

55. DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL RIGHT (2000).

56. ERIC FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001)

have been studies of the right to judicial determination of the legality of detention in other legal traditions, most notably those by Hector Fix Zamudio focused on Latin America.[58] Although not specifically focused on habeas corpus, works by authors such as Giorgio Agamben,[59] Kim Lane Scheppele,[60] Tom Bingham,[61] and Brian Tamanaha,[62] provide important context for understanding its importance.

Much less has been written about habeas corpus as a right guaranteed by international law. Articles that examine habeas corpus tend focus on the application of the right in particular circumstances. Marco Sassòli[63] and Robert Goldman[64] both look at the interplay between human rights guarantees and international humanitarian law detention review provisions during situations of armed conflict. In addition to this question, Fiona de Londras emphasizes the extraterritorial application and derogability of habeas corpus in the "war on terror."[65] Doug Cassel examines the role of habeas corpus in regulating preventative detention, particularly in the context of the Guantánamo Bay facility.[66] Habeas corpus has also been addressed as one aspect of the protection of detainees or the protection of fair trial

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57. HALLIDAY, *supra* note 25.

58. Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 LAW. AM. 361 (1981); Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of* Amparo, 9 CAL. W. INT'L L.J. 306 (1979)

59. GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005).

60. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

61. TOM BINGHAM, THE RULE OF LAW (2010).

62. BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

63. Marco Sassòli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts, in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX (Orna Ben-Naftali ed. 2011); Marco Sassòli & Laura Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599 (2008).

64. Robert Goldman, *Extraterritorial Application of the Human Rights to Live and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict, in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW (Robert Kolb & Gloria Gaggioli eds. 2013).

65. Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists*, 12 J. CONFLICT & SEC. L. 223 (2007).

66. Doug Cassel, *International Human Rights Law and Security Detention*, 40 CASE W. RES. J. INT'L L. 383 (2009); Doug Cassel, *Liberty, Judicial Review, and the Rule of Law at Guantanamo: A Battle Half Won*, 43 NEW ENG. L. REV. 37 (2008); Douglass Cassel, *Pretrial and Preventative Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811 (2008).

rights in institutional reports such as a major 1994 United Nations report by Stanislav Chernichenko and William Treat.[67]

While some larger works address international habeas corpus guarantees in the context of fair trial rights or the prohibition on arbitrary detention, or look at it as part of a survey of a particular international or regional instrument,[68] this treatment is limited and habeas corpus is not a primary focus. The bookshelf of monographs concentrating primarily on the right to habeas corpus in international law is a small one indeed. The foremost of these is Luis Kutner's *World Habeas Corpus*, an ambitious effort that lays out the plan for an international treaty establishing courts which will provide habeas corpus review when domestic courts fail to do so.[69] Kutner provides important insights into the specific importance of *international* habeas corpus guarantees, and a detailed framework for achieving his goal. His book, however, was published in 1962 and therefore predates the treaty-based habeas corpus provisions of the International Covenant and the American Convention, and the cases interpreting the European Convention. While Kutner's ideas and arguments are in many ways still fresh, his examination was superseded by the adoption of human rights treaties and was likely fading from memory until being revisited by Vicki Jackson in her examination of contemporary international and domestic habeas corpus protection.[70]

Also of note is Larry May's *Global Justice and Due Process* published in 2011.[71] This work provides a philosophical understanding of the importance of habeas corpus and argues that the right should be considered a rule of *jus cogens* in international law. While May argues for this elevated status in international law, his justifications are largely based on the importance of habeas corpus within the Anglo-American legal tradition. His work is a valuable contribution to understanding the importance of an international habeas corpus guarantee and builds on Kutner's view of using international institutions to provide review, but it does not engage in a significant way with current international and regional guarantees.

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67. Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994).

68. *See, e.g.*, THE RIGHT TO A FAIR TRIAL (David Weissbrodt & R. Wolfrum eds. 1998).

69. LUIS KUTNER, WORLD HABEAS CORPUS (1962).

70. Vicki Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303 (2006).

71. LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS (2011)

It is, in essence, a philosophical argument about what international law *should* do, with little attention to its current scope or application.

Although these works are important contributions to understanding various aspects of habeas corpus, no definitive work exists examining the location, scope, application, and significance of the right to habeas corpus as guaranteed by international law, a lacuna that this thesis will endeavor to fill. In a 1994 report, two United Nations Special Rapporteurs recommended action to "amplify and further define the international meaning of the right to habeas corpus."[72] While this clarification has occurred piecemeal in General Comments of the Human Rights Committee and the decisions of international courts, it has not been approached in a comprehensive and systematic manner. One goal of this thesis is to identify the parameters of the guarantees of access to domestic habeas corpus in the Universal Declaration, the International Covenant, the European Convention, the American Declaration, and the American Convention.

Habeas corpus has received renewed attention in post-2001 world. These experiences have revealed the serious challenges that exist to the availability of effective domestic habeas corpus review as guaranteed by international law. Restrictive interpretations or applications of these international guarantees have been addressed as they occur by courts and scholars in many cases. Synthesis of these experiences is needed to provide a more holistic look at the form that these challenges to international habeas corpus guarantees have taken and to assess their legality. Anticipation of future challenges will allow a more proactive approach to ensuring protection. It is also important to understand why habeas corpus is so critical, both in terms of protection to the individual and the role of habeas corpus in regulating government action. By understanding the parameters of current law, analyzing the challenges faced by habeas corpus, and understanding the importance of the international law guarantees of habeas corpus, it is possible to consider how habeas corpus might be strengthened. Such an effort has the potential to promote the goals expressed in the United Nations Charter[73] and the Universal Declaration of Human Rights[74] of achieving peace and security through the rule of law. As Kutner wrote a half century ago, "On those occasions in which Man must be

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72. Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1994/24, ¶ 165 (June 3, 1994).

73. U.N. CHARTER preamble.

74. UDHR preamble.

saved from his rulers, and equally when he must be saved from himself and his unreasoning explosions of passion or prejudice, resort to Law is the only alternative to revolution."[75]

Overview

The history of habeas corpus provides a useful foundation to understanding its importance in law today. An examination of its history shows how the writ of habeas corpus was transformed by judges from a tool to exert state authority to one that would be used to regulate government power. While proceedings similar to habeas corpus existed prior to its development in England, the English form of the remedy emerged as the most prominent of these remedies and the basis on which international guarantees would be developed. Therefore, the development of habeas corpus in English law is important to understanding its place in international law. Chapter 1 traces the history of habeas corpus from its origins in England through its status across the globe in 1945. Section 1.1 examines the origin and development of habeas corpus in the English legal system. Section 1.2 looks at the proliferation of the English remedy, the development of habeas corpus in other jurisdictions, and its status in domestic law at the end of World War II.

As with many fundamental rights, the movement of habeas corpus from the exclusive province of domestic law to the realm of international law began in the years following World War II. The events of the war altered the previously accepted view that a state's relationship with its citizens was beyond the concern of international law. A new postwar regime emerged, driven by democratic ideals and a common desire to prevent the abuses perpetrated by the defeated fascist states in the future. Central to this new regime was the recognition and protection of human rights at the international level. Chapter 2 examines the place of habeas corpus in the human rights discourse following World War II and its treatment in the Universal Declaration of Human Rights, adopted in 1948. Section 2.1 details the postwar development of international law, most notably with the adoption of the Charter of the United Nations. Section 2.2 tells how the right to habeas corpus was initially included during the drafting of the Universal Declaration, then removed, and finally reintroduced as part of a broader guarantee in the General Assembly. Section 2.3 explains the significance of

75. KUTNER, *supra* note 69, at 35.

the Universal Declaration in international law and interprets Article 8 of the Declaration, which implicitly includes the right to habeas corpus.

While the Universal Declaration was a milestone, it was intended as just one part of an International Bill of Human Rights. In 1966, the General Assembly opened for signature a binding human rights convention, the International Covenant on Civil and Political Rights. The Covenant, ratified by a majority of states, contains more detailed provisions than the Declaration. Chapter 3 delineates the right to habeas corpus guaranteed by Article 9(4) of the Covenant. Section 3.1 covers the drafting of the habeas corpus provision of the Covenant by the Commission on Human Rights and its adoption by the General Assembly. Section 3.2 looks to the jurisprudence of United Nations institutions and scholarly writing to interpret the terms of this provision on issues such as the right to counsel and the meaning of a "court."

In addition to the International Bill of Human Rights, the right to habeas corpus is also protected in the regional human rights systems, which feature more elaborate enforcement mechanisms. The European and Inter-American systems each contain an express human rights guarantee, though the emphasis in each system is somewhat different. The democratic stability of the European system has led to greater definition of the procedural aspects of habeas corpus. In contrast, the Inter-American system has focused on basic access to habeas corpus given the prevalence of disappearances and lengthy states of emergency. The African system contains a general remedy similar to that in the Universal Declaration, but the African Court of Human Rights has not yet interpreted this provision. Thus, Chapter 4 focuses on the European and Inter-American systems. Section 4.1 first follows the development of Article 5(4) of the European Convention on Human Rights and Fundamental Freedoms, signed in 1954. It then examines how the European Court of Human Rights has interpreted Article 5(4), and the development of concepts such as incorporated supervision. Section 4.2 begins by looking at the drafting and interpretation of Article XXV of the 1948 American Declaration of the Rights and Duties of Man. It next details the history of Article 7(6) of the American Convention on Human Rights, adopted in 1969, and the interpretation of that article by the Inter-American Court of Human Rights.

While Chapter 2, 3, and 4 establish the general parameters of the habeas corpus guarantees of the Universal Declaration, the International Covenant, and the regional instruments, it is clear that challenges exist to the effectiveness of these habeas corpus guarantees. The applicability of these international human rights provisions is drawn into question during armed conflict, by the possibility of derogation, and in extraterritorial state action. The manipulation of procedural rules can also limit the right. These challenges have

all become more apparent and overt since 2001. Chapter 5 examines these challenges to understand where vulnerabilities exist in current habeas corpus protection. Section 5.1 looks at detention review during armed conflict. It first examines the general relationship between human rights law and international humanitarian law, and then introduces the specific detention review mechanisms of the Geneva Convention. Next, it analyzes the interplay of the international humanitarian law provisions and the habeas corpus provisions of human rights law during both international and non-international armed conflict. Finally, the section identifies potential gaps in protection, such as the applicability of human rights obligations on non-state actors during non-international armed conflict. Section 5.2 examines the risk presented by derogation from human rights obligations. It explains the purpose of derogation provisions and reviews the authority on the derogability of habeas corpus, noting that while habeas corpus is widely considered non-derogable following the Inter-American Court's landmark 1987 advisory opinion *Habeas Corpus in Emergency Situations,*[76] the European Court has not yet expressly ruled to this effect. Section 5.3 presents the dilemma of extraterritorial detention and the jurisdictional limitations of human rights law. Although the law points toward the availability of habeas corpus extraterritorially, the section notes that a lack of clarity may still exist. Section 5.4 identifies concerns with habeas corpus procedures. While established procedural rules provide some guidance, the 'war on terror' has revealed potential procedural shortcomings that must be addressed.

Urgency exists in addressing these challenges given the significance of international habeas corpus guarantees, which are vital to the individual detainee but also to the maintenance of the rule of law. It is important to recognize that habeas corpus proceedings are concerned with two subjects. First, they are concerned with the detainee and serve both as a means of protecting liberty and as a means of preventing the violation of other rights. Second, they are concerned with the custodian of the detainee, and in this way serve as a means of regulating state action. Chapter 6 considers why habeas corpus is such an important guarantee. Section 6.1 looks at how habeas corpus protects the personal liberty of detainees, but also protects other substantive rights by exposing abuses such as torture, extrajudicial killing, or other mistreatment. It also explains why habeas corpus must be guaranteed in *international* law. Section 6.2 examines the critical role that habeas corpus plays in regulating state action, particularly executive action. It begins by discussing the rule of law, which demands that even the state be subject to established legal norms, and shows how the

76. Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8 (Jan. 30, 1987).

development of habeas corpus marked a watershed moment in the submission of the executive to the rule of law. Next, it introduces the concept of the state of exception, in which the normal domestic legal order may be suspended to contend with a real or perceived threat to the state. This development presents the potential for significant abuse, as illustrated by the establishment of the Nazi state within the framework of Germany's constitutional order. The section then argues that the right to habeas corpus occupies the key position in preventing the state of exception, again highlighting the essential nature of habeas corpus as a non-derogable *international* guarantee. Finally, it asserts that because of these factors, habeas corpus represents a policy choice, as it prevents the state from claiming to operate 'legally' but unfettered by any normative constraints.

In light of these essential functions, the right to habeas corpus as guaranteed by human rights law must be strengthened. Potential challenges to habeas corpus must be addressed to ensure its availability in all situations as a tool to protection individual rights and maintain the rule of law. Chapter 7 considers how this is best accomplished. Section 7.1 contemplates the best location for the advancement of habeas corpus, beginning with the possibility of that existing law might be better defined, and that habeas corpus may represent a general principle of international law or a rule of *jus cogens*. Next, it weighs the prospects for creation of a new treaty specifically related to habeas corpus, noting, however, that this option was not pursued previously. It then broaches the possibility that international institutions could conduct habeas corpus review, specifically discussing Kutner's grand proposal for a world habeas corpus system and similar ideas discussed by May. It concludes that while the use of international institutions is worthy of further exploration, existing law provides a suitable vehicle for ensuring strong habeas corpus in the near term. Section 7.2 looks to history and the role of habeas corpus in protecting individuals and maintaining the rule of law to identify two fundamental principles –availability and adaptability – that should guide interpretation and application of habeas corpus guarantees. Following these principles, section 7.3 asserts the proper scope and application of habeas corpus based on existing law in a manner aimed at resolving the shortcoming identified earlier.

This thesis concludes by emphasizing that gaps remain in international habeas corpus protection, and that these will likely continue to be exploited by states. It also stresses that attempts to strengthen habeas corpus should be seen not only as an attempt to protect individuals, but also as a policy choice aimed at maintaining the rule of law. It acknowledges that the ability of the remedy to achieve these aims is dependent on the existence of a strong and independent judiciary. The conclusion recommends that action to strengthen habeas

corpus take into account the twin purposes of individual protection and bolstering the rule of law described in Chapter 6, and that an international organization take steps to draft a declaration clarifying the scope and availability of the right. Finally, it recommends that consideration be given in the long term to the possibility that international institutions take a role in providing habeas corpus review in situations where domestic courts are unwilling or unable to do so in a meaningful manner.

1

THE DEVELOPMENT OF HABEAS CORPUS IN DOMESTIC LAW

The origins of habeas corpus and the development of habeas corpus jurisprudence have been extensively reviewed resulting in a large body of work examining both the contents and determinacy of the right.[1] Understanding this history is crucial to understanding the place habeas corpus occupies in international law today. Tracing its origin reveals its transformation in the hands of judges[2] from a device used to exert government authority in medieval England to one of the most important instruments available to check abuses of government power around the globe. This chapter outlines the development of habeas corpus through World War II. Section 1.1 examines the origin and development of habeas corpus in the English legal system. Section 1.2 then examines the development of habeas corpus in other jurisdictions and its status in domestic law at the end of the war.

Proceedings resembling habeas corpus existed prior to the development of the writ in the English legal system;[3] however, the English common law remedy emerged as the most prominent of such remedies. As a result, habeas corpus guarantees in international law are largely modeled after the English remedy and its jurisprudence.[4] The development of habeas corpus in English law, therefore, merits review as it is the backdrop to the development of the right in international law.

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1. *See, e.g.*, *Remarks on the Writ of Habeas Corpus ad Subjiciendum, and the Practice Connected Therewith*, 4 AM. L. REG. 257 (1856); 3 WILLIAM BLACKSTONE, COMMENTARIES *129-37; DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL RIGHT (2000); Clarence Crawford, *The Suspension of the Habeas Corpus Act and the Revolution of 1689*, 30 ENG. HIST. REV. 613 (1915); WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); ERIC FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010); W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 108-25 (1926); ROLLIN HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS (1876); George Longsdorf, *Habeas Corpus – A Protean Writ and Remedy*, 10 OHIO ST. L.J. 301 (1949); Helen Nutting, *The Most Wholesome Law – The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527 (1960); R.J. SHARPE, THE LAW OF HABEAS CORPUS (1989).

2. Halliday puts it bluntly: "Habeas corpus did not evolve. Judges made it, transforming a common device for moving people about in aid of judicial process into an instrument by which they supervised imprisonment orders made anywhere, by anyone, for any reason." HALLIDAY, *supra* note 1, at 9.

3. *See infra* § 1.2 (discussing the independent development of remedies in the nature of habeas corpus).

4. MANFRED NOWAK, CCPR COMMENTARY 178 (1993).

1.1 Origins of Habeas Corpus in English Law

The term *habeas corpus*, meaning "you have the body," applies to a number of writs, or commands, to produce the body of the individual in question.[5] The history of habeas corpus in England has long been colored by its modern role in protecting individual liberty in the form of *habeas corpus ad subjiciendum*.[6] William Duker writes that since the seventeenth century, scholars have "perpetuated the myth that the writ of habeas corpus originated and developed primarily to protect the English subject from illegal imprisonment."[7] While it is impossible to know where and when a writ in the vein of habeas corpus was first issued in England, it was not with the intent of protecting against arbitrary detention.[8] Rather, habeas corpus originated as a writ used to compel the presence of an individual before a court for judgment.[9] As Paul Halliday notes, "this power to judge arose not from ideas about liberty, but from sovereignty as we understood it three or four centuries ago. . . ."[10]

1.1.1 Judicial Rivalry as an Impetus for Development

Following the Norman conquest in 1066, William the Conqueror instituted a centralized court system over a localized system that had previously existed in England.[11] For these centralized courts to exercise their judicial functions, they needed a process to bring persons physically before the court and a procedure was

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5. Longsdorf, *supra* note 1, at 301.

6. In addition to *habeas corpus ad subjiciendum*, other forms of the common law writ included *habeas corpus ad deliberandum* and *habeas corpus ad prosequendum* (ordering a prisoner transferred to the jurisdiction where a crime was alleged to have been committed), *habeas corpus ad faciendum et recipiendum* (ordering transfer of an individual to a superior court), *habeas corpus ad satisfaciendum* (ordering transfer to execute upon a judgment), and *habeas corpus ad testificandum* (compelling appearance to give testimony). Leonard v. B. Sutton, *Habeas Corpus – Its Past, Present, and Possible Worldwide Future, in* THE HUMAN RIGHT TO INDIVIDUAL FREEDOM 171, 170-71 (Luis Kunter, ed. 1970).

7. DUKER, *supra* note 1, at 13.

8. HALLIDAY, *supra* note 1, at 7.

9. HOLDSWORTH, *supra* note 1, at 108-09.

10. HALLIDAY, *supra* note 1, at 7.

11. DUKER, *supra* note 1, at 14.

developed to command a sheriff to bring a party into court.[12] According to Duker, the writ of habeas corpus was firmly established in the form of *habeas corpus ad respondendum* by 1230.[13]

This initial form of the writ of habeas corpus was an exercise of the crown's authority over its subjects and was issued at the court's prerogative.[14] The writ continued to be employed, primarily in this manner, over the succeeding centuries. However, subtle but important developments marked the beginning of the writ's slow transformation to a vehicle to guarantee liberty and guard against arbitrary interference in the security and liberty of person.

Mid-fourteenth century cases reveal instances of the writ of habeas corpus, usually combined with another writ, such as certiorari, being issued upon petition of a defendant who has been imprisoned while awaiting trial in private actions.[15] These cases mark two significant developments in habeas corpus jurisprudence. First, these writs were issued on petition of the detained person, rather than *sua sponte* by the court. Second, issuance of the writ implied the court wished to inquire into the cause and legitimacy of imprisonment ordered by a lower court.[16] This action by the court, eventually recognized as the distinct writ of *habeas corpus cum causa*, ordered the sheriff to produce the body of the prisoner and offer explanation as to the cause of detention.[17]

While the development of *habeas corpus cum causa* suggests an increased concern for personal liberty, this was not wholly the case. As R.J. Sharpe shows, the

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12. *Id.* at 15.

13. *Id.* at 17. In 1902, Edward Jenks wrote that "the early use of habeas corpus was to put people in gaol rather than to get them out." more recent scholars refute this claim. SHARPE, *supra* note 1, at 2 (quoting Edward Jenks, *The Story of Habeas Corpus*, 18 QUARTERLY L. REV. 64 (1902)). This writ of *habeas corpus ad respondendum* only ordered the sheriff to bring a person before the court. While this writ could be used to bring a person accused of a crime before the court, it did not order imprisonment. Id. Habeas corpus was, therefore, distinct from the writ of capias, which ordered arrest and imprisonment. DUKER, supra note 1, at 20. For a discussion of the distinction between the writs of habeas corpus and capias, *see* DUKER, supra note 1, at 19-23.

14. HALLIDAY, *supra* note 1, at 7.

15. It was reported that a "writ issued out of Chancery 'if [petitioner] be detained for that reason and no other' that the Sheriff should have his body on a certain day before the Justices." Y.B. 14 Edw. 3, Trin. 12 (1340).

16. DUKER, *supra* note 1, at 24.

17. *Id.* at 25.

development was largely driven by the struggle between England's new centralized courts and the older local courts.[18] Through issuance of the writ of *habeas corpus cum causa*, the central courts – particularly the courts of equity – were able to divest lower courts of jurisdiction and deprive the local courts of their power to imprison.[19]

Sharpe argues that the removal of litigation from inferior courts by use of habeas corpus did sometimes serve a legitimate purpose by fostering the centralized administration of justice,[20] removing parties to the appropriate courts in cases of privilege,[21] and correcting unjust decisions of the lower courts.[22] Perhaps its greatest appeal, however, was that use of the writ increased revenue for the central courts which resulted in its frequent use and abuse.[23] In response, Parliament passed several statutes beginning in the fifteenth century aimed at limiting the use of *habeas corpus cum causa*.[24] By the time of their passage, however, the supremacy of the central courts over the local courts had been firmly established.

The struggle between local and central courts, having been resolved in favor of the latter, gave way to a struggle between the various central, or superior, courts. As Duker asserts, the courts of common law sought to protect and expand their authority *vis-à-vis* England's other superior courts and, once again, an unintentional result of the struggle for judicial primacy was the enhancement of habeas corpus. [25]

Chancery, as England's court of equity, possessed injunctive powers and as early as the fifteenth century utilized injunctions to suspend litigation in cases before other courts, thus encroaching on the other court's authority and denying it revenue.[26]

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18. SHARPE, *supra* note 1, at 4.

19. DUKER, *supra* note 1, at 27.

20. SHARPE, *supra* note 1, at 5.

21 DUKER, *supra* note 1, at 31-32 (describing the firm establishment of privilege by the fifteenth century and the use of *habeas corpus cum causa* in its enforcement).

22. *Id.* at 27.

23. *Id.* at 29.

24. *See, e.g.*, Statute of Leicester, 1414, 2 Hen. 5, c.2, § 4; 1433, 11 Hen. 6, c. 10; 1554, 1 & 2 Phil. & M., c. 13, § 7; 1601, 43 Eliz., c. 5, § 2.

25. For a full discussion of the role of habeas corpus in the struggle between the common law courts and the other superior courts, *see* DUKER, *supra* note 1, at 33-40.

26. *Id.* at 34.

1. Development

To check this expansive power, the courts of common law employed the writ of habeas corpus to inquire into the legality of the imprisonment of persons by Chancery.[27] The courts of common law also used habeas corpus to scrutinize imprisonment ordered by the ecclesiastical Court of High Commission and the Courts of Admiralty. [28] By the seventeenth century, habeas corpus was routinely used by the courts of common law to challenge the legality of detentions ordered by other superior courts.[29] Thus, judicial rivalry played an important role in the evolution of habeas corpus into a means to test the validity of imprisonment available upon petition of the prisoner.

1.1.2 Habeas Corpus and the Executive

The most important stage in the development of habeas corpus would occur in its extension to actions by the executive. Henceforth, the writ would truly begin to take on the appearance of a safeguard of individual liberty from the government power in its *cum causa* and *ad subjiciendum* forms.[30] The first executive actions to which habeas corpus was extended were those of the monarch's Privy Council.

The Privy Council managed much of the business of governance on behalf of the crown. Duker describes the Council as being akin to a modern administrative agency, exercising both executive and judicial functions.[31] Although deference was given to the Council as the agent of the monarch,[32] this deference waned as a

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27. *See, e.g.*, Y.B. 22 Edw. 4, Mich. 21 (1483); Glanville v. Courtney, 80 Eng. Rep. 1139 (K.B. 1610); Addis' Case, 79 Eng. Rep. 190 (K.B. 1610); King v. Dr. Gouge, 81 Eng. Rep. 98 (K.B. 1615).

28. *See, e.g.*, Thomlinson's Case, 77 Eng. Rep. 1379 (C.P. 1605); Chancey's Case, 77 Eng. Rep. 1360 (K.B. 1612); Hawkeridge's Case, 77 Eng. Rep. 1404 (C.P. 1617).

29. HALLIDAY, *supra* note 1, at 7.

30. While both forms of the writ allowed for inquiry into the cause for imprisonment, *habeas corpus cum causa* was specifically addressed to an inferior court while *habeas corpus ad subjiciendum* was addressed to the custodian of the prisoner. The two forms of the writ were sometimes used in conjunction. Steven Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando,* 37 GOLDEN GATE U.L. REV. 219, 258 (2007).

31. DUKER, *supra* note 1, at 40.

32. *See, e.g*. Hinde's Case, 74 Eng. Rep. 701 (C.P. 1577).

combination of factors led the common law courts and then Parliament to assert their power.[33]

Examples of judicial scrutiny of executive action first appear in the late sixteenth century in response to committals ordered by individual members of the Privy Council. In three cases, the common law Court of Common Pleas held committals by individual Councilors to be inadequate.[34] Committals by the entire Council, however, continued to be upheld so long as a specific return was made to the writ of habeas corpus showing cause for imprisonment.[35] Committals by special order of the monarch or the entire Council for reasons of state were upheld so long as a general return was made, although Sharpe suggests this was done reluctantly by the courts under political pressure.[36]

With the Council's authority tentatively accepted by the courts, the struggle shifted to Parliament. Forced to convene Parliament to raise revenue, King Charles I was soon subjected to grievances lodged by its members. In 1628, the House of Commons passed a trio of resolutions stating that no one should be imprisoned without lawful cause being shown, that habeas corpus should be available in all cases of detention, and a person should be released if lawful cause for detention could not be shown.[37] The King accepted, in the form of a compromise "Petition of Right," the proposition that he could no longer imprison by special order without showing cause.[38] Sharpe argues that the impact of the Petition of Right was mixed. Not technically a statute, the Petition was of questionable legal force and was generally

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33. These reasons included the creation of numerous inferior councils, the end of a period of lawlessness, the court's own thirst for power, and the sophistication of arguments against arbitrary detention. DUKER, *supra* note 1, at 41.

34. *See* Hellyard's Case, 74 Eng. Rep. 455 (C.P. 1587); Peter's Case, 74 Eng. Rep. 628 (C.P. 1587); Howel's Case, 74 Eng. Rep. 66 (C.P. 1588) (holding the committal valid after being informed the action had been taken by the entire Council); *but see* Search's Case, 74 Eng. Rep. 65 (C.P. 1588) (holding insufficient a return citing letters patent from the Queen as the basis for imprisonment).

35. Judges of the common law courts confirmed this rule by resolution in 1591. DUKER, *supra* note 1, at 42-43.

36. *See* Darnell's Case, 3 St. Tr. 1 (1627). For a thorough analysis of the arguments, decision, and effect of *Darnell's Case*, *see* SHARPE, *supra* note 1, at 9-13.

37. *Darnell*, 3 St. Tr. at 82-83.

38. SHARPE, *supra* note 1, at 13-14.

seen as restating rights that had already existed.[39] The Petition was put to its first test in a case involving members of the same Parliament from which it had arisen.

At the close of the parliamentary session, six members were arrested on warrants issued by the King.[40] The explanation of the basis for imprisonment provided in response to their petitions for habeas corpus was questionable, but the Attorney General argued that the Petition of Right was not law and that no new rights had been granted to the King's subjects.[41] Thus the King signaled both his reluctance to accept any limits on his power and his intention to avoid the reach of habeas corpus.

Surprisingly, the Petition of Right fared better in the long term. Despite the uncertainty surrounding the Petition's legal force at its inception, Sharpe asserts that its validity was unquestioned a century later.[42] By the mid-seventeenth century, it was understood that the Petition of Right prevented the executive from ordering imprisonment without cause unless authorized by Parliament.[43] Perhaps the most lasting effect of the 1628 Resolution and the Petition of Right was the association it created between the writ of habeas corpus and the Magna Carta. The myth that habeas corpus originated and developed to protect English subjects from unjust imprisonment was largely predicated on the equally romantic notion that a right to habeas corpus was enshrined in the Magna Carta from its signing in 1215,[44] a view

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39. *Id.* at 14.

40. *See* Six Members' Case, 3 St. Tr. 235 (1629).

41. *Id.* at 281-2.

42. SHARPE, *supra* note 1, at 14.

43. *Id.*

44. Article 39 of the Magna Carta is most often cited as being the source of habeas corpus. An English translation of this article reads:

> No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any other 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.

Magna Carta, 1225, 9 Hen. 3, c. 30, art. 39, *translated in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 45 (1998).

propagated by many legal scholars, including Sir Edward Coke and William Blackstone.[45]

While the Magna Carta marked a watershed in limiting the authority of the monarch and in guaranteeing due process, it contained no express or implied right to a remedy in the nature of habeas corpus. More recent writings by Halliday and Duker now conclude that habeas corpus did not, in fact, have its origins in the Magna Carta.[46] The commonly understood connection between habeas corpus and the Magna Carta is rooted in the case made by Parliament as it sought to strengthen habeas corpus in 1628. As it pushed the limit executive detention without cause, the House of Commons asserted that habeas corpus flowed naturally from the Magna Carta.[47] Though historically dubious, this argument is perhaps best understood as a romantic appeal, connecting habeas corpus to this almost-mythical legal document. That Coke was a member of the legislature at the time perhaps helps explain his willingness to embrace and reinforce the connection in later years. In any event, the link had been made and the myth flourished.

1.1.3 The Habeas Corpus Acts

Although habeas corpus had not originated to protect individual liberty,[48] nor had it sprung forth from the Magna Carta,[49] it was slowly beginning to emerge as the great writ of liberty that would give rise to those legends. While the Petition of Right did not eliminate arbitrary imprisonment by King Charles I, it did signal a transformation in the way habeas corpus was employed. Reviewing the legality of detentions would no longer be an "incidental effect" of habeas corpus as it was used in the struggle for judicial supremacy; it would now be the primary purpose of the

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45. *See* 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 52-53 (1671); 3 BLACKSTONE, *supra* note 1, *133. *See also* Sutton, *supra* note x, at 171; Armistead Dobie, *Habeas Corpus in the Federal Courts*, 13 VA. L. REV. 433, 433 n.2 (1927).

46. *See* J.C. HOLT, MAGNA CARTA 11 (1965); HALLIDAY, *supra* note 1, at 15-16; DUKER, *supra* note 1, at 45; Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 377 (1998).

47. DUKER, *supra* note 1, at 45.

48. HALLIDAY, *supra* note 1, at 7.

49. *Id.* at 15-16; DUKER, *supra* note 1, at 45.

writ.[50] Duker offers *Chambers's Case*[51] as illustrating this transformation as well as the king's continued success in evading judicial control.[52]

Chambers had been imprisoned by the Privy Council and petitioned the common law Court of King's Bench for a writ of habeas corpus.[53] The petition was granted and a writ of habeas corpus issued. Finding the Council's return to the writ insufficient, the Court admitted Chambers to bail.[54] The case marks one of several examples of judicial use of habeas corpus to free or bail persons imprisoned by the Council during the eleven-year suspension of Parliament from 1629 to 1640.[55]

Chambers, however, was subsequently imprisoned by the Court of Star Chamber, a secretive political court renowned for its abuses of power.[56] The Court of King's Bench refused to intervene upon his second petition for writ of habeas corpus, finding that habeas corpus could not be used to question committal by the Court of Star Chamber because it was one of England's "high and honourable Courts of Justice."[57] With the Privy Council being held in check to some extent by the common law courts, the Court of Star Chamber was routinely called on to do the king's bidding.[58]

When Parliament finally reconvened in 1640, it again sought to strengthen habeas corpus and to limit arbitrary imprisonment by the king. The Habeas Corpus Act of 1640 abolished the Court of Star Chamber[59] and provided that any person

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50. DUKER, *supra* note 1, at 46.

51. 79 Eng. Rep. 717 (K.B. 1629).

52. DUKER, *supra* note 1, at 46.

53. *See id.*

54. *See id*.

55. *See* Lawson's Case, 79 Eng. Rep. 1038 (K.B. 1638); Barkham's Case, 79 Eng. Rep. 1037 (K.B. 1638); Freeman's Case, 79 Eng. Rep. 1096 (K.B. 1640). *But see* Shipmoney's Case, 3 St. Tr. 825 (1637).

56. *See* HAROLD POTTER, A HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 135-36 (1932); GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 258-59 (1955).

57. *Chambers*, 79 Eng. Rep. at 747

58. DUKER, *supra* note 1, at 47.

59. An Act for the Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber, 1640, 16 Car., c. 10, § 1, http://www.british-history.ac.uk/report.asp?compid=47221.

restrained of liberty by the Star Chamber, any similar court, the king, or the Privy Council, would be granted a writ of habeas corpus upon petition to the Court of King's Bench or the Court of Common Pleas.[60] Within three days of the return, the court was required to examine the cause of imprisonment and free, bail, or remand the prisoner.[61] A judge failing to so act was made liable for treble damages.[62]

The Act, however, did not resolve the constitutional crisis between king and Parliament.[63] In 1641 Parliament issued its "Grand Remonstrance" setting forth complaints against the King, including unjust imprisonment and his continued disregard for the Petition of Right.[64] The following year, civil war broke out in England and King Charles I was beheaded in 1649.[65]

Despite having been a major basis for complaints against the ousted king, arbitrary imprisonment continued under the Protectorate of Oliver Cromwell. Courts refused to take action even when insufficient cause was shown for imprisonment.[66] Judicial independence was compromised as judges were intimidated into compliance with the government's wishes.[67] Duker observes that only in the context of civil cases did habeas corpus enjoy progress, as Parliament passed legislation allowing imprisoned debtors to use habeas corpus to compel their creditors' appearance in court.[68]

Following the Restoration, Parliament was faced with new abuses of the writ of habeas corpus. Prisoners were transferred to Scotland or overseas in order to avoid the writ's reach, or were moved from prison to prison to prevent service on the correct

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60. *Id.* § 6.

61. *Id.*

62. *Id.*

63. DUKER, *supra* note 1, at 47-48.

64. Grand Remonstrance (1641), arts. 11-12, 14-15, *reprinted in* CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 209-10 (Samuel Gardiner ed. 1906).

65. GOLDWIN SMITH, A HISTORY OF ENGLAND 325, 339 (1949).

66. *See* Streater's Case, 5 St. Tr. 366 (1653); Lilburne's Case, 5 St. Tr. 371 (1653).

67. *See* Cony's Case, 5 St. Tr. 935 (1655).

68. DUKER, *supra* note 1, at 48-49.

jailer.[69] Increasingly, Parliament intervened when the courts were denied jurisdiction,[70] going so far as to impeach the Lord High Chancellor for causing subjects to be "imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law," amongst other charges.[71]

The crown's extraordinary efforts to evade habeas corpus, and Parliament's defense of the writ, evidence its maturation into the primary safeguard of individual liberty in England. Writing in 1670, Chief Justice Vaughn of the Court of Common Pleas stated that, "The writ of habeas corpus is now the most usual remedy by which a man is restored to his liberty, if he have been against law deprived of it."[72] Parliament attempted to strengthen habeas corpus on numerous occasions but was unable to pass legislation intended to close loopholes in habeas corpus procedure.[73]

Success finally came in 1679. On April 8, 1679, the House of Commons passed a bill reaffirming the importance of habeas corpus and enhancing procedural law.[74] An amended bill was approved by the House of Lords on May 2,[75] and after several conferences a bill was agreed on and approved on May 27, the last day of Parliament.[76] The Habeas Corpus Act,[77] as it was commonly known, applied to all criminal cases[78] and provided, among other things, the following reforms:

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69. SHARPE, *supra* note 1, at 18; DUKER, *supra* note 1, at 52-53.

70. *See* DUKER, *supra* note 1, at 52.

71. *See* Earl of Clarendon's Case, 6 St. Tr. 291 (1667). Duker notes that, ironically, the House of Commons initially sought to sequester the Lord High Chancellor on general charges but was prevented from doing so by the House of Lords. DUKER, *supra* note 1, at 53.

72. Bushell's Case, 124 Eng. Rep. 1006, 1007 (C.P. 1670).

73. Attempts to strengthen habeas corpus were made in 1668, 1669, 1673, 1675, 1676 and 1677. *See* DUKER, *supra* note 1, at 53-58; Nutting, *supra* note 1, at 528-43. In addition to loopholes leaving habeas corpus open to abuse, it was also uncertain whether writs of habeas corpus could be issued by courts out of their regular term. *See* Jenkes's Case, 6 St. Tr. 1190 (1676).

74. 9 H.C. Jour., at 590, http://www.british-history.ac.uk/report.asp?compid=27745#s21.

75. 13 H.L. Jour., at 549, http://www.british-history.ac.uk/report.asp?compid=11685#s5.

76. 13 H.L. Jour., at 594-95, http://www.british-history.ac.uk/report.asp?compid=11707#s7.

77. Habeas Corpus Act 1679, 31 Car. 2, c. 2, http://british-history.ac.uk/report.asp?compid=47484.

78. *Id.* § 1.

- Imprisoned English subjects were not to be moved to other places of confinement, except as specifically provided by the Act.[79]

- The imprisonment of subjects in Scotland, Ireland, the islands, or "places beyond the seas" was outlawed.[80]

- The Courts of Chancery, Exchequer, Common Pleas and King's Bench were all authorized to issue the writ of habeas corpus.[81]

- Judges were required to consider petitions for writ of habeas corpus even outside of regular court terms under threat of fine.[82]

- A sheriff or jailer served with a writ was required to make return and produce the individual before the court within three days.[83]

- Within two days of the production of the prisoner, judges were required to discharge the person if no cause was shown, release the individual on bail, or, remand the person to prison.[84]

- No person discharged pursuant to a writ of habeas corpus could be recommitted for the same offense without court order, under threat of fine.[85]

- Persons not eligible for release were assured trial in a timely manner.[86]

The Habeas Corpus Act had its procedural shortcomings,[87] and it was clear from the onset that Parliament did not intend to have its own committals subjected to the same independent review it desired for the executive. In the years following

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79. *Id.* § 8.

80. *Id.* § 11.

81. *Id.* §§ 2, 9.

82. *Id.* § 9

83. *Id.* § 1. The time period was extended to ten days if the person was imprisoned twenty miles or more from the court, and to twenty days if imprisoned one-hundred miles or more from the court. *Id.*

84. *Id.* § 2.

85. *Id.* § 5.

86. *Id.* § 6.

87. The Act allowed judges absolute discretion in setting bail. *Id.* § 2. This discretion was later limited by the Bill of Rights of 1688 which provided "that excessive bail ought not be required." Bill of Rights, 1 W. & M. c. 2, § 1 (1688).

enactment of the Act, both the courts[88] and the House of Commons itself[89] confirmed that committals by Parliament were not subject to inquiry via habeas corpus. David Clark and Gerald McCoy also point out that Parliament granted the monarch wider legal powers of arrest at the same time that it attempted to strengthen habeas corpus.[90]

Nevertheless, the significance of the Habeas Corpus Act was tremendous. It confirmed the fundamental nature of the right to habeas corpus and settled its place in English constitutional law. The law of habeas corpus would continue to evolve through case law and legislation,[91] but the 1679 Act signaled the full arrival of habeas corpus as "another *magna charta*."[92]

1.2 A Right of Universal Importance

By the end of the seventeenth century, habeas corpus was a fundamental part of English law. Had habeas corpus remained unique to English law, however, its impact would likely have been limited, and it may not have become a fixture of international law. The proliferation of the English habeas corpus model and the independent development of other remedies in the nature of habeas corpus ensured that it would be considered a truly universal right by the end of the Second World War.

1.2.1 Habeas Corpus Goes Global

The earliest export of habeas corpus was to Britain's colonies, although this did not always occur with enthusiasm. Clark and McCoy observe that the British

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88. *See* Danby's Case, 11 St. Tr. 831 (K.B. 1682); Regina v. Paty, 91 Eng. Rep. 431 (K.B. 1704).

89. *See* 8 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS 220-222 (1769), http://www.british-history.ac.uk/source.asp?pubid=267.

90. CLARK & MCCOY, *supra* note 1, at 41.

91. *See* Habeas Corpus Act 1816, 56 & 57 Geo. 3, c. 100 (allowing the court to examine the truth of facts set forth in a return and to hold proceedings to controvert the facts recited in the return); Habeas Corpus Act 1862, 25 & 26 Vict., c. 20 (prohibiting issuance of writs from English courts into any colony with a competent court); Administration of Justice Act 1960, 8 & 9 Eliz. 2, c. 65, §§ 14-15 (limiting repeat applications and providing procedure for appeals).

92. 3 BLACKSTONE, *supra* note 1, at *133.

government was jealous of its authority, and did not wish to grant colonists statutory rights that could be asserted against it.[93] As a result, habeas corpus was available in the colonies under principles of common law, but with the exception of Ireland,[94] Parliament did not statutorily extend the Habeas Corpus Act of 1679 to colonies until the nineteenth century.[95]

As Clark and McCoy note, in most colonies, the common law version of habeas corpus was available once courts were established with the same jurisdiction as the English superior courts at Westminster.[96] Eventually, colonial governments were able to extend statutory habeas corpus rights within their jurisdictions. In a few, this was accomplished by incorporating the English habeas corpus acts into local law.[97] More than a dozen colonies followed the lead of India, where habeas corpus was statutorily established through criminal procedure acts.[98] Others, including Ghana and jurisdictions in Canada and Nigeria, adopted local habeas corpus legislation.[99]

As Duker notes, the extension of the English habeas corpus acts to the American colonies was a particularly contentious issue. As with other colonial territories, the common law writ was available. However, the extent to which and statutes of England was in force in the American colonies was an unsettled legal question;[100] were the colonies "uninhabited country, newly found" in which case English statutes were automatically in effect, or "conquered territory" in which case

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93. CLARK & MCCOY, *supra* note 1, at 20.

94. The 1679 Act was enacted in Ireland in 1783. *See* Habeas Corpus Act (Ireland), 1781, 21 & 22 Geo. 3, c. 11.

95. CLARK & MCCOY, *supra* note 1, at 20.

96. *Id.* at 19.

97. This was the case in the West Indian Colonies and Hong Kong. *Id.*, at 20-21.

98. INDIA CODE CRIM. PROC., § 491 (1898). This approach was followed in Brunei, Fiji, the Gambia, Kenya, Kiribati, Malaya, Mauritius, Nauru, the Solomon Islands, Southern Arabia, the Straits Settlements, Tanganyika, Tuvalu, and Vanuatu. CLARK & MCCOY, *supra* note 1, at 21-23.

99. *Id.* at 23-24.

100. DUKER, *supra* note 1, at 96-99.

statutes were only in force if declared by the conqueror.[101] As a practical matter, colonists desired both the civil liberties guaranteed by English statutes and the autonomy granted colonial legislatures in their absence.[102] Following its independence from Britain, the new constitution of the United States was the first written constitution containing a guarantee of habeas corpus rights. The United States Constitution, which entered into force in 1789, did not contain an express affirmative grant of habeas corpus,[103] however, among the enumerated legislative powers it provided that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[104]

Debate has raged over the nature and extent of a constitutional right to habeas corpus in the U.S. Constitution. Shortly after enactment of the United States Constitution, Congress passed legislation specifically granting federal courts the authority to issue writs of habeas corpus.[105] The United States Supreme Court has stated that habeas corpus statutes implement "the constitutional command that the writ of habeas corpus be made available."[106] The Court has frequently commented on the prominence of habeas corpus. For example, in 1869, Chief Justice Salmon P. Chase noted that, "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom."[107] At the same time, the Court has been reluctant to define the extent of a constitutional right to habeas corpus.[108] In January 2007, U.S. Attorney General Alberto Gonzalez famously

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101. Blankard v. Galty, 91 Eng. Rep. 356, 357 (1694) (discussing applicability of English statutory law to Jamaica).

102. DUKER, *supra* note 1, at 99. For a full discussion of the extension of habeas corpus to the American colonies, *see id.* at 95-116.

103. *See generally*, U.S. CONST.

104. U.S. CONST. art. I, § 9, cl. 2.

105. *See* Federal Judiciary Act of 1789, ch, 20, § 14, 1 Stat. 81-82.

106. Jones v. Cunningham, 371 U.S. 236, 237 (1963).

107. *Ex Parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1869). *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 39 (2007) (testimony of Attorney General Alberto Gonzalez).

108. See *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807); *In re* Burrus, 136 U.S. 586, 590 (1890); Harris v. Nelson, 394 U.S. 286, 290-91 (1969); Preiser v. Rodriguez, 411 U.S. 475, 485 (1973); Rasul v. Bush, 542 U.S. 466, 473-80 (2004).

testified before the Senate Judiciary Committee that "there is no expressed grant of habeas in the Constitution" and that "the Constitution doesn't say every individual in the United States or every citizen is hereby granted or assured the right to habeas."[109] Notwithstanding this debate over its scope, it is clear that habeas corpus is considered a fundamental principle in American law.[110]

Through British colonial influence, habeas corpus was disseminated throughout the common law world and beyond. In the nineteenth and twentieth centuries, many non-common law jurisdictions adopted the English model of habeas corpus as well. In many non-common law countries, however, remedies similar to habeas corpus already existed based on independent sources, as shown by Sharpe and by Clark and McCoy. In early Roman law, mechanisms existed to restore an unjustly imprisoned individual to liberty. The Digest of Justinian recognized the edict of *de homine libero exhibendo*.[111] This edict ordered the production of a freeman who was unlawfully deprived of his liberty.[112] This remedy only ordered production "when it is certain that someone is a freeman.[113] It did not provide for a factual investigation into the individuals status as a freeman or slave.[114]

This remedy clearly influenced many European civil law systems. For example, Sharpe explains that a form of *de homine libero exhibendo* developed in Roman-Dutch law into a remedy with qualities more closely resembling habeas corpus.[115] It was also disseminated through much of the Dutch colonial world, and existed in South Africa, Namibia, Lesotho, Zimbabwe, and Botswana prior to British

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109. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 39 (2007) (testimony of Attorney General Alberto Gonzalez).

110. For an overview of the nature of the guarantee and the debate over the power to suspend the write, *see generally* David Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006).

111. DIG. 43.29.1 (Ulpian, Ad Edictum 71).

112. *Id*. (Alan Watson trans.).

113. *Id.* at 43.29.7

114. *Id.*

115. SHARPE, *supra* note 1, at 27.

control.[116] In South Africa, the terms habeas corpus and *de homine libero exhibendo* were later used interchangeably.[117]

Early Spanish law also contained a procedure to secure individual liberty. Hector Fix Zamudio notes that complaint hearings known as *manifestación de las peronas* ("the demonstration of persons") were part of the law of Aragon prior to the fifteenth century.[118] Both Fix Zamudio and Leonard Sutton observed that the remedy provided wider protection at that time than its English equivalent.[119]

The remedy of *manifestación* made its way to Latin America through the Law of the Indies.[120] In Mexico, it became the basis for the writ of *amparo de la libertad* ("liberty *amparo*"), one of several judicial remedies known as *amparo*.[121] *Amparo de la libertad* was used to enforce individual rights and protect liberty much like habeas corpus.[122] According to Fix Zamudio, both *amparo* and habeas corpus flourished in Latin America as a result of influence from the United States, Spain, France and Mexico.[123]

As in Mexico, *amparo de la libertad* became the primary safeguard of personal liberty in Chile.[124] In Venezuela, Honduras and Nicaragua, habeas corpus was essentially a part of the remedy of *amparo*.[125] Habeas corpus was adopted as the exclusive means to challenge the legality of detention in Argentina, Peru, Guatemala,

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116. *Id.*

117. *Id.*

118. Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 LAW. AM. 361, 365 (1981).

119. *Id*.; Sutton, *supra* note 6, at 171, *citing* HURD, *supra* note 1, at 131.

120. Fix Zamudio, *supra* note 118, at 366.

121. *Id.* at 366. There are three general types of *amparo*: 1) a method of challenging court decisions, 2) injunctions to protect property rights, and 3) the liberty *amparo*, similar to habeas corpus. *Id*. at 364-65.

122. *Id*. at 365-66.

123. Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of* Amparo, 9 CAL. W. INT'L L.J. 306, 309-10 (1979).

124. Fix Zamudio, *supra* note 118, at 367.

125. *Id*. at 372, 376-77.

El Salvador, Costa Rica, Panama, Bolivia, Paraguay, and Brazil, while the general remedy of *amparo* remained available to enforce all other constitutional rights.[126]

1.2.2 The Status of Habeas Corpus in 1945

By the end of World War II, habeas corpus was a highly regarded right with a rich history and developed jurisprudence.[127] George Longsdorf wrote in 1949 that habeas corpus had evolved from obscurity to the "great writ for the protection of the inalienable liberty of man."[128] Three major steps in its early English history had elevated the writ from a royal command into a remedy for the protection of liberty. First, the writ came to be available upon petition of the detained person, rather than being available only at a court's prerogative. Second, courts extended the purview of habeas corpus to include a factual investigation into the legal basis for the detention. Third, the writ's greatest strength came in its use to determine the legality of actions of the executive power.

When exported abroad, the right took firm root and complimented already-existing remedies of a similar nature. These other remedies reflected the universal importance of individual liberty and suggested that habeas corpus might be considered a fundamental right. According to the American Law Institute's influential Statement of Essential Human Rights, the right to habeas corpus was guaranteed in thirty-four national constitutions by the end of the war.[129] The "great writ" had long been considered a "bulwark of liberty"[130] and was described in the

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126. *Id*. at 368, 374-79, 382.

127. *See, e.g.*, Longsdorf, *supra* note 1; Robert Hall, *The Writ of Habeas Corpus*, 11 DALLAS B. SPEAKS 88 (1948).

128. Longdorf, *supra* note 1, at 301.

129. Statement of Essential Human Rights comment to art. 8 (Americans United for World Org. ed. 1945). Those countries were Bolivia, Brazil, Chile, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Estonia, El Salvador, Greece, Guatemala, Honduras, Iceland, India, Iran, Irish Free State, Liberia, Lithuania, Mexico, Netherlands, Nicaragua, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Spain, United States, Uruguay, U.S.S.R., Venezuela, and Yugoslavia. American Law Institute, Procedural Rights (Three Articles) (Sept. 28, 1943).

130. S.G.F., *The Suspension of Habeas Corpus During the War of the Rebellion*, 1888 POL. SCI. Q. 454, 454.

early Twentieth Century as "the crystallization of the freedom of the individual."[131]

Habeas corpus had proven itself as a key check against arbitrary government power, particularly that of the executive, as the world emerged from the war to face its future. The right to habeas corpus would, therefore, be among those rights considered by the United Nations Commission on Human Rights as it began the work of drafting an International Bill of Human Rights in the post-war years, a process detailed in Chapter 2.

131. William W. Grant, Jr., *Suspension of the Habeas Corpus in Strikes*, 3 VA. L. REV. 247, 247 (1916).

2

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

As with many fundamental rights, the movement of habeas corpus from the exclusive province of domestic law to the realm of international law began in the years following World War II. As Mary Ann Glendon observes, the events of the war, particularly the Holocaust, profoundly altered the previously accepted view that a state's relationship with its citizens was beyond the concern of international law.[1] A new postwar regime emerged, driven by democratic ideals and a common desire to prevent the abuses of the defeated fascist states in the future. Central to this new regime was the recognition and protection of human rights at the international level. This chapter, therefore, examines the place of habeas corpus in the human rights discourse following WWII and its treatment by the drafters of the seminal human rights instrument, the Universal Declaration of Human Rights.[2]

2.1 The Postwar Development of International Law

The end of World War II ushered in what William Schabas terms a "revolutionary transformation" of international law.[3] At the forefront of this transformation were the establishment of the International Military Tribunal at Nuremberg and the adoption of the Charter of the United Nations by the victorious allied nations. Both would mark important advances for the rule of law in the international arena, including the promotion of rights such as habeas corpus.

The International Military Tribunal at Nuremberg was established by a 1945 agreement between France, the Soviet Union, the United Kingdom, and the United States[4] to prosecute Nazi war criminals. A second forum, the International Military Tribunal for the Far East, was created by order of General Douglas MacArthur, the

1. MARY ANN GLENDON, A WORLD MADE NEW 9 (2001).

2. G.A. Res. 217 A (III), U.N. Doc A/810 at 731 (Dec. 10, 1948) [hereinafter "UDHR" or "Universal Declaration"].

3. William Schabas, Inaugural Lecture at Leiden University: The Three Charters: Making International Law in the Post-War Crucible, at 1 (Jan. 25, 2013), http://www.mediafire.com/view/?p7zisqsup89ay0h.

4. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 251.

Supreme Commander of the Allied Powers, on January 19, 1946.[5] Though not immune from accusations of victors' justice, the decision to conduct trials with established process even for the most heinous crimes helped set a tone of respect for the rule of law and human rights in the postwar period.[6]

An even more direct impact on human rights came with the signing of the Charter of the United Nations in San Francisco on June 26, 1945, by delegates from forty-five nations.[7] The new organization had been championed by United States President Franklin D. Roosevelt prior to his death in early 1945 and enjoyed strong bipartisan support from the United States, a marked difference from the failed League of Nations.[8] Glendon asserts that the United Nations reflected the postwar spirit of hope and change, heralding such concepts as self-government and decolonization.[9] A sense of egalitarianism prevailed, with the historically less-influential Latin American states making up the largest single bloc of countries at the drafting convention.[10] As Schabas points out, women also enjoyed an increasingly meaningful role in the new organization.[11] In light of the abuses perpetrated by the Nazi regime, prominence was given to the protection and promotion of human rights.

According to David Weissbrodt, many participants in the San Francisco Conference, including United States President Harry Truman and Jan Smuts of South Africa, anticipated that a bill of human rights would be attached to the Charter.[12] Delegates from Cuba, Mexico, and Panama urged the Conference to adopt a human

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5. *See* Charter of the International Military Tribunal for the Far East, T.I.A.S. 1589 [hereinafter "Far East Charter"].

6. Neither tribunal's charter provided for habeas corpus proceedings. *See generally* Charter of the International Military Tribunal, 82 U.N.T.S. 284; Far East Charter. This is not surprising given the limited jurisdiction of the tribunals and their international, ad hoc nature. A person convicted by one of the international military tribunals, however, no longer had access to habeas corpus in the courts of the United States, either. *See* Hirota v. MacArthur, 338 U.S. 197 (1948).

7. *See* U.N. CHARTER; GLENDON, *supra* note 1, at 15.

8. GLENDON, *supra* note 1, at 27.

9. *Id*. at 12-13.

10. *Id*. at 15.

11. Schabas, *supra* note 3, at 8.

12. DAVID WEISSBRODT, THE RIGHT TO A FAIR TRIAL: ARTICLES 8, 10, AND 11 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 5 (2001).

rights instrument along with the Charter.[13] In the end, however, the delegates to the San Francisco Conference opted not to include specific human rights provisions but instead to leave the matter for the General Assembly.

As a result, Article 55 of the U.N. Charter simply states that "United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[14] Several other articles allude to the importance of human rights,[15] and all states are obligated to ensure their promotion.[16] The Charter also contemplated the creation of commissions and procedures to facilitate the promotion of human rights.[17]

2.2 Drafting the Universal Declaration

The first session of the United Nations General Assembly opened on January 10, 1946, in London.[18] A nuclear planning commission for human rights was established by the Economic and Social Council.[19] The nuclear commission, meeting in New York in the spring of 1946, made recommendations for the permanent structure of a Commission on Human Rights to be created pursuant to Article 68[20] and recommended that the Commission's first work would be to draft an International Bill of Human Rights.[21] In June 1946, the permanent Commission on Human Rights[22]

13. *Id.* at 5.

14. U.N. CHARTER art. 55.

15. *Id.*, preamble, arts. 1, 13 & 72.

16. *Id.* art. 56.

17. *Id.* arts. 62 & 68.

18. GLENDON, *supra* note 1, at 28.

19. Comm'n on Hum. Rts. Res., U.N. Doc. E/27 at 1-2 (Feb. 22, 1946).

20. *See* Rep. of Comm'n on Hum. Rts. to the Second Session of Econ. & Soc. Council, U.N. Doc. E/38/Rev.1 (May 21, 1946).

21. *Id.* at 6; Eleanor Roosevelt, *The Promise of Human Rights*, 26 FOREIGN AFFAIRS 470, 471 (1948).

22. Econ. & Soc. Council, Draft Res. Concerning the Rep. of the Comm. on Hum. Rts., U.N. Doc. E/56/Rev.1 (June 19, 1946).

was established. The Commission was to have eighteen members, one from each of the United Nations.[23]

The first session of the new Human Rights Commission took place from January 27 to February 10, 1947, at Lake Success, New York.[24] Eleanor Roosevelt of the United States was selected as chair of the Commission with China's P.C. Chang as vice-chair and Charles Malik of Lebanon as rapporteur.[25] Early on, the idea of drafting a declaration of rights was given much attention by the Commission. In Glendon's view, the creation of a statement of human rights norms seemed to be a natural prerequisite for the establishment of mechanisms such as an international court of human rights.[26] Although the Commission hoped its Bill of Human Rights would eventually contain both a declaration of rights and a binding convention, Weissbrodt asserts that the Commission recognized that a declaration could be more expeditiously adopted, compared to slower process of a convention being ratified by states-parties.[27] It was therefore agreed that a declaration of human rights be prepared in the form of a resolution for approval by the General Assembly.[28]

Even so, a declaration would still have to make it over several hurdles. First, a draft declaration would have to be approved by the full Commission and then sent to member states for comments. After comments were received and reviewed, it would be reconsidered by the Commission. The Economic and Social Council would then review the Commission's draft to determine whether to forward it to the Third Committee on Social, Humanitarian, and Cultural Affairs for final review before consideration by the U.N. General Assembly.[29]

The protection of human rights, particularly guarantees of personal liberty such as habeas corpus, would also have to navigate the familiar tension between security and liberty. Glendon demonstrates this tension in the course of a debate

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23. U.N. Doc. E/84/Rev.1 at 3 (July 1, 1946).

24. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/259 at 1 (Oct. 2, 1947).

25. *Id*. at 2.

26. GLENDON, *supra* note 1, at 38.

27. WEISSBRODT, *supra* note 12, at 7.

28. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/259 at 3 (Oct. 2, 1947).

29. U.N. Doc. E/235 at 2-3 (April 22, 1947); GLENDON, *supra* note 1, at 55-56.

regarding the relationship between the individual and the state during the Commission's first session, in which the representative from the United Kingdom asserted that individuals "must pay the price of the advantages that result from our calling upon the State to safeguard our liberties. . . ."[30] Balancing these competing interests would be one of the challenges for the drafters of the declaration.

A drafting group consisting of the three officers and John Humphrey, the Secretariat's representative, was appointed to begin work on draft human rights instruments to be submitted to the Commission at its second session.[31] At the request of the Economic and Social Council, this group was soon enlarged to form a more representative Drafting Committee.[32] On behalf of the Commission, the Council requested that the Secretariat prepare a "documented outline concerning an International Bill of Human Rights."[33]

2.2.1 Habeas Corpus from the Start

In preparing the outline, the Secretariat reviewed all national constitutions and human rights instruments then available, as well as proposals from governments and organizations.[34] At that time, the right to habeas corpus would have been found in at least thirty-four national constitutions[35] as well as several submissions made to the Secretariat. Cuba, for example, proposed inclusion of, "[t]he right to immunity from arbitrary arrest and to a review of the regularity of his arrest by ordinary tribunals."[36]

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30. GLENDON, *supra* note 1, at 40.

31. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/259 at 2 (Oct. 2, 1947).

32. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/383 (Mar. 27, 1947); Comm'n on Hum. Rts. Drafting Comm., Memorandum on Hist. Background of the Comm., U.N. Doc E/CN.4/AC.1/2 at 4-7 (May 29, 1947).

33. Econ. & Soc. Council Res., U.N. Doc. E/325 at 2 (Apr. 22, 1947).

34. The Secretariat prepared an extensive report documenting relevant observations made by Commission members, drafts of proposals submitted by governments and nongovernmental organizations, and provisions from 51 national constitutions for each of the forty-eight rights in the outline. *See* Comm'n on Hum. Rts. Drafting Comm., Int'l Bill of Rights Documented Outline, U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 2, 1947).

35. Statement of Essential Human Rights comment to art. 8 (Americans United for World Org. ed. 1945) [hereinafter A.L.I. Statement].

36. Cuban Delegation Draft Declaration on Hum. Rts., U.N. Doc. E/HR/1 (Feb. 12, 1946).

2. UDHR

Glendon states that two human rights instruments were particularly influential in the Secretariat's compilation – the Draft Declaration of the International Rights and Duties of Man and the American Law Institute's Statement of Essential Human Rights.[37] The Draft Declaration, prepared by the Inter-American Juridical Committee and submitted by Chile, would later form the basis for the American Declaration of the Rights and Duties of Man [38] This document, however, did not contain the right to habeas corpus.[39]

Even more prominent in the Secretariat's work was the A.L.I. Statement, drafted during the war in the United States, and submitted to the Commission by Panama.[40] The Statement was labeled by Humphrey as the "best of the texts from which I worked"[41] and did include a habeas corpus provision. It stated, "Every one who is detained has the right to immediate judicial determination of the legality of his detention. The state has a duty to provide adequate procedures to make this right effective."[42] The comment to this article offered an interpretation of two important phrases in the article:

> "Immediate" determination means not only that he shall have access without delay to a competent tribunal but also that the tribunal shall promptly decide the question. Whatever the character of the tribunal may be, it is indispensable that the determination be "judicial" in the sense of the judicial tradition of responsibility, independence, and impartiality.[43]

The succinct statement and comment were no doubt taken into account as the Secretariat produced a draft outline for the Drafting Committee's planned June 1947 session.

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37. *See* GLENDON, *supra* note 1, at 57.

38. Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 31 (2003).

39. *See* Inter-Am. Juridicial Comm., Draft Declaration of the Int'l Rts. and Duties of Man, U.N. Doc. E/CN.4/2 (Jan. 8, 1947).

40. Pan. Delegation, Statement of Essential Hum. Rts., U.N. Doc. E/HR/3 (Apr. 26, 1946).

41. JOHN HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 32 (1984).

42. A.L.I. Statement art. 8.

43. *Id*., comment to art. 8.

2. UDHR

The Secretariat's draft contained forty-eight items which, in Humphrey's view, included "every conceivable right the Drafting Committee might want to discuss."[44] Included in the draft was the right to habeas corpus, along with a prohibition against arbitrary detention, at Article 7. Modeled closely on the language of the A.L.I. Statement, the article read "Every one shall be protected against arbitrary and unauthorized arrest. He shall have the right to immediate judicial determination of the legality of any detention to which he may be subject."[45]

The full Drafting Committee envisaged the Secretariat's outline as potentially serving as the foundation for both a declaration of human rights and a human rights convention, so a four-person temporary working group was assigned to consider how these documents might flow from the outline.[46] The temporary working group elected to begin a draft declaration and decided that purpose and unity could best be achieved by putting the declaration in the hands of the French representative to the Commission, Rene Cassin.[47] Cassin attempted to meet these goals by adding a preamble and organizing the rights in the declaration thematically.

Cassin placed the habeas corpus protection at Article 10 in his draft, part of Chapter 3 concerning "Personal Freedom."[48] This entire article read "No person may be arrested or detained save in cases provided for and in accordance with the procedure prescribed by law. Any person arrested or detained shall have the right to immediate judicial determination of the legality of the proceedings taken against him."[49] Cassin's Article 10 mirrored the A.L.I. Statement in most core ways, requiring that the inquiry be "immediate," that the inquiry be "judicial" and that it be limited to determining the "legality" of the action. However, unlike the A.L.I. Statement and the Secretariat's draft, the Cassin draft required inquiry into the legality

44. GLENDON, *supra* note 1, at 57 (*quoting* Verbatim Record of June 9, 1947, Drafting Committee Meeting (Papers of Charles Malik, Library of Congress, Manuscript Division)).

45. Comm'n on Hum. Rts. Drafting Comm., Draft Outline of Int'l Bill of Rts., U.N. Doc. E/CN.4/AC.1/3 art. 8 (June 4, 1947).

46. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/21 at 3 (July 1, 1947).

47. *Id.* at 4.

48. U.N. Doc. E/CN.4/AC.1/W.2/Rev.1 ch. 3 (1947); Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/21 annex D at 53, ch. 3 (July 1, 1947).

49. U.N. Doc. E/CN.4/AC.1/W.2/Rev.1 ch. 3 (1947); Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/21 annex D at 53, art. 10 (July 1, 1947).

of "the proceedings" against a person rather than inquiry into the legality of his or her "detention." This language, of course, presupposed respect for the first portion of Article 10 – that an individual only be detained for legitimate reasons under previously established law. This presupposition, however, unintentionally negated one of the primary historical purposes of habeas corpus, which was to provide a means to challenge detentions that *were not* for legitimate reasons under previously established law.

On June 17, 1947, Cassin unveiled his draft declaration to the Drafting Committee.[50] By this time, the Committee realized that it would not likely have the time to complete proposals for both a declaration and convention, and opted, by default, to make its first priority the production of a draft declaration to be distributed to the full Commission on Human Rights at its December, 1947, meeting.[51] Even this more limited objective proved elusive, however, and the Committee adjourned on June 25, 1947, without having fully completed its review and revision of Cassin's draft.[52] The Committee's draft was not a polished product and articles for which "more that one view was expressed" contained alternatives and comments.[53]

In its consideration of the habeas corpus article, the Committee appeared to have recognized the potential problem with Cassin's language, and reverted to the language used in the Secretariat's draft. This article, however, was one of those for which alternative text was included. The complete habeas corpus article in the Committee's June 1947 draft, including notes, read as follows:

> No one shall be deprived of his personal liberty or kept in custody except in cases prescribed by law and after due process. Every one placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject.
>
> [1. There was a feeling in the drafting committee that articles 8, 9, and 10 would need to be reconsidered in the light of any convention that might be recommended for adoption. 2. The representative of the

50. GLENDON, *supra* note 1, at 69.

51. *Id.*

52. *Id.* at 70.

53. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/21 at 5 (July 1, 1947).

> United States felt that the following alternative wording for the second sentence might be considered:
>
> Every one placed under arrest or detention shall have the right to release on bail and if there is a question as to the correctness of the arrest shall have the right to have the legality of any detention to which he may be subject determined in a reasonable time."][54]

While the primary article remained consistent with the A.L.I. Statement and the Secretariat's draft, the alternate language, proposed by Eleanor Roosevelt on behalf of the United States, contained subtle but significant differences. First, by including a right to release on bail with the right to habeas corpus, the proposal seemed to blur the lines between the rights of a criminal defendant and the very distinct right of habeas corpus, which applies outside of criminal prosecutions. Second, the legality of detention would only be reviewed if there was "a question as to the correctness of the arrest."[55] This would seem to preclude, for example, the use of habeas corpus by a person who was legally arrested but not released at the expiration of his sentence, or a person who was voluntarily admitted to an institution but was not allowed to leave. Finally, the alternative mandated that a review occur "in a reasonable time" rather than "immediately."[56]

The second session of the full Commission on Human Rights second session took place in Geneva in December 1947.[57] The beginning of the session was dominated by continued discussion regarding the relative merits of a human rights declaration as opposed to a binding convention.[58] Smaller nations lobbied for a convention and implementation, while the United States and Soviet Union preferred limiting the Commission's work to a non-binding declaration.[59] Glendon asserts that the motivations of the smaller nations were varied, with some viewing the process as a way to foster the domestic stability that would be necessary for implementation of

54. *Id*., annex F at 74, art. 8. The brackets appear in the original version.

55. *Id*.

56. *Id*.

57. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/600 at 2 (Dec. 17, 1947).

58. GLENDON, *supra* note 1, at 84-88.

59. *Id*. at 85-86.

constitutional democracy.[60] Implementation may have been a less urgent matter to larger nations because, as Eleanor Roosevelt stated, "the people of our country don't feel the need for protection."[61]

Eventually, it was agreed to move forward on the declaration and a convention, as well as measures of implementation.[62] Commission members were assigned to one of three working groups.[63] The new working group for the declaration was expected to review and revise the Drafting Committee's June draft.[64] This would, of course, require some choices regarding the Committee's habeas corpus article and the proposed alternative submitted by Roosevelt. At Cassin's urging, the Working Group incorporated some aspects of Roosevelt's alternative proposal into a new article.[65] It provided:

> No one shall be deprived of his personal liberty or kept in custody except in cases prescribed by law and after due process. Every one placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject and to trial within a reasonable time or to release.[66]

While the first part of the habeas corpus sentence, on whole, stayed true to previous versions, it now also incorporated elements of the rights of a criminal defendant, namely the right to a speedy trial and the right to release on bail. The Working Group approved the habeas corpus article by a 4-0 vote with two abstentions.[67] On December 12 the revised declaration was presented to the full Commission and

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60. *Id*. at 88.

61. *Id.*

62. Rep. of Comm'n on Hum. Rts., U.N.Doc. E/600 at 5 (Dec. 17, 1947). Eventually the second and third stages – a convention and implementation – would be combined. Erik Møse, *Article 8*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 187 (Gundmundur Alfredsson and Asbjørn Eide eds. 1999).

63. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/600 at 5 (Dec. 17, 1947).

64. GLENDON, *supra* note 1, at 87.

65. WEISSBRODT, *supra* note 12, at 25.

66. Comm'n on Hum. Rts., Rep. of Working Group on Declaration on Hum. Rts., U.N. Doc. E/CN.4/57 at 7 (Dec. 10, 1947).

67. Comm'n on Hum. Rts., 2nd Sess., Working Group on Declaration on Hum. Rts., 3d mtg., U.N. Doc. E/CN.4/AC.2/SR.3 at 9 (Dec. 6, 1947).

approved by a vote of 13-0 with four abstentions.[68] The Commission also expressed its preference that the Drafting Committee make the declaration "as short as possible,"[69] an imperative that would soon impact the right to habeas corpus.

The draft was then circulated to member states for comments in anticipation of the Drafting Committee's scheduled May 1948 meeting.[70] By the time that meeting began on May 3, comments had been received from thirteen states, many expressing the desire for a simpler declaration.[71] The Drafting Committee, however, struggled to reach a consensus on how much detail to include in the habeas corpus article. The majority of the Committee favored keeping Article 8 of the Commission's December draft with no changes.[72] A minority wished to combine the article with additional fair trial provisions.[73] As a result, when the Committee ended its review on May 21, without having even completed its review of the portion of the declaration addressing social and economic rights,[74] two habeas corpus alternatives emerged to be considered by the third session of the full Commission on Human Rights.[75]

2.2.2 The Removal of Habeas Corpus

The third session of the Commission on Human Rights convened on May 24, 1948, at Lake Success, to prepare the draft declaration for submission to the Economic and Social Council.[76] It was at this session, late in the drafting process, that a separate article specifically guaranteeing the right to habeas corpus would disappear from the declaration. A proposal by China, India and the United Kingdom urged amendment of the article that had previously contained the right to habeas

68. GLENDON, *supra* note 1, at 93.

69. Rep. of Comm'n on Hum. Rts., U.N. Doc E/600 at 16 (Dec. 17, 1947).

70. GLENDON, *supra* note 1, at 94.

71. *Id*. at 107.

72. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/95 at 5 (May 21, 1948).

73. *Id*. at 6.

74. GLENDON, *supra* note 1, at 111.

75. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/95 at 5-6 (May 21, 1948).

76. *See* Rep. of Third Session of Comm'n on Hum. Rts., U.N. Doc E/800 (June 28, 1948).

corpus to simply state, "No one shall be subjected to arbitrary arrest or detention." [77] The proposal was discussed, and several members of the Commission preferred it because they felt that the original draft contained too many separate provisions.[78] According to the representative from India, Hansa Mehta, "the Declaration should lay down principles and not become involved in the details."[79] Charles Malik of Lebanon also spoke favorably of the amendment, stating that elaboration was more appropriate for the covenant.[80] The discussion did not specifically address the right to habeas corpus in the original draft, but focused instead on the level of detail to be included in the general right to liberty of person in the declaration,[81] an issue on which the Commission had previously expressed a preference for brevity.[82]

At the close of the discussion, the China-India-U.K. proposal was approved by a vote of 10-4 with two abstentions.[83] Following the vote, the Soviet delegate pointed out that in addition to the general prohibition on arbitrary arrest or detention contained in the proposal, other rights – such as the right to habeas corpus – must be considered.[84] The Chair, Eleanor Roosevelt, stated that the proposal had already been discussed and voted on, and that it did not seem possible to reopen discussion.[85] Roosevelt's decision was ratified by a vote of the Commission.[86] The amended article was thus included the newly streamlined declaration approved by the Commission on June 18, 1948, by a vote of 12-0 with four abstentions.[87] For the first time in its

77. India & U.K. Proposed Amend. to Draft Declaration on Hum. Rts., U.N. Doc. E/CN.4/99 at 2 (May 24, 1948); China Amend. to Draft Int'l Declaration on Hum. Rts., U.N. Doc. E/CN.4/102 at 2 (May 27, 1948).

78. Comm'n on Hum. Rts., 3d Sess., 54th mtg., U.N. Doc. E/CN.4/SR.54 at 4 (June 10, 1948).

79. *Id.*

80. *Id.*

81. *Id.* at 4-7.

82. The Commission previously requested that the drafting committee make the declaration "as short as possible." Rep. of Comm'n on Hum. Rts., U.N. Doc E/600 at 16 (Dec. 17, 1947).

83. Comm'n on Hum. Rts., 3d Sess., 54th mtg., U.N. Doc. E/CN.4/SR.54 at 6 (June 10, 1948).

84. *Id.* at 7.

85. *Id.*

86. *Id.*

87. Rep. of Third Session of Comm'n on Hum. Rts., U.N. Doc. E/800 at 5 (June 28, 1948).

drafting history, the declaration did not guarantee the right to habeas corpus or offer any similar protection.

2.2.3 *Amparo* to the Rescue

The Commission's June 1948 draft was forwarded to the Economic and Social Council. On August 26, 1948, having failed to consider the declaration so far during its six-week session in Geneva, the Council approved the draft without debate by a unanimous vote.[88] Without a habeas corpus provision, the declaration moved on to the Third Committee of the General Assembly, which met in Paris in the fall of 1948.

The concept of judicial review of the legality of detention did, however, remain on the minds of delegates. Numerous amendments were considered in the Third Committee, including a proposal by Cuba, Ecuador, France, Mexico, the Soviet Union, and Uruguay, to restore the following language to the arbitrary detention article:

> Anyone deprived of his freedom has the right to have the legality of the action taken against him confirmed without delay by a judge and also to have his case brought before the court with undue delay to or be liberated.[89]

Again, advocates of a simpler declaration argued that it "should be a brief and simple statement of general principles," while "precise legal provisions should rather be included in the covenant."[90] The proposed amendment was defeated by a vote of 20-18 with seven abstentions.[91] Although habeas corpus would not be restored as a separate right, a similar right would become a part of the declaration very late in its drafting.

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88. Econ. & Soc. Council Res., U.N. Doc. E/1046 (Aug. 26, 1948).

89. Draft Declaration of Hum. Rts., Synthesized Text for Art. 7 Elaborated Jointly by Delegations of Cuba, Ecuador, Fr., Mex., U.S.S.R., & Uru., U.N. Doc. A/C.3/313 (Oct. 26, 1948).

90. Johanna Niemi-Kiesiläinen, *Article 9, in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 148 (Asbjørdn Eide et al. eds. 1992) (quoting the New Zealand delegate).

91. U.N. GAOR, 3rd Sess., pt. 1, 114th mtg. of Third Comm., at 253, U.N. Doc. A/C.3/SR.114 (Oct. 27, 1948).

On October 12, a new proposal for inclusion in the declaration was introduced by Pablo Campos Ortiz of Mexico.[92] The proposed article stated "[t]here should likewise be available to every person a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."[93] Campos Ortiz explained this was "a statement of a fundamental right recognized by most national legislation – the right to take legal proceedings, on the basis of a prompt and simple procedure that assured protection against the acts of public authorities who violated a person's fundamental rights."[94] Although it had not previously been proposed for the declaration, the concept contained in the proposed article was familiar to many delegates. It mirrored exactly the language of Article XVIII of the American Declaration of the Rights and Duties of Man, adopted just months earlier in Bogota.[95] The language clearly reflected the Latin American remedy of *amparo*, which had been a part of Mexican law since 1847.[96] As Erik Møse notes, the use of *amparo* to enforce constitutional rights was, in part, inspired by the concept of judicial review in the United States.[97]

Campos Ortiz admitted the proposed article touched on implementation, a topic to be addressed separately from the declaration, but pointed out that the remedy was national rather than international.[98] The representative from Uruguay suggested that the proposal was more than a procedure, and might be considered a new right.[99] Chile's representative pointed out that prior to the third session of the Commission on Human Rights, the declaration had contained the specific right to habeas corpus.[100]

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92. Draft Declaration of Hum. Rts., Mex. Amend. to Arts. 3, 6, 7, 14, 23, & 25, U.N. Doc. A/C.3/266 at 1 (Oct. 12, 1948).
93. *Id*. at 1.

94. U.N. GAOR, 3rd Sess., pt. 1, 111th mtg. of Third Comm., at 230, U.N. Doc. A/C.3/SR.111 (Oct. 23, 1948).

95. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). The American Declaration did, incidentally, contain a separate habeas corpus provision at Article XXV.

96. Møse, *supra* note 62, at 197. For a discussion of the origins of *amparo*, *see supra* § 1.2.1.

97. Møse, *supra* note 62, at 197.

98. U.N. GAOR, 3rd Sess., pt. 1, 111th mtg of Third Comm., at 231, U.N. Doc. A/C.3/SR.111 (Oct. 23, 1948).

99. U.N. GAOR, 3rd Sess., pt. 1, 112th mtg of Third Comm., at 232, U.N. Doc. A/C.3/SR.112 (Oct. 25, 1948).

100. *Id*. at 233.

Now, he noted, no article protected the individual from abuses of authority and he argued that the Mexican proposal filled that lacuna.[101]

Several other suggestions were offered. An alternate version introduced by Cuba provided a remedy for violation of rights enumerated by the declaration rather than constitutional rights.[102] Campos Ortiz offered a simplified version of his earlier proposal, which read, "Everyone has the right to an effective judicial remedy for acts violating his fundamental constitutional rights."[103] The Venezuelan representative suggested changing the phrase "effective judicial remedy" to "effective remedy by competent national tribunals."[104] China stated that it preferred the phrase "effective judicial remedy" because many countries had provincial or state courts that were not "national tribunals."[105] However, after both Venezuela and the Soviet Union expressed concern that "judicial remedy" could be interpreted to mean recourse to an international court or agency, China withdrew its suggestion.[106]

This proposed new article was not without its skeptics. Although not completely opposed to the article, the United States felt it was somewhat "unnecessary."[107] Yugoslavia felt the proposal might not be adequately universal since it could only apply in states where separation existed between the executive and the judiciary.[108] Australia, France, and the United Kingdom suggested such an article was better placed in the convention, and were troubled by the phrase "fundamental constitutional rights" since some nations had no written constitution.[109] In response to

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101. *Id*.

102. Draft Int'l Declaration of Hum. Rts., Cuba Add. to Art. 6, U.N. Doc. A/C.3/310 (Oct. 25, 1948).

103. Draft Int'l Declaration of Hum. Rts., Mex. Amend. To Art. 6, U.N. Doc. A/C.3/308 (Oct. 25, 1948).

104. U.N. GAOR, 3rd Sess., pt. 1, 112th mtg of Third Comm., at 234-35, U.N. Doc. A/C.3/SR.112 (Oct. 25, 1948).

105. U.N. GAOR, 3rd Sess., pt. 1, 113th mtg of Third Comm., at 242, U.N. Doc. A/C.3/SR.113 (Oct. 26, 1948).

106. *Id*.

107. U.N. GAOR, 3rd Sess., pt. 1, 112th mtg of Third Comm., at 234, U.N. Doc. A/C.3/SR.112 (Oct. 25, 1948).

108. *Id*. at 235. This criticism, of course, would also have applied to the earlier habeas corpus article.

109. *Id*. at 236 (remarks of French delegate); *id*. at 237 (remarks of U.K. delegate); *id*. at 238 (remarks of Australian delegate).

the latter concern, the Chilean representative suggested that the remedy be available for violations of "constitution or law."[110]

On October 26, 1948, a new version was proposed based on the simplified language provided by Mexico which incorporated the suggestions made by Chile and Venezuela.[111] It read "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[112] The article was put to a vote, and passed 46-0 with 3 abstentions.[113] The Third Committee forwarded the declaration to the General Assembly on December 7.[114]

On December 9 the final declaration was introduced to the General Assembly and voting on individual articles followed. Article 8 passed unanimously.[115] On December 10, 1948, the Universal Declaration of Human Rights was approved by the General Assembly on a vote of 48-0 with eight abstentions.[116]

2.3 The Broad Guarantee of Habeas Corpus

Hurst Hannum expresses the view of most experts in staying that at the time of its adoption in 1948, the Universal Declaration of Human Rights was not viewed as imposing legal obligations on states.[117] The United Nations itself referred to the

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110. U.N. GAOR, 3rd Sess., pt. 1, 112th mtg of Third Comm., at 239-40, U.N. Doc. A/C.3/SR.112 (Oct. 25, 1948).

111. Draft Declaration of Hum. Rts., Mex., Chile, Venez. Amend. to Art. 6, U.N. Doc. A/C.3/309 (Oct. 25, 1948). This version inadvertently still contained the word "judicial," but the error was recognized prior to the vote. U.N. GAOR, 3rd Sess., pt. 1, 113th mtg of Third Comm., at 241, U.N. Doc. A/C.3/SR.113 (Oct. 26, 1948).

112. U.N. GAOR, 3rd Sess., pt. 1, 113th mtg of Third Comm., at 242, U.N. Doc. A/C.3/SR.113 (Oct. 26, 1948).

113. *Id.*

114. Rep. of Third Comm., U.N. Doc. A/777 (Dec. 7, 1948); U.N. GAOR, 3rd Sess., pt. 1, 179th mtg of Third Comm., at 893, U.N. Doc. A/C.3/SR.179 (Dec. 7, 1948).

115. WEISSBRODT, *supra* note 12, at 10 n. 71.

116. G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948).

117. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317 (1995/96).

Declaration as "a manifesto with primarily moral authority."[118] However, what was adopted as "common standard of achievement,"[119] has since been held to exert "moral, political, and legal influence far beyond the hopes of many of its drafters."[120]

As demonstrated later in this work, the Universal Declaration is incorporated into many domestic constitutions, and serves as the model for human rights protection in many more constitutions and statutes.[121] Some agree with Louis Henken that the Declaration provides the content of the U.N. Charter's pledges, thus taking on the binding character of that treaty.[122] Hannum points to a number of commentators, including Humphrey Waldock, Patrick Thornberry, Philip Alston, and Justice R. Lallah, who argue that the entire Declaration represents international customary law,[123] and Schabas has referred to it as a codification of customary law.[124] The Human Rights Council has established the Declaration as one of the normative bases for Universal Periodic Review,[125] and Schabas observes that the behavior of states shows an acceptance of the Declaration as a legal foundation for their submissions to the Council.[126]

Schabas rightly points out that the Declaration is addressed broadly, even to states that are not members of the United Nations and to non-state actors.[127] It is not

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118. UNITED NATIONS, THE INTERNATIONAL BILL OF HUMAN RIGHTS 1 (1988), *quoted in* Hannum, *supra* note 117, at 318.

119. Universal Declaration, preamble.

120. Hannum, *supra* note 117, at 289.

121. *Id*. *See infra* § 7.1.1 (noting aspects of the Universal Declaration in domestic constitutional habeas corpus provisions).

122. LOUIS HENKEN, THE AGE OF RIGHTS 19 (1990). *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, ¶ 131 (June 21) (stating that the denial of fundamental human rights constitutes a violations of purposes and principles of the U.N. Charter).

123. Hannum specifically identifies works by Waldock, Thornberry, Alston, Robertseon, Merrills, Bilder, Kartashkin, Pohl, Lallah, and Haleem as supporting this proposition. Hannum, *supra* note 117, at 323-26.

124. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 23 (2002).

125. Human Rights Council, Institution-building of the United Nations Human Rights Council, U.N. Doc. A/HRC/RES/5/1, Annex at 1 (June 18, 2007)

126. Schabas, *supra* note 3, at 10-11.

127. *Id*. at 11.

subject to jurisdictional limits or derogation.[128] The Declaration's treatment of the right to habeas corpus is therefore significant in determining the place of that right in international law. There are two questions that are necessary to address when endeavoring to shed light on the extent to which the Declaration guarantees the right to habeas corpus. First, what was the underpinning of the initial inclusion and later removal of a separate, specific habeas corpus article during the drafting process, and second, what is the relationship between habeas corpus and Article 8?

2.3.1 Context for Removal of a Distinct Article

It is significant that the right to habeas corpus was included in the bill of human rights project from the beginning. Habeas corpus was the only remedy of a specific nature included in the Secretariat's original outline[129] and remained so in each draft of the declaration[130] until it was removed during the third session of the Commission in June 1948.[131] Each of these versions contained the same core elements of the right to habeas corpus as were found in the A.L.I. Statement.

The circumstances under which the separate habeas corpus provision was removed from the draft declaration are revealing. There were no statements by Commission members questioning the merits of the right to habeas corpus; only the favorable post-vote statement by the Soviet member.[132] However, the revision was made at a stage in the drafting when the Commission had recently expressed its collective desire for the declaration to be "as short as possible."[133] Indeed, the entire

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128. The existence these challenges present for treaty-based guarantees is discussed *infra* at §§ 5.2 & 5.3.

129. *See generally* Comm'n on Hum. Rts. Drafting Comm., Draft Outline of Int'l Bill of Rts., U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947).

130. *See generally* Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/21 annex D, annex F (July 1, 1947); Comm'n on Hum. Rts., Rep. of Working Group on Declaration on Hum. Rts., U.N. Doc. E/CN.4/57 (Dec. 10, 1947).

131. *See* Comm'n on Hum. Rts., 3d Sess., 54th mtg., U.N. Doc. E/CN.4/SR.54 at 4-7 (June 10, 1948).

132. *Id.* at 4-7.

133. Rep. of Comm'n on Hum. Rts., U.N. Doc E/600 at 16 (Dec. 17, 1947).

declaration was reduced from thirty-three articles to twenty-eight during the session in which the separate habeas corpus language was removed.

The inclusion of a separate habeas corpus ran contrary to the prevailing desire for the Declaration to be limited to succinct and clear language, with the determinacy of each article left to the covenant. The Indian representative, Hansa Metha, clearly favored brevity, arguing that the declaration should "not become involved in the details."[134] The fact that Metha co-sponsored the proposal that removed a separate habeas corpus provision while retaining the prohibition on arbitrary detention certainly suggests that she viewed the habeas corpus language as a detail as compared to the more general the arbitrary detention article.[135]

The changes made to the habeas corpus language by the working group during the second session of the Commission may have contributed to view that habeas corpus was a detail in the arbitrary detention article. The right to a speedy trial, a right generally limited to the criminal forum, had been added to habeas corpus in the second sentence of the article: "Every one placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject and to trial within a reasonable time or to release."[136] The new wording referred to these two distinct legal rights in the singular as "the right."[137] This suggests that the significance of the separate right to habeas corpus may not have always been clear to Commission members, a majority of whom, as Glendon points out, did not have legal training.[138]

There are four points that emerge when examining the decision to forego a distinct habeas corpus provision. First, the specific right to habeas corpus was included in early drafts of the declaration. Second, there is no indication that the Commission, or even individual members, felt habeas corpus was not an important right, even at the time it was removed. Third, at the time it was removed, habeas

134. Comm'n on Hum. Rts., 3d Sess., 54th mtg., U.N. Doc. E/CN.4/SR.54 at 4 (June 10, 1948).

135. It is interesting, if not ironic, to note that the removal of habeas corpus was proposed by the United Kingdom, from which the right originated, and India, a common-law country, along with China.

136. Comm'n on Hum. Rts., Rep. of Working Group on Declaration on Hum. Rts., U.N. Doc. E/CN.4/57 at 7 (Dec. 10, 1947).

137. *Id.*

138. GLENDON, *supra* note 1, at 59.

corpus was grouped together with the right to a speedy trial. Finally, at the time habeas corpus was removed, the Commission sought to shorten the declaration and wished to eliminate "details" and focus on principles.

It is possible that a distinct habeas corpus provision would have remained in the draft declaration had it not been combined with the right to a speedy trial. At the very least, the removal of the right was not to signal that its fundamental value was contested. Rather, the *travaux préparatoires* suggests that the drafters viewed a distinct habeas corpus article was simply too detailed for separate inclusion in its broad statement of principles. Weissbrodt and Mattias Hallendorff concur, arguing that the conclusion that the habeas corpus wording was removed "as part of the simplification" of the draft.[139]

2.3.2 Interpreting Article 8

Just four months after a distinct habeas corpus provision disappeared from the draft declaration, Article 8 was added, providing "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[140] Although more general in its scope than the separate habeas corpus article, it is clear that Article 8 incorporates the specific right to habeas corpus.

The domestic law from which Article 8 sprung shows this clear connection. The inclusion of Article 8 was championed by Latin American countries, where the right to *amparo* is deeply rooted.[141] In five of those countries, judicial determination of the legality of a person's detention is conducted pursuant to general or specific forms of *amparo*.[142] In these jurisdictions habeas corpus is not recognized as a separate right, but is incorporated into *amparo*. In nine other jurisdictions, habeas

139. David Weissbrodt & Mattias Hallendorff, Travaux Préparatoires *of the Fair Trial Provisions – Articles 8 to 11 – of the Universal Declaration of Human Rights*, 21 HUM. RTS. Q. 1061, 1094 (1999).

140. Universal Declaration, art. 8.

141. *See, e.g.*, Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 LAW. AM. 361, 365 (1981).

142. The general remedy of *amparo* is used in Venezuela, Honduras, and Nicaragua, while the more specific remedy of *amparo de la libertad* is used in Mexico and Chile. For a discussion of *amparo*, *see supra* § 1.2.1

corpus is used to examine the legality of detention, while *amparo* is available to enforce any other constitutional rights.[143]

It is instructive to consider the manner in which Article 8 was added to the draft declaration. The separate habeas corpus provision was omitted during the third session of the eighteen-member Commission on Human Rights, that body's last consideration of the draft.[144] The declaration was not debated before being approved by the Economic and Social Council.[145] The next serious scrutiny of the declaration after it left the Commission, therefore, came in the Third Committee, where the absence of a distinct habeas corpus provision did not go unnoticed.[146] Attention was drawn to the lack of an article protecting the individual from abuses of authority. Advocates of Article 8 noted that the declaration had, until recently, contained the right to habeas corpus.[147]

The Latin American representatives who supported the addition noted that it reflected both the right to habeas corpus and the broader right to *amparo*.[148] The plain language of Article 8 clearly required "an effective remedy by the competent national tribunals for acts violating" an individual's right to be free from arbitrary detention.[149] In those situations the "effective remedy" is a determination of the legality of detention.[150]

The absence of the right to habeas corpus in the Commission's draft was apparent when it was reviewed in the Third Committee. The protection of habeas

143. These nine countries are Argentina, Peru, Guatemala, El Salvador, Costa Rica, Panama, Bolivia, Paraguay, and Brazil. *See supra* §. 1.2.1.

144. *See* Comm'n on Hum. Rts., 3d Sess., 54th mtg., U.N. Doc. E/CN.4/SR.54 at 4-7 (June 10, 1948).

145. Econ. & Soc. Council Res., U.N. Doc. E/1046 (Aug. 26, 1948).

146. *See supra* § 2.2.3.

147. U.N. GAOR, 3rd Sess., pt. 1, 112th mtg. of Third Comm., at 233, U.N. Doc. A/C.3/SR.112 (Oct. 25, 1948).

148. U.N. GAOR, 3rd Sess., pt. 1, 113th mtg. of Third Comm., at 245, 249, U.N. Doc. A/C.3/SR.113 (Oct. 26, 1948).

149. Eric Møse argues that Article 8 only provides a remedy for violations of a nation's constitution or domestic law, and that Article 9 of the Declaration would not, by itself, be sufficient basis to argue that a obligation existed to provide an effective remedy for such detention. *See* Møse, *supra* note 62, at 204.

150. Article 8's referral to a "competent national tribunal" reflects the well-established position that an individual's first recourse should be to domestic remedies. Møse, *supra* note 62, at 187. The article is not satisfied, however, simply because a "competent national tribunal" does not exist. Niemi-Kiesiläinen, *supra* note 90, at 145.

corpus was part of the motivation for the addition of the broader Article 8 by the Committee. This sequence demonstrates the recognition of the fundamental importance of the specific right, and its restoration in broader terms, consistent with the general nature of the Declaration.

There is agreement that Article 8 contains both the right to habeas corpus and the broader remedy of *amparo*.[151] In a 1999 appellate decision in *Barayagwizi v. Prosecutor*,[152] the International Criminal Tribunal for Rwanda confirmed that the right to habeas corpus is enshrined in Article 8 of the Universal Declaration.[153] The inclusion of habeas corpus in Article 8 is significant given the weight of the Universal Declaration and its broad applicability. As Schabas writes, the question of whether a treaty right is applicable in a given situation often sparks discussion "about deconstructing and interpreting jurisdictional clauses."[154] By contrast, the broad human rights obligations of the Declaration, including the right to habeas corpus, apply in all situations.[155]

Conclusion

The postwar revolution of international law and its emphasis on human rights provided the impetus for the creation of an International Bill of Rights. As described above, a variety of political and practical factors led to a bifurcated effort to produce a declaration on human rights stated in general terms and a more detailed human rights covenant. The first part of his effort resulted in the Universal Declaration of Human Rights, which guarantees the right to habeas corpus as part of Article 8, just three years after the end of the war. The next chapter recounts the second part of this effort and examines its resulting guarantee of habeas corpus.

151. Weissbrodt & Hallendorff, *supra* note 139, at 1094-96.

152. Case No. ICTR-99-54, Decision (Nov. 3, 1999).

153. *Id*. ¶ 88.

154. Schabas, *supra* note 126, at 12.

155. *Id*.

3

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The adoption of the Universal Declaration of Human Rights[1] in 1948 was a milestone in international human rights law. The Declaration, however, was never intended to stand alone. From the earliest stages of its drafting, the Declaration was seen as just one part of an International Bill of Human Rights, to be complimented by a binding human rights convention. This convention would finally come to fruition in the form of the International Covenant on Civil and Political Rights[2] and its companion International Covenant on Economic, Social and Cultural Rights.[3]

As a source of international human rights law, the Covenant differs from the Declaration in two important ways. First, the Covenant takes the form of a treaty ratified by a significant majority of the world's nations. Second, its provisions are much more detailed than the Declaration, therefore providing what David Weissbrodt considers to be a richer codification of the law.[4] In contrast to the Declaration, the Covenant addresses the right to habeas corpus in a very detailed way. Article 9(4) of the Covenant provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[5]

This chapter examines the right to habeas corpus as guaranteed by the Covenant. In the first section the drafting history of Article 9(4) is examined. The second section explores the interpretation of this article and its application by its monitoring body, the Human Rights Committee.

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1. G A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter "UDHR" or "Universal Declaration"].

2. 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter "ICCPR" or "Covenant"].

3. 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

4. DAVID WEISSBRODT, THE RIGHT TO A FAIR TRIAL: ARTICLES 8, 10, AND 11 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 35 (2001).

5. ICCPR art. 9(4).

3.1 The *Travaux Préparatoire* of Article 9(4)

3.1.1 The Work of the Commission on Human Rights

The creation of an International Bill of Rights was the first order of business for the newly-established United Nations Commission on Human Rights in 1946.[6] During its first session in early 1947, the Commission on Human Rights established a Drafting Committee to begin work on a bill of rights, although the exact form the bill would take was uncertain.[7] At the request of the Economic and Social Council,[8] the Secretariat prepared an outline of rights for consideration by the Committee.[9] Proposals from Commission members were also welcomed,[10] and a draft international bill of human rights was submitted by the representative from the United Kingdom, along with certain draft articles submitted by the United States.[11]

Both the Secretariat's outline and the United Kingdom's draft contained the right to habeas corpus. The Secretariat's outline provided, "Every one shall be protected against arbitrary and unauthorized arrest. He shall have the right to immediate judicial determination of the legality of any detention to which he may be subject."[12] Article 9 of the United Kingdom's draft bill concerned arbitrary detention. The fourth paragraph of this article provided that "Every person who is deprived of his liberty shall have an effective remedy in the nature of "habeas corpus" by which

6. For a full discussion of the establishment of the United Nations and the Commission on Human Rights, *see supra* §§ 2.1 & 2.2. The Commission was replaced by the Human Rights Council in 2006. *See* G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006) (replacing the Commission on Human Rights with the Human Rights Council).

7. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/259 at 2-3 (Oct. 2, 1947).

8. Econ. & Soc. Council Res., U.N. Doc. E/325 at 2 (Apr. 22, 1947).

9. Comm'n on Hum. Rts. Drafting Comm., Draft Outline of Int'l Bill of Rts., U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947).

10. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/259 at 2 (Oct. 2, 1947).

11. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/21 at 2-3. (July 1, 1947).

12. Comm'n on Hum. Rts. Drafting Comm., Draft Outline of Int'l Bill of Rts., U.N. Doc. E/CN.4/AC.1/3, art. 8 (June 4, 1947).

the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not justified."[13]

The Committee convened its first session on June 9, 1947, and began contemplating what form a Bill of Rights might take.[14] Arguments were offered in favor of both a declaration of rights to be adopted by the General Assembly and a binding human rights convention to be ratified by individual states.[15] The Committee determined that both a declaration and convention should be pursued and established a temporary working group tasked with drafting a working paper as the basis for each.[16]

Members of the temporary working group set about both tasks concurrently. Rene Cassin was chosen to mold the Secretariat's outline into a draft declaration.[17] Meanwhile, the remainder of the group, consisting of Lord Dukeston of the United Kingdom, Charles Malik of Lebanon, and Eleanor Roosevelt of the United States, sought to define which parts of the Secretariat's outline and the United Kingdom's draft international bill of rights should be considered for inclusion in a draft convention.[18] After reviewing the various proposals before it, the temporary working group concluded that part II of the United Kingdom's draft would make a suitable foundation for a convention.[19] The draft was forwarded to the full Commission on Human Rights as the group's working paper.[20]

At the Commission's second session in December 1947, discussion continued about the form the International Bill of Rights should take. The Commission eventually decided that the Bill of Rights should consist of a declaration, convention,

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13. Text of Ltr. from Lord Dukeston, U.K. Rep. on Hum. Rts. Comm'n, to Sec.-Gen. of U.N., U.N. Doc. E/CN.4/AC.1/4 at 10, art. 10(5) (June 5, 1947).

14. *Id*. at 3.

15. *Id.*

16. *Id*. at 3-4.

17. For details of Cassin's work on the draft declaration, *see supra* § 2.1.1.

18. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/21 at 4 (July 1, 1947).

19. *Id.*

20. *Id*. at 5. The habeas corpus article in the working paper was in the same form as in the United Kingdom's draft. *See id*. at 82, annex G, art. 4(5).

and measures of implementation, and a working group was established for each.[21] The working group for the convention consisted of the representatives from Chile, China, Egypt, Lebanon, the United Kingdom, and Yugoslavia.[22]

The convention working group met from December 5–10, 1947, to consider both the Drafting Committee's proposal and a draft submitted by the United States.[23] During the group's discussion, the representative from the United States pointed out that its draft did not use technical language such as "habeas corpus," and Malik suggested that habeas corpus was not essential so long as arbitrary arrest was prohibited, an arrested individual should be immediately tried, and a person wrongfully arrested should be compensated.[24] Nonetheless, the working group's report on the draft convention contained only minor changes to the habeas corpus paragraph, which now read, "Every person who is deprived of his liberty shall have an effective remedy in the nature of 'habeas corpus' by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[25]

This provision was adopted by the Commission by a vote of 11-0 with seven abstentions.[26] It was at this stage that the document began to be referred to as the International *Covenant* on Human Rights.[27] The working group's report was forwarded to the Economic and Social Council with a request that comments from

21. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/600/Supp.1 at 4 (Dec. 17, 1947).

22. Comm'n on Hum. Rts., Rep. of Working Party on Int'l Convention on Hum. Rts., U.N. Doc. E/CN.4/56 at 1 (Dec. 11, 1947).

23. *Id*. at 1, 3. The draft proposed by the United States did not contain a specific habeas corpus provision. *See* Proposal for Hum. Rts. Convention Submitted by Rep. of U.S. on Comm'n on Hum. Rts., U.N. Doc. E/CN.4/37 (Nov. 26, 1947).

24. Comm'n on Hum. Rts., Drafting Comm., 1st Ses., 3rd mtg., U.N. Doc. E/CN.4/AC.3/SR.3 at 2-3 (Dec. 6, 1947) (statement of Lebanon's delegate).

25. Comm'n on Hum. Rts., Rep. of Working Party on Int'l Convention on Hum. Rts., U.N. Doc. E/CN.4/56 at 8, art. 8(4) (Dec. 11, 1947). The substitution of the word "justified" by "lawful" was suggested by the representative from India. Comm'n on Hum. Rts., Drafting Comm., 1st Sess., 4th mtg., U.N. Doc. E/CN.4/AC.3/SR.4 at 5 (Dec. 8, 1947).

26. Comm'n on Hum. Rts., 2nd Sess., 36th mtg., U.N. Doc. E/CN.4/SR.36 at 8 (Dec. 13, 1947).

27. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/600 at 5 (Dec. 17, 1947).

member states be solicited.[28] The Council did so without making any changes to the content of the report.

The Drafting Committee began its second session on May 3, 1948, and reviewed the comments received from member states before engaging in a discussion of each article of the Covenant.[29] During the discussion of Article 9, the Chair of the Committee, Eleanor Roosevelt of the United States, proposed an abbreviated article on liberty of person that did not include a specific right to habeas corpus.[30] While discussing the habeas corpus paragraph, the Chinese representative noted that the phrase "was not altogether clear to people who did not know Latin or English" and preferred a clearer explanation.[31] Malik, however, defended the term as being "considered a milestone in the history of human liberty."[32] A proposal to add the phrase "by arrest or detention" was approved by a vote of 4-0, with two abstentions.[33]

At the conclusion of its session, the Committee voted 6-0, with one abstention, to report Article 9 of the United Kingdom's draft as amended back to the Commission.[34] It read, "Every one who is deprived of his liberty by arrest or detention shall have an effective remedy in the nature of 'habeas corpus' by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[35] The Commission on Human Rights

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28. *Id*. at 4-5.

29. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/95 at 3 (May 21, 1948). For the comments of member states *see* Comments from Gov'ts on Draft Int'l Declaration on Hum. Rts., Draft Int'l Covenant on Hum. Rts., and Question of Implementation, U.N. Doc. E/CN.4/82/Rev.1 (Apr. 22, 1948); Collation of Comments of Gov'ts, E/CN.4/85 (May 1, 1948). Both the United States and the Soviet Union also submitted amendments to Article 9 which did not contain habeas corpus provisions. Draft Int'l Covenant on Hum. Rts. with U.S. Recommendations, U.N. Doc. E/CN.4/AC.1/19 May 3, 1948); U.S.S.R. Amend. to Art. 9 of Draft Int'l Covenant on Hum. Rts., U.N. Doc. E/CN.4/AC.1/31 (May 12, 1948).

30. Comm'n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 5 (May 10, 1948). She explained that this concern was address by another paragraph prohibiting arrest or detention without "a fair hearing within a reasonable time." *Id*. at 5-6.

31. *Id*. at 8.

32. *Id.*

33. *Id.*

34. *Id*. at 13.

35. Rep. of Drafting Comm. to Comm'n on Hum. Rts., U.N. Doc. E/CN.4/95 at 20, annex B, art. 9(4) (May 21, 1948).

commenced its third session on May 24, 1948, and decided to first consider the draft declaration which had been progressing alongside the Covenant.[36] This consumed the entire session, however, and the Commission did not have an opportunity to examine the draft Covenant prior to the end of its session. Nonetheless, the Commission submitted the Drafting Committee's version of the covenant to the Economic and Social Council,[37] which in turn forwarded the "advance draft" to the Third Committee of the General Assembly.[38] During the same session in which the Universal Declaration of Human Rights was adopted,[39] the General Assembly, upon recommendation by the Third Committee, passed a resolution requesting that the Covenant be completed "as a matter of priority."[40]

On May 9, 1949, the Commission on Human Rights began its fifth session.[41] It began by revising the existing articles of the Covenant before turning to the questions of implementation and social and economic rights.[42] It was during this session that it was recognized that the use of the phrase "in the nature of 'habeas corpus'" in the prior drafts was somewhat limiting.[43] The United Kingdom proposed altering the provision to read, "Every one 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."[44]

Several other proposals were considered during the session. A proposal by Australia to add an exception for "an enemy alien lawfully detained as a prisoner of

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36. Rep. of 3rd Sess. of Comm'n on Hum. Rts., U.N. Doc. E/800 at 5 (June 28, 1948).

37. *Id.* at 5.

38. G.A., Rep. of 3rd Comm., Draft Int'l Declaration of Hum. Rts., U.N. Doc. A/777 at 1 (Dec. 7, 1948)

39. The adoption of the Declaration is discussed *supra* at § 2.1.

40. G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948). *See also* G.A., Rep. of 3rd Comm., Draft Int'l Declaration of Hum. Rts., U.N. Doc. A/777 at 9 (Dec. 7, 1948).

41. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/1371 at 1, 12 (June 23, 1949).

42. *Id.* at 11-18.

43. Comm'n on Hum. Rts., 5th Sess., 96th mtg., U.N. Doc. E/CN.4/SR.96 at 3 (June 1, 1949).

44. Comm'n on Hum. Rts., U.K. Proposals on Certain Articles, U.N. Doc. E/CN.4/188 (May 16, 1949).

war"[45] was tendered, but later withdrawn.[46] Denmark offered an amendment that would allow the lawfulness of detention to be decided not only by a court, but also by "a superior executive authority."[47] Opposition was expressed to this amendment, however, and it was rejected by a vote of 8-1, with five abstentions.[48]

Finally, France suggested that the new United Kingdom proposal should be amended by replacing "court" with "judicial or administrative court," "proceedings" with "recourse," and "speedily" with the phrase "as soon as possible."[49] Although these amendments were accepted by the United Kingdom and adopted by a vote of 12-0, with three abstentions,[50] they were not incorporated into the Commission's final report for the session. Instead, the report contained verbatim the new text proposed by the United Kingdom at the beginning of the session.[51] The Covenant was again transmitted to member states for comment.[52]

The Commission reviewed the draft Covenant along with comments from member states during its sixth session, which began on March 27, 1950.[53] After a first reading of the draft Covenant, a committee was established to offer recommendations on the style of the articles.[54] The recommendations of the committee were accepted during the draft's second reading.[55] The term "speedily" in the habeas corpus provision was replaced by the term "without delay" on a vote of 12-

45. Comm'n on Hum. Rts., Australia: Amend. to Art. 9, U.N. Doc. E/CN.4/201 (May 19, 1949).

46. Comm'n on Hum. Rts., 5th Sess., 100th mtg., U.N. Doc. E/CN.4/SR.100 at 9 (June 3, 1949).

47. Comm'n on Hum. Rts., Denmark: Amend. to Proposal of U.K. Regarding Art. 9 of Covenant, U.N. Doc. E/CN.4/200 (May 19, 1949).

48. Comm'n on Hum. Rts., 5th Sess., 100th mtg., U.N. Doc. E/CN.4/SR.100 at 11 (June 3, 1949).

49. *Id.*

50. *Id.* at 11-12.

51. Rep. of Comm'n on Hum. Rts., U.N. Doc. A/1371 at 31, annex I, art. 9(5) (June 23, 1949).

52. Annotations on Text of Draft Int'l Covenant on Hum. Rts., U.N. Doc. A/2929 at 7 (July 1, 1955).

53. Comm'n on Hum. Rts., Rep. to Econ. & Soc. Council on Work of 6th Sess. of Comm'n, U.N. Doc. E/1681 at 5 (May 25, 1950).

54. *Id.* at 8.

55. Comm'n on Hum. Rts., Rep. to Econ. & Soc. Council on Work of 6th Sess. of Comm'n, U.N. Doc. E/1681 at 8 (May 25, 1950).

1, with one abstention.[56] The amended provision was adopted 14-0.[57] It read, "Anyone 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 without delay by a court and his release ordered if the detention is not lawful."[58]

As the Commission decided to delay consideration of economic, social, and cultural rights until a later session, the habeas corpus provision was forwarded to the Economic and Social Council as part of what was now being considered the "first of a series of covenants."[59] The Council, in its eleventh session, requested the General Assembly give its opinion on the general adequacy of this "draft first covenant."[60] The General Assembly responded curtly, observing that the draft did not contain "certain of the most elementary rights," and asking that the Commission's revision "define the rights set forth in the Covenant and the limitations thereto with the greatest possible precision."[61]

The draft Covenant was returned to the Commission on Human Rights as it began its seventh session on April 16, 1951.[62] In addition to the request of the General Assembly, the Commission was presented with a compilation of observations by member states.[63] However, the Commission's efforts were now devoted to questions of implementation and economic, social, and cultural rights.[64] Not long after this session, the General Assembly formally requested the separation of the

56. Comm'n on Hum. Rts., 6th Sess., 147th mtg., U.N. Doc. E/CN.4/SR.147 at 16 (Apr. 17, 1950).

57. *Id.*

58. Comm'n on Hum. Rts., Rep. to Econ. & Soc. Council on Work of 6th Sess. of Comm'n, U.N. Doc. E/1681 at 16, annex I, art. 6(5) (May 25, 1950).

59. Annotations on Text of Draft Int'l Covenant on Hum. Rts., U.N. Doc. A/2929 at 9 (July 1, 1955).

60. Econ. & Soc. Council Res. 303 (XI), U.N. Doc. E/RES/303 I(XI) (Aug. 9, 1950).

61. G.A. Res. 421 (V), U.N. Doc. A/RES/421(V) (Dec. 4, 1950).

62. Econ. & Soc. Council, Rep. of Comm'n on Hum. Rts. on 7th Sess., U.N. Doc. E/1992 at 1 (May 24, 1951).

63. *Id.* at 5. For these observations *see* Compilation of Observations of Member States on Draft Int'l Covenant on Hum. Rts., U.N. Doc. E/CN.4/552 (Apr. 24, 1951).

64. Annotations on Text of Draft Int'l Covenant on Hum. Rts., U.N. Doc. A/2929 at 4 (June 23, 1949).

instrument into two covenants, one dealing with civil and political rights, and another which addressed economic, social, and cultural rights.[65]

The Commission began working to fulfill this request as it commenced its eighth session on April 14, 1952.[66] The Commission's previous work was revised, and a preamble and eighteen articles were adopted as part of the new draft Covenant on Civil and Political Rights.[67] During this process, the habeas corpus paragraph would receive its last significant makeover. France suggested that the phrase "by which the lawfulness of his detention shall be decided without delay by a court and his release ordered" be amended to "before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release."[68] The amendment was adopted on an 8-0 vote, with nine abstentions.[69]

The paragraph, as amended, read, "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[70] The provision was adopted by the Commission on a unanimous 14-0 vote.[71] The paragraph would remain in substantially this form for the next fourteen years as the Covenant wound its way toward adoption by the General Assembly.

3.1.2 Article 9(4) in the General Assembly

The Commission's work on the draft covenants was completed during its ninth and tenth sessions, held in 1953 and 1954, and both were submitted to Council with the suggestion that they be adopted by the General Assembly after two separate

65. G.A. Res. 543 (VI), U.N. Doc. A/RES/543(VI) (Feb. 5, 1952).

66. Econ. & Soc. Council, Rep. of Comm'n on Hum. Rts. on 8th Sess., U.N. Doc. E/2256 at 1 (June 27, 1952).

67. *Id*. at 13.

68. U.N. Doc. E/CN.4/L.151 (May 19, 1952).

69. Comm'n on Hum. Rts., 314th mtg., U.N. Doc. E/CN.4/SR.314 at 13 (June 11, 1952).

70. Econ. & Soc. Council, Rep. of Comm'n on Hum. Rts. on 8th Sess., U.N. Doc. E/2256 at 48, annex I, art. 8(4) (June 27, 1952).

71. Comm'n on Hum. Rts., 314th mtg., U.N. Doc. E/CN.4/SR.314 at 13 (June 11, 1952).

readings at consecutive sessions.[72] The first reading took place during the Third Committee of the General Assembly during its ninth session. On the recommendation of the Third Committee, the General Assembly requested that the Secretary-General prepare an annotation of the covenants, and again invited comments on the covenants from member states, specialized agencies, and nongovernmental organizations.[73]

The Secretary-General's annotation indicated that the adoption of the habeas corpus paragraph had generally been smooth. It explained that the phrase "a remedy in the nature of habeas corpus" had been replaced by the more generic "proceedings" language to emphasize that states-parties "must be free to allow for such a right of appeal within the framework of their own legal systems."[74] Aside from this, the annotation noted that the habeas corpus paragraph "did not give rise to much discussion."[75]

The Covenants would spend the majority of the next dozen years in the Third Committee as a second reading took place and articles were considered and individually adopted. The habeas corpus paragraph, which comprised part of Article 9 of the draft Covenant on Civil and Political Rights, generated a bit of interest when it was considered during the thirteenth session of the Third Committee in 1958. Costa Rica proposed an amendment that more specifically defined the type of court that could hear a petition and allowed for third party petitions.[76] After incorporating suggestions to its original text offered by Greece, the Costa Rican amendment read,

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court of justice, in order that such court may decide without delay on the lawfulness of the detention and order his release if the detention is not lawful. The appropriate proceedings may be instituted by any person on behalf and as a representative of the person detained.[77]

72. Annotations on Text of Draft Int'l Covenant on Hum. Rts., U.N. Doc. A/2929 at 6 (July 1, 1955).

73. G.A. Res. 833 (IX), U.N. Doc. A/RES/833(IX) (Dec. 4, 1954).

74. Annotations on Text of Draft Int'l Covenant on Hum. Rts., U.N. Doc. A/2929 at 35 (July 1, 1955).

75. *Id.*

76. Amend. of Costa Rica, U.N. Doc. A/C.3/L.685 (Oct. 23, 1958).

77. Revised Amend of Costa Rica, U.N. Doc. A/C.3/L.685/Rev.1 (Oct. 27, 1958).

The first sentence of the amendment, specifying the type of court, was a well-intentioned effort to clarify that habeas corpus proceedings could not be heard by administrative courts, special tribunals, or other institutions lacking guarantees of impartiality and due process.[78] An argument was made, however, that this proposal could not be tailored to all legal systems.[79] The first sentence of the Costa Rican amendment was rejected on a vote of 35-22, with 15 abstentions.[80]

The amendment's second sentence addressed an even more critical concern; how would the proceedings be initiated if the detained person was held incommunicado or otherwise prevented from doing so on his own? Historically, the ability of third party to initiate habeas corpus proceedings was a great strength of the remedy, and this was particularly true in Latin America. However, concerns were raised by representatives that the amendment would "open the door to the misplaced and inopportune zeal of any ill-advised person or group who wished to exploit a given situation" regardless of their legitimate interest in a matter.[81] In response, some representatives suggested that a third party seeking to initiate proceedings be required to prove his interest in the matter.[82] Others argued that it was more important to guarantee access to a lawyer, although this right was already addressed in another article.[83] It was also suggested that a provision could be added prohibiting incommunicado detention.[84] In the end, however, the consensus was that it would be

78. U.N. GAOR, 13th Sess., 862nd mtg. of Third Comm., at 132, U.N. Doc. A/C.3/SR.862 (Oct. 23, 1958) (statement by Costa Rica); U.N. GAOR, 13th Sess., 865th mtg. of Third Comm., at 149, U.N. Doc. A/C.3/SR.865 (Oct. 28, 1958) (statement by Costa Rica).

79. U.N. GAOR, 13th Sess., 864th mtg. of Third Comm., at 141-142, U.N. Doc. A/C.3/SR.864 (Oct. 28, 1958) (statements by India and the Philippines).

80. U.N. GAOR, 13th Sess., 866th mtg. of Third Comm., at 157, U.N. Doc. A/C.3/SR.866 (Oct. 29, 1958).

81. U.N. GAOR, 13th Sess., 865th mtg. of Third Comm., at 150, U.N. Doc. A/C.3/SR.865 (Oct. 28, 1958) (statement of Saudi Arabia); U.N. GAOR, 13th Sess., 866th mtg. of Third Comm., at 154, U.N. Doc. A/C.3/SR.866 (Oct. 29, 1958) (statement of Spain); U.N. GAOR, 13th Sess., 863rd mtg. of Third Comm., at 140, U.N. Doc. A/C.3/SR.863 (Oct. 27, 1958) (statement of France).

82. U.N. GAOR, 13th Sess., 862nd mtg. of Third Comm., at 132, U.N. Doc. A/C.3/SR.862 (Oct. 23, 1958) (statement by Portugal); U.N. GAOR, 13th Sess., 863rd mtg. of Third Comm., at 140, U.N. Doc. A/C.3/SR.863 (Oct. 27, 1958) (suggestion by Portugal and Belgium); U.N. GAOR, 13th Sess., 865th mtg. of Third Comm., at 150, U.N. Doc. A/C.3/SR.862 (Oct. 28, 1958).

83. U.N. GAOR, 13th Sess., 864th mtg. of Third Comm., at 143, U.N. Doc. A/C.3/SR.864 (Oct. 28, 1958) (statement of the United Kingdom). The right to an attorney in criminal proceedings is guaranteed by Article 14(3)(d).

84. *Id*. (statement of the United Kingdom).

difficult to tailor the proposal to all legal systems. The second sentence of the Costa Rican amendment was rejected 38-19, with fourteen abstentions.[85]

The habeas corpus paragraph thus remained in its original form as the Third Committee voted on Article 9 of the draft Covenant. On December 9, 1958, the Third Committee adopted Article 9 by a vote of 70-0, with three abstentions.[86] Once the entire Covenant had been adopted, it was forwarded to the full General Assembly.[87] It was agreed that the General Assembly should vote on the covenant as a whole, rather than by individual article, and on December 16, 1966, the International Covenant on Civil and Political Rights was adopted by the General Assembly by a vote of 106-0.[88]

The adoption of the Covenant by the General Assembly opened the instrument for signatures and ratification by member states. Thirty-five ratifications or ascensions were required for the Covenant to take effect.[89] A decade passed before this number was met and on March 23, 1976, thirty years after an International Bill of Rights had been proposed, the International Covenant on Civil and Political Rights finally entered into force. Since its entry into force, the Covenant has become a core

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85. U.N. GAOR, 13th Sess, 866th mtg. of Third Comm., at 157, U.N. Doc. A/C.3/SR.866 (Oct. 29, 1958). In 1964, the Committee on Arbitrary Detention lamented the rejection of the amendment by the Third Committee, stating that "the institution of proceedings by persons other than the aggrieved party would, in various circumstances, greatly contribute to strengthen the effectiveness of the remedy." *Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention, and Exile*, U.N. Doc. E/CN.4/826/Rev.1 ¶ 580 (1964).

86. U.N. GAOR, 13th Sess, 866th mtg. of Third Comm., at 157, U.N. Doc. A/C.3/SR.866 (Oct. 29, 1958). Ironically, the only countries not voting in favor of Article 9 were the United Kingdom, where habeas corpus had originated, and South Africa and Israel, two other common-law countries with a strong British influence. The United Kingdom explained that its abstention was the result of its concern over the uncertainty of the term "arbitrary" in Article 9. *Id*. at 156.

87. G.A. Res. 2200 (XXI), U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966). There was one minor difference between the text adopted by the Commission in 1952 and the text adopted by the Third Committee in 1958. The Commission's version provided that a person could take proceedings before a court "in order that *such* court" may determine the lawfulness of his detention. The Third Committee's version allowed for proceedings before a court "in order that *that* court" may determine the lawfulness of his detention.

88. *Id*.; U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/PV.1496 at 6 (Dec. 16, 1966).

89. ICCPR art. 49.

source of human rights protection and has been widely ratified.[90] William Schabas has called this treaty "the cornerstone or modern international human rights law."[91]

Many states' instruments of ratification or accession to the International Covenant on Civil and Political Rights have been accompanied by reservations or declarations. The Covenant contains no specific provision regarding reservations, meaning that reservations are governed by the general rule that they are permitted so long as they are not in conflict with the "object and purpose" of the treaty.[92] Several states have lodged such reservations and declarations, thereby limiting application of the habeas corpus provision of the Covenant in certain circumstances.

France exempts military discipline from the Covenant's deprivation of liberty provisions. Its reservation states that Article 9 "cannot impede enforcement of the rules pertaining to the disciplinary regime in the armies."[93] Likewise, the United Kingdom makes a reservation for laws and procedures necessary to preserve discipline in its military and in penal institutions.[94] Austria declares that, notwithstanding Article 9, its procedures for deprivation of liberty "remain permissible" within the framework of domestic law.[95] Finally, the United States declares that Article 9 is "not self-executing," meaning it does not create an individual right enforceable in domestic law.[96]

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90. As of February 2013, 167 of the 191 United Nations member states had ratified or acceded to the Covenant. U.N. TREATY COLLECTION, INT'L COVENANT ON CIVIL AND POL. RTS., http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

91. William Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 277 (1995).

92. *See id*. (*citing* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28)).

93. U.N. TREATY COLLECTION, INT'L COVENANT ON CIVIL AND POL. RTS., http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

94. *Id.*

95. *Id.*

96. The United States declares that Articles 1 through 27 of the ICCPR are not self-executing. *Id*. Under the domestic law of the United States, a treaty is "self-executing" and requires no implementing legislation to create enforceable rights unless a clear intent is shown otherwise. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

3.2 Interpreting Article 9(4)

Article 9(4) of the International Covenant on Civil and Political Rights guarantees the right to habeas corpus in much more detail than the Universal Declaration. Nonetheless, the text of the article does not provide particular detail on how this right is to be enforced. This section will examine the decisions of the monitoring body for the Covenant, the Human Rights Committee,[97] and other institutions to help define the parameters of Article 9(4). It is worth noting at the outset that Sarah Joseph, Jenny Schultz, and Melissa Castan argue that the Committee's interpretation of Article 9(4) and other "procedural" rights is underdeveloped because in many cases the Committee will not reach procedural issues once it has found a violation of a separate substantive right.[98] This discussion presupposes the applicability of Article 9(4); the questions of its applicability during armed conflict, its suspension by derogation, and its extraterritorial reach will be addressed in Chapter 5.[99]

Article 9(4) allows "anyone" deprived of his or her liberty to seek the remedy set forth in the paragraph. The text imposes no restrictions regarding the status of the individual aside from the fact that he or she has suffered deprivation of liberty by arrest or detention. During the second session of the Drafting Committee, the Chilean representative noted that "[t]he principle of habeas corpus should have as wide an application as possible."[100]

The comments and decisions of the Human Rights Committee[101] suggest that restrictions on the applicability of habeas corpus are generally not permissible. The Committee has stated in its general comments that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her

97. *See* ICCPR arts. 28-45.

98. SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS & COMMENTARY 344 (2nd ed. 2004).

99. *See infra* § 5.1 (availability of habeas corpus during armed conflict); § 5.2 (derogability of habeas corpus guarantees); § 5.3 (extraterritorial application of habeas corpus guarantees).

100. Comm'n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 8 (May 10, 1948). The comment came in response to a inquiry by the United States whether habeas corpus might not apply to minors or aliens. *Id*.

101. Hereinafter "Committee."

nationality or statelessness."[102] Thus, although some domestic remedies are available only to citizens, this is not the case with Article 9(4). According to the Committee, the Covenant also applies to aliens, asylum seekers, refugees, and migrant workers.[103]

In *Voulanne v. Finland*, the Committee found that Article 9(4) applied to persons in military service.[104] In reaching its decision, the Committee observed that the "all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons."[105]

It is worth noting that Article 9(4) does not contemplate the initiation of proceedings by a third party on the individual's behalf. In fact, such a provision was suggested and rejected by the Third Committee.[106] The comments and concerns accompanying this decision demonstrate the Committee's intent not to allow a third party to initiate proceedings.

The Covenant guarantees access to habeas corpus proceedings for a person "deprived of his liberty by arrest or detention." This phrase appeared in the original proposal submitted by the United Kingdom in 1949 and remained intact throughout the drafting process. While the word "liberty" in its broadest form can be understood to mean "the power of acting as one thinks fit,"[107] the word "liberty" as used in Article 9(4) has a narrower, more particular meaning.

Article 9(1) guarantees the right to "liberty and security *of person.*"[108] In the context of the article as a whole, the word "liberty" in paragraph four should be read to mean "liberty of person." Manfred Nowak explains that "liberty of person,"

> relates only to a very specific aspect of human liberty: the freedom of bodily movement in the narrowest sense. An interference with

102. General Comment 15, ¶ 2 (April 11, 1986), *in* U.N. Doc. HRI/GEN/1/Rev.7 at 140 (May 12, 2004).

103. General Comment 31, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); General Comment 15, ¶ 1 (April 11, 1986), *in* U.N. Doc. HRI/GEN/1/Rev.7 at 140 (May 12, 2004).

104. No. 265/1987 (Apr. 7, 1989), *in* U.N. Doc. A/44/40 at 249 (Sept. 29, 1989).

105. *Id.* ¶ 9.3.

106. *See supra* text accompanying notes 76-85.

107. BLACK'S LAW DICTIONARY 919 (6th ed. 1990).

108. *See*, ICCPR art. 9(1) (emphasis added).

> personal liberty results only from the forceful detention of a person at a certain, narrowly bounded location . . . .[109]

Thus, Article 9 is not concerned with other, broader aspects of liberty, a conclusion confirmed by the fact that broader notions of liberty, including freedom of movement, religion, and assembly, are specifically addressed in other articles of the Covenant.[110]

It is also useful to consider the meaning of the words "arrest" and "detention" which appear not only in the habeas corpus provision but in each of the other paragraphs of Article 9 as well.[111] The *travaux préparatoires* of the Covenant shows that "arrest" and "detention" were considered by some representatives to be the only means by which deprivation of liberty occurs for purposes of Article 9.[112] In contrast, there were others who believed that deprivation of liberty could occur through means other than arrest or detention.[113] In the latter case, the words "by arrest or detention" would qualify the types of deprivation of liberty that give rise to the right to habeas corpus. Deprivation of liberty by means other than arrest or detention, therefore, could not be challenged via Article 9(4).

The former view, that "arrest or detention" encompasses every type of deprivation of liberty, is the more compelling. Nowak argues that the actions of the General Assembly demonstrate that it "supported a broad interpretation of the words "arrest" and "detention."[114] Under this interpretation, every "deprivation of liberty" is either an "arrest" or "detention." "Arrest" refers to the *act* of depriving a person of his or her liberty of person, while "detention" refers to the *state* of deprivation of liberty of person.[115] As a result, the words "by arrest or detention" do not qualify the

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109. MANFRED NOWAK, CCPR COMMENTARY 160 (1993).

110. *See, e.g.*, ICCPR arts. 12, 18, 22 (guaranteeing liberty of movement, freedom of religion, and freedom of association, respectively).

111. *See id*. art. 9.

112. *See* U.N. GAOR, 13th Sess., 863rd mtg. of Third Comm., at 135, U.N. Doc. A/C.3/SR.863 (Oct. 27, 1958) (statement of the U.K.).

113. The French representative suggested that kidnapping by a private person as an example of deprivation of liberty that was neither "arrest" nor "detention."

114. NOWAK, *supra* note 109, at 169.

115. *Id*.

type of deprivation of liberty that must occur to trigger Article 9(4), but simply describe the form that every deprivation of liberty takes.

The General Comments and cases of the Human Rights Committee support this interpretation. The Committee has made clear that Article 9(4) applies to "all deprivations of liberty," whether they occur in connection with a criminal case or not.[116] The Committee's general comment on the right to liberty and security of persons specifies that the remedy must be available to persons deprived of liberty due to "mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc."[117] Habeas corpus must also be made available in cases of preventative detention for reasons of public security.[118]

The individual cases of the Human Rights Committee identify additional, specific circumstances in which an Article 9 "arrest or detention" has occurred. In two cases, the Committee found that the abduction of individuals in another country and their transportation into Uruguay by military personnel was an arrest and detention.[119] Arrest and detention was also found to have occurred when a political opponent was subjected to house arrest and subsequent confinement at a military camp,[120] and when an individual was held at a police station prior to his expulsion from the country.[121]

In *Bleier v. Uruguay*,[122] *Quinteros v. Uruguay*,[123] and *Perez v. Colombia*,[124] the Committee considered whether "disappearances" constitute a deprivation of liberty. In these cases, claims were received that individuals had been placed under

116. General Comment 8, ¶ 1 (June 30, 1982), *in* U.N. Doc. HRI/GEN/1/Rev.7 at 130 (May 12, 2004).

117. *Id*.

118. *Id*. ¶ 4.

119. Lopez Burgos v. Uruguay, No. 12/52, ¶ 13 (July 29, 1981), *in* U.N. Doc. A/36/40 at 176 (1981). *See also* Celiberti v. Uruguay, No. 13/56, ¶ 11 (July 29, 1981), *in* U.N. Doc. A/36/40 at 185 (1981) (kidnapping in Brazil and transportation to Uruguay by military forces).

120. Monja Jaona v. Madagascar, No. 132/1982, ¶¶ 12.2, 14, U.N. Doc. CCPR/C/24/D/132/1982 (Apr. 1, 1985).

121. Hammel v. Madagascar, No. 155/1983, ¶¶ 18.2, 19.4, 20 (Apr. 3, 1987), *in* U.N. Doc. CCPR/C/OP/2 at 179 (1990).

122. No. 7/30, ¶¶ 2.2, 14 (Mar. 29, 1982), *in* U.N. Doc. A/37/40 at 130 (1982).

123. No. 107/1981, ¶ 13 (July 21, 1983), *in* U.N. Doc. CCPR/C/OP/2 at 138 (1990).

124. No. 181/1984, ¶ 11, U.N. Doc. CCPR/C/37/D/181/1984 (Nov. 3, 1989).

extrajudicial arrest and held incommunicado by agents of the state. These claims, coupled with the concerned states' failure to refute or investigate allegations, caused the Committee to conclude that a deprivation of liberty had occurred.[125]

In *Vuolanne v. Finland*,[126] the confinement of a military service member gave the Committee the opportunity to consider what constitutes deprivation of liberty for a person already restricted by the regimen of military life. It observed that military discipline results in deprivation of liberty, "if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life with in the armed forces" of the particular state.[127] In making this determination, the nature, duration, effects, and manner of the penalty are considered.[128] The confinement of the service member in this case to a small cell with short breaks and no communication for a period of ten days was found to result in deprivation of liberty for purposes of Article 9(4).[129]

Article 9(4) guarantees the right of a detained person to bring proceedings "before a court." The nature of the tribunal empowered to hear habeas corpus proceedings gave rise to a fair amount of discussion during the drafting process. The original United Kingdom draft on which Article 9(4) is based stated that habeas corpus proceedings should take place before a "court." The word "court" remained when the paragraph was revised to replace the term "habeas corpus" with the more generic phrase "proceedings before a court" during the fifth session of the Commission on Human Rights.[130] The word "court" was not defined in the paragraph, nor were any terms included to describe or qualify the court authorized to hear the proceedings. Several such qualifications were proposed, however, and their treatment provides guidance in interpreting the term. In the Commission's fifth session, Denmark proposed that the paragraph be amended to allow proceedings

125. Bleier v. Uruguay, No. 7/30, ¶¶ 13.3, 13.4 (Mar. 29, 1982), *in* U.N. Doc. A/37/40 at 130 (1982).

126. No. 265/1987 (Apr. 7, 1989), *in* U.N. Doc. A/44/40 at 249 (Sept. 29, 1989).

127. *Id.* ¶ 9.4.

128. *Id.*.

129. *Id.* ¶ 9.5.

130. *See supra* text accompanying notes 43-51.

before a court "or a superior executive authority."[131] This amendment was rejected on a vote of 8-1, with five abstentions.[132] During the same session, France proposed replacing the word "court" with "judicial or administrative court."[133] The United Kingdom accepted this amendment and it was adopted on a vote of 12-0, with three abstentions.[134] The amendment was not, however, incorporated into the final version adopted by the Commission.[135]

The nature of the "court" contemplated in paragraph Four again became a topic of debate during the Third Committee's discussion of Article 9. Costa Rica proposed replacing the word "court" with the phrase "court of justice."[136] The proposal was offered to specify that the court "should not be an administrative court or special tribunal which did not offer adequate guarantees of impartiality or due process."[137] Concerns were raised, however, that the term "court of justice" might not be of significance in every domestic legal system. The word "court," on the other hand, was more appropriate because it was more easily adaptable to different legal systems. The amendment was rejected by a 35-22 vote, with fifteen abstentions.[138] The unadorned word "court" remained in the final text of paragraph four.

Some indication of what constitutes a "court" can be gathered from Article 14 of the Covenant. After referring to the right to equality before courts, this article guarantees criminal defendants a fair and public hearing before "a competent,

131. *See* Comm'n on Hum. Rts., Denmark: Amend. to Proposal of U.K. Regarding Art. 9 of Covenant, U.N. Doc. E/CN.4/200 (May 19, 1949).

132. Comm'n on Hum. Rts., 5th Sess., 100th mtg., U.N. Doc. E/CN.4/SR.100 at 11 (June 3, 1949).

133. *Id*.

134. *Id*. at 11-12.

135. Rep. of Comm'n on Hum. Rts., U.N. Doc. E/1371 at 31, annex I, art. 9(5) (June 23, 1949).

136. Amend. of Costa Rica, U.N. Doc. A/C.3/L.685 (Oct. 23, 1958).

137. Rep. of Third Comm., U.N. Doc. A/4045 at 18-19 (Dec. 9, 1958). *See also* U.N. GAOR, 13th Sess., 862nd mtg. of Third Comm.., at 132, U.N. Doc. A/C.3/SR.862 (Oct. 23, 1958) (statement by Costa Rica); U.N. GAOR, 13th Sess., 865th mtg. of Third Comm., at 149, U.N. Doc. A/C.3/SR.865 (Oct. 28, 1958) (statement by Costa Rica).

138. U.N. GAOR, 13th Sess., 866th mtg. of Third Comm., at 157, U.N. Doc. A/C.3/SR.866 (Oct. 29, 1958).

independent and impartial tribunal established by law."[139] This phrasing suggests that these qualities are to be expected in a "court." The Human Rights Committee interprets "court" to mean a decision maker possessing "judicial or quasi-judicial" qualities.[140] Indications of judicial character include a high degree of objectivity and independence.[141] The Committee has found that an administrative official or military officer does not constitute a "court" within the meaning established by the Covenant.[142] On the other hand, a military court could be considered a "court" when exercising jurisdiction over military personnel.[143]

The decision of a court reviewing a habeas corpus petition must be "without delay" according to Article 9(4). The word "speedily" in the original draft of the article was replaced with the words "without delay" during the sixth session of the Commission on Human Rights to more accurately reflect the original French amendment "sans delai."[144] While no precise definition was given, it was agreed that the term "did not mean without any delay."[145] Nowak asserts that the term means "within several weeks."[146]

The Human Rights Committee has considered the issue of delay in several individual cases, but its decision leave much wanting. Scott Carlson and Gregory Gisvold write that the Committee's interpretation what constitutes delay is "vague," depending on the facts of the case.[147] Joseph, Schultz, and Castan have termed the Committee's jurisprudence on this issue "disappointing."[148] Although emphasizing

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139. ICCPR art. 14(1). Independence was identified as being "essential to the notions of a 'court'" in a report by five special rapporteurs with mandates from the Commission on Human Rights. *Situation of Detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120, ¶ 28(a) (Feb. 27, 2006).

140. Vuolanne v. Finland, No. 265/1987, ¶ 9.5 (Apr. 7, 1989), *in* U.N. Doc. A/44/40 at 249 (Sept. 29, 1989).

141. Inés Torres v. Finland, No. 291/1988, ¶ 7.2, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 5, 1990).

142. *Id*.; *Vuolanne*, No. 265/1987, ¶ 9.6.

143. *Id*.

144. Comm'n on Hum. Rts., 6th Sess., 147th mtg., U.N. Doc. E/CN.4/SR.147 at 15 (Apr. 17, 1950).

145. *Id*.

146. NOWAK, *supra* note 109, at 179.

147. SCOTT CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 86 (2003).

148. JOSEPH, SCHULTZ, & CASTAN, *supra* note 98, at 333.

that habeas corpus proceedings should be adjudicated "as expeditiously as possible," the Committee has determined that delay should be assessed on a case-by-case basis.[149] Thus, while it found in one case that a delay of three months was "in principle too extended," a violation was not found because the reasons for the delay were not known.

In *Ahani v. Canada*,[150] a "reasonableness hearing," considered by the Committee to satisfy Article 9(4), was not resolved until four years and ten months after detention began.[151] The Committee attributed most of this delay – over four years –to the applicant due to his decision to contest the constitutionality of the statute under which he was detained, rather than proceed directly to the "reasonableness hearing."[152] However, the Committee found that the nine and half months that passed after the resolution of the constitutional challenge violated the requirement of determination "without delay."[153]

It is important to note that the prohibition on delay in Article 9(4) refers to the time between the initiation of habeas corpus proceedings and the issuance of a decision on the legality of detention by the court. It *does not* refer to a period between the commencement of detention and the time habeas corpus is made available. Under Article 9(4), habeas corpus is theoretically available from the moment the deprivation of liberty occurs.[154]

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149. Inés Torres v. Finland, No. 291/1988, ¶ 7.3, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 5, 1990).

150. No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (Mar. 29, 2004).

151. Id. ¶ 10.2.

152. *Id*.

153. *Id*.

154. In *Kelly v. Jamaica* the author was held for five weeks without being brought before a judge and without the opportunity to challenge his detention. The Committee found a violation of Article 9(3) because the author was not brought "promptly" before a judge and a violation of Article 9(4) because he was not allowed an opportunity to challenge his detention at all. The passage of five weeks was not important in finding the violation of Article 9(4), because the violation was not based on a delay between the filing of his habeas corpus petition and its decision, but upon denial of the opportunity to even file a petition. *See* Kelly v. Jamaica, No. 253/1987, ¶ 3.2, 5.6, U.N. Doc. CCPR/C/41/D/253/1987 (Apr. 8, 1991). Nowak's discussion of this case could easily be misinterpreted to suggest that the Committee found the passage of five weeks in the case was a violation of the requirement that determination occur "without delay," rather than a violation due to complete denial of access to the remedy. *See* NOWAK, *supra* note 109, at 179-80.

3. ICCPR

A habeas corpus court is charged with deciding the "lawfulness" of a person's detention, and ordering release if the detention is not "lawful." Article 9(4) does not specify what law is to be applied in determining the lawfulness of detention. The Human Rights Committee has found that "lawfulness" means the deprivation of liberty is compatible with the requirements of Article 9(1).[155] Therefore, determining the "lawfulness" of detention requires an understanding of what detention is proscribed by Article 9(1) of the Covenant.

Article 9(1) contains two prohibitions against deprivation of liberty. First, deprivation of liberty is prohibited "except on such grounds and in accordance with such procedures as are established by law."[156] Nowak states that for purposes of Article 9(1) "[t]here can be no doubt that the word *"law"* ("loi") refers to the domestic legal system."[157] A "law" is understood as a parliamentary statute or a common law norm; an administrative rule does not suffice.[158] Under the terms of this guarantee, deprivation of liberty must comply with both the substantive and procedural laws of a state.

However, the review of lawfulness "is not limited to mere compliance of the detention with domestic law."[159] Article 9(1) also prohibits, "arbitrary" arrest or detention.[160] The Human Rights Committee has ruled that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[161] Deprivation of liberty must not only be legal under domestic law, but also reasonable and necessary under the circumstances.[162] Both the enforcement of a law or the law itself must

155. Baban v. Australia, No. 1014/2001, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (Sept. 18, 2003).

156. ICCPR art. 9(1).

157. NOWAK, *supra* note 109, at 171.

158. *Id*.

159. A v. Australia, No. 560/1993, ¶ 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997).

160. ICCPR art. 9(1).

161. van Alphen v. The Netherlands, No. 305/1988, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (July 23, 1990). *See also* Shafiq v. Australia, No. 1324/2004, ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/204 (Oct. 31, 2006).

162. *van Alphen*, No. 305/1988, ¶ 5.8.

comply with this provision.[163] Joseph, Schultz, and Castan agree that "perverse" domestic laws which allow detention in unreasonable situations would violate other provisions of the Covenant, such as Article 9(1).[164]

Article 9(4) states that the court that determines the lawfulness of a person's detention may "order his release if the detention is not lawful." The Human Rights Committee has stressed that this language "requires that the court be empowered to order release" if the detention is not lawful.[165] Habeas corpus "must include the possibility of ordering release" or a violation of Article 9(4) will be found.[166] Nowak and Carlson and Gisvold agree that the court must order the immediate release of a person found to be unlawfully detained.[167]

An important question arises regarding the nature of "arrest or detention": does the deprivation of liberty by arrest or detention that triggers Article 9(4) require state action? Nothing in Article 9(4) expressly limits applicability of the paragraph to state action, nor is any limitation found in the general comments or cases of the Human Rights Committee. Discussing Article 9 as a whole, Nowak correctly points out that kidnapping by a private party is private action. He reasons that if this private action is not considered "arrest or detention" and is not prohibited by domestic law, then it is not prohibited by Article 9(1).[168] Nowak suggests that this is an absurd result, and is incompatible with the object and purpose of the Covenant. He concludes that "deprivation of liberty by private persons [is] to be understood as arrest or detention, making the guarantees in paras. 1, 4 and 5 fully applicable."[169] Thus, Article 9(4) would be applicable to a kidnapped person or a mentally ill person being

163. NOWAK, *supra* note 109, at 171.

164. JOSEPH, SCHULTZ, & CASTAN, *supra* note 98, at 344.

165. A v. Australia, No. 560/1993, ¶ 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997).

166. Shafiq v. Australia, No. 1324/2004, ¶ 7.4, U.N. Doc. CCPR/C/88/D/1324/204 (Oct. 31, 2006); Baritussio v. Uruguay, R.6/25, ¶¶ 12-13, *in* U.N. Doc. A/37/40 at 187 (1982).

167. *See* CARLSON & GISVOLD, *supra* note 147, at 85; NOWAK, *supra* note 109, at 179.

168. NOWAK, *supra* note 109, at 168. This is because Article 9(1) prohibits "deprivation of liberty" that violates domestic law and separately prohibits "arbitrary arrest or detention." Thus, a deprivation of liberty that does not violate domestic law is not a violation of Article 9(1), nor is an arbitrary deprivation of liberty if it is not considered an "arrest or detention." *See supra* §§ 3.2.2 & 3.2.5.

169. NOWAK, *supra* note 109, at 169. Article 9(1) guarantees the right to liberty and prohibits arbitrary arrest and detention. Article 9(5) guarantees compensation to a person subjected to unlawful arrest or detention. ICCPR arts. 9(1) & 9(5).

held in a private clinic.[170] Limiting the applicability of Article 9(4) to state action would minimize its effectiveness as a weapon against "disappearances" or other actions carried out by unofficial, secret, or quasi-state authorities.[171]

The obligation of the state is to provide access to habeas corpus proceedings, and to provide effective review. The cases of the Human Rights Committee show that Article 9(4) is violated when no opportunity exists for a detained person to seek a determination of the legality of his or her detention.[172] This violation occurs regardless of whether the deprivation of liberty is, in fact, legal. However, the onus is on the person deprived of his or her liberty to exercise the right. The failure of an individual to take advantage of the opportunity to initiate proceedings does not result in a violation.[173] Once a petition is filed, however, the state has an obligation to ensure proper review by a competent court on the lawfulness of detention.[174]

Article 9(4) does not mention legal representation for a person seeking a determination of the legality of his or her detention. The issue was addressed during the Third Committee's discussion of a Costa Rican proposal to allow a third party to initiate habeas corpus proceedings. The United Kingdom's representative suggested that it was more important to guarantee a detained person the right to communicate with a lawyer.[175] No action was taken, however, to add this guarantee to Article 9(4). The Human Rights Committee has not expressly stated that Article 9(4) includes a

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170. NOWAK, *supra* note 109, at 168. Nowak notes, however, that paragraphs two and three of Article 9 are applicable only in criminal cases. Article 9(2) requires a person arrested be informed of the charges against him or her, while Article 9(3) requires that a person arrested on criminal charges be promptly brought before a judge. ICCPR arts. 9(2) & 9(3).

171. Nowak provides the example of state-tolerated religious police in Iran. NOWAK, *supra* note 109, at 168.

172. *See* Essono Mika Miha v. Equatorial Guinea, No. 414/1990, ¶6.5, U.N. Doc. CCPR/C/51/D/414/1990 (Aug. 10, 1994); Kelly v. Jamaica, No. 253/1987, ¶¶ 5.6, 6, U.N. Doc. CCPR/C/41/D/253/1987 (Apr. 8, 1991). Some commentators suggest that the state does not need to make habeas corpus proceedings available if the deprivation of liberty is based on a court order, such as in cases of pretrial detention or a sentence of imprisonment. NOWAK, *supra* note 109, at 17 (citing Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, *in* THE INTERNATIONAL BILL OF RIGHTS – THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114, 134 (Louis Henkin, ed. 1981)).

173. Stephens v. Jamaica, No. 373/1989, ¶ 9.7, U.N. Doc. CCPR/C/55/D/373/1989 (Oct. 25, 1995).

174. Smirnova v. Russia, No. 712/1996, ¶ 10.1, U.N. Doc. CCPR/C/81/D/712/1996 (Aug. 18, 2004).

175. U.N. GAOR, 13th Sess., 864th mtg. of Third Comm., at 143, U.N. Doc. A/C.3/SR.864 (Oct. 28, 1958) (statement of the U.K.).

right to counsel. Its decisions have hinted that this right might exist but its position remains vague, in the view of Carlson and Gisvold.[176]

In *Berry v. Jamaica,*[177] the most significant case dealing with the issue of legal representation, an applicant alleged a violation of Article 9(4). The state contended that no violation occurred because the applicant could have initiated habeas corpus proceedings and did not take advantage of this opportunity.[178] It was uncontested that the applicant did not have access to legal representation at the time, but no other bars on access to habeas corpus were specifically alleged by the applicant. [179] The Committee found that "[i]n the circumstances" a violation of Article 9(4) occurred because the applicant "was not, in due time, afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention."[180] The only circumstances specifically identified as a bar to access was the lack of access to counsel.

The Committee was later presented with a specific claim that Article 9(4) encompassed a right to counsel in *A v. Australia*.[181] Without acknowledging such a right existed, the Committee noted that counsel was available and that the applicant was informed of this but failed to request representation. The applicant did secure representation at a later date, but was forced to change attorneys several times due to his transfer between detention facilities, and access to his attorney was "inconvenient." The Committee found that the fact the applicant was forced to change attorneys and that access was not convenient did not raise an issue under Article 9(4).[182] By focusing on the extent to which legal representation can be limited without violating Article 9(4), the decision implies that a right to counsel does exist.

176. CARLSON & GISVOLD, *supra* note 147,at 86.

177. No. 330/1988, U.N. Doc. CCPR/C/50/D/330/1988 (Apr. 6, 1994).

178. *Id*. ¶ 11.1.

179. *Id.*

180. *Id.*

181. No. 560/1993, ¶ 9.6, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997).

182. *Id.*

3. ICCPR

Joseph, Schultz, and Castan have argued that it is "virtually impossible" to seek a determination of the legality of one's detention without an attorney.[183] Moreover, communication with counsel tends to protect against other violations of the rights of a person in state custody. Although they have not yet expressly found that Article 9(4) contains a right to counsel, the Committee's cases demonstrate a strong recognition of the importance of counsel.

Conclusion

Article 9(4) of the International Covenant on Civil and Political Rights elaborates on the broadly stated right to habeas corpus set out in Article 8 of the Universal Declaration of Human Rights. These provisions, as part of the International Bill of Human Rights, represent the core guarantee of habeas corpus in the post-war international human rights system. In addition to the international system, regional human rights systems guarantee this right. The next chapter will examine the right to habeas corpus in the regional human rights systems.

183. JOSEPH, SCHULTZ & CASTAN, *supra* note 98, at 334.

4

HABEAS CORPUS AND REGIONAL HUMAN RIGHTS SYSTEMS

The Universal Declaration of Human Rights[1] and the International Covenant on Civil and Political Rights,[2] together with the Covenant on Economic, Social, and Cultural Rights,[3] provide the basis for the United Nations system of human rights protection. The human rights guarantees of these instruments are complimented by the guarantees contained in regional human rights instruments. Thomas Buergenthal argues that the regional systems, with their more elaborate enforcement mechanisms, are more effective in addressing individual human rights violations.[4]

The first comprehensive regional human rights system was established in Europe, followed by the implementation of regional systems in the Americas and Africa, respectively. The foundation of each of these three systems is a binding human rights treaty enforced by a regional human rights court. Two of these regional human rights conventions, those of the European and Inter-American systems, contain an express guarantee of the right to habeas corpus.

In the European system, the existence of stable democratic states and the variety of legal systems have influenced habeas corpus jurisprudence. Procedural requirements, for example, have been defined with greater precision than in other systems. At the same time, a variety of review mechanisms have been found to satisfy the habeas corpus article to accommodate different systems.

By comparison, the Inter-American system has emphasized the access to habeas corpus review. The right finds its foundations in both the broad Latin American remedy of *amparo* and Anglo-American habeas corpus jurisprudence. Habeas corpus in the Inter-American system has evolved in response to the practice of forced disappearances during lengthy states of emergency in unstable states. This has resulted in a robust remedy with broad applicability.

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1. G A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter "UDHR" or "Universal Declaration"].

2. 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter "ICCPR" or "Covenant"].

3. 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

4. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 791 (2006).

4. Regional Systems

Unlike the other regional human rights instruments, the African Charter on Human and Peoples' Rights[5] does not contain an express, distinct guarantee of habeas corpus.[6] Fatsah Ouguergouz asserts that the right to security of person in the African system is set out in a "highly incomplete fashion."[7] Like to the Universal Declaration, the African Charter guarantees both the right to personal liberty in Article 6 and a general right to recourse in Article 7,[8] and the African Commission on Human and Peoples' Rights has noted that a detained person should have recourse to national courts.[9] While the Commission has stated that "deprivation of the right to habeas corpus alone does not automatically violate Article 6," it has held that in a common law state where habeas corpus is well established, the suspension of habeas corpus violates Article 6 and 7.[10] The African Court on Human and Peoples' Rights[11] has not yet addressed the issue, however, leaving the African system's jurisprudence quite limited.

This chapter thus focuses on the habeas corpus provisions found in the European and Inter-American human rights systems. The first part of this chapter focuses on the right to habeas corpus under the European system. It first outlines the drafting history of the provision and then analyzes of the scope and interpretation of

5. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter "African Charter"].

6. *See id.* The African Union has, however, called on states to enact legislation to ensure the right to habeas corpus. AFRICAN UNION, PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, DOC/OS(XXX)247 at 12, http://www.achpr.org/files/instruments/guidelines-right-fair-trial/achpr_principles_and_guidelines_fair_trial.pdf.

7. FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 120 (2003).

8. African Charter arts. 6, 7(1)(a). Sassòli and Olson include Article 7(1)(a) in a list of international and regional habeas corpus provisions. Marco Sassòli & Laura Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 619 n.103 (2008).

9. In *Achutan v. Malawi*, the Commission found that the applicant "was not allowed recourse to the national courts to challenge the violation of his fundamental right to liberty as guaranteed by Article 6 of the African Charter and the constitution of Malawi." It held that this violated Article 7(1) of the Charter, guaranteeing the right to remedy violations of rights in the national courts. Comm. No. 64/92 (7th & 8th ann. rpt.) (1995). *See also* Int'l Pen v. Nigeria, Comm. No. 137/94 (12th ann. rpt.) (Oct. 31, 1998).

10. Const. Rts. Proj. & Civil Lib. Org. v. Nigeria, Comm. No.143/95 (13th ann. rpt.) (Nov. 15, 1999).

11. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 2 (entered into force Jan. 25, 2004), OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

the provision in the European system. The second applies the same approach to the habeas corpus provision of the Inter-American system. As with the discussion of the International Covenant in Chapter 3, these section focus on the parameters of the relevant habeas corpus guarantees when it is available. Issues related to the availability of habeas corpus during armed conflict, its suspension by derogation, and its extraterritorial reach will be addressed in Chapter 5.[12]

4.1 European Human Rights Law

Buergenthal rightly considers the European human rights regime to be "the most effective international system for the protection of individual human rights."[13] Europe's Convention for the Protection of Human Rights and Fundamental Freedoms[14] is the oldest of the binding international human rights conventions. Unlike the lengthy drafting period of the International Covenant on Civil and Political Rights, the European Convention was drafted in an expeditious manner with few alterations along the way.[15] The Convention established a sophisticated mechanism of enforcement via a human rights court and commission.

The European Convention guarantees the right to habeas corpus at Article 5(4). C.A. Gearty terms this a "crucial provision" of the Convention, and notes its particular importance in protecting the rights of domestic minorities and the mentally ill.[16] Article 5(4) provides:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[17]

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12. *See infra* § 5.1 (availability of habeas corpus during armed conflict); § 5.2 (derogability of habeas corpus guarantees); § 5.3 (extraterritorial application of habeas corpus guarantees).

13. Buergenthal, *supra* note 4, at 792.

14. 213 U.N.T.S. 222 (entered into force on Sept. 3, 1953) [hereinafter "European Convention"].

15. Buergenthal, *supra* note 4, at 792.

16. C.A. Gearty, *The European Court of Human Rights and the Protection of Civil Liberties: An Overview*, 52 CAMBRIDGE L.J. 89, 102, 110 (1993).

17. European Convention art. 5(4).

As with the International Covenant, the right to habeas corpus falls within the general right to liberty and security guaranteed by Article 5 of the European Convention.

4.1.1 Drafting History of the European Convention

As Europe emerged from the shadows of World War II, an organized effort to unify the nations of the continent began to take shape. To this end, the International Committee of Movements for European Unity sponsored an assembly known as the Congress of Europe. The Congress, convened in May 1948 in The Hague, would serve as the basis for the Council of Europe.[18] A.H. Robertson and J.G. Merrills show that, much like the nascent United Nations organization, the protection of human rights was seen as critical by the Congress, which adopted a resolution calling for "a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition" and a court of justice to implement such a charter.[19] Preliminary drafting of a charter was undertaken under the auspices of the International Committee of Movements for European Unity early in 1949.[20]

On May 5, 1949, the Statute of the Council of Europe was signed in London by ten states.[21] The Statute provided for the creation of two bodies, a Consultative Assembly and a Committee of Ministers. The Consultative Assembly was intended to be the deliberative organ and present recommendations to a Committee of Ministers which would, in turn, take binding action to carry out the organization's aims.[22] Among the Ministers' powers was the setting of an agenda for the Assembly.

The Ministers met in early August 1949 to set the agenda for the Assembly's first session.[23] During the discussion on human rights, the opinion was expressed that

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18. A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (1993).

19. *Id.*

20. *Id.* at 5-6.

21. 87 U.N.T.S. 103 (entered into force Aug. 3, 1949) [hereinafter "Council Statute"].

22. Council Statute arts. 13, 15, 16 & 22.

23. 1 COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 10-12 (1975) [hereinafter "TRAVAUX"].

the issue had already been dealt with by the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly less than a year earlier, and the ministers excluded the item from the Consultative Assembly's agenda.[24] When asked by the Assembly to reconsider the matter,[25] several ministers raised concerns about the possibility of two different declarations being issued by the United Nations and Europe.[26] Other ministers, however, pointed out that the Universal Declaration was not drafted as a binding treaty and that an opportunity existed to define human rights protections in binding terms. An agenda item was added with a request that "due consideration be given to the question of the definition of human rights."[27]

The Assembly referred the issue to its Committee on Legal and Administrative Questions. Rather than drafting specific articles, the committee's initial work was limited to identifying those general rights it felt were appropriate for inclusion in a convention.[28] On September 5, 1949, it recommended twelve broad categories to the Assembly, including the right to freedom from arbitrary arrest or detention as protected by Article 9 of the Universal Declaration.[29] The Assembly subsequently requested that the Committee of Ministers draft a convention that included the rights identified by the Committee and an enforcement mechanism that would provide a remedy to individuals in case of state violations.[30]

On November 5, 1949, the Committee of Ministers convened a committee of legal experts to draft the convention.[31] The experts' initial proposal was based on the Assembly's list of general rights and did little to further define these rights. The right to freedom of liberty in this draft was nearly identical to that in the Universal Declaration. It simply read, "No one shall be subjected to arbitrary arrest, detention

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24. *Id.* at 10-12.

25. *Id.* at 14-20.

26. *Id.* at 22-26.

27. *Id.*

28. *Id.* at 199.

29. *Id*.

30. 2 TRAVAUX, *supra* note 23, at 276.

31 *Id.* at 296.

or exile."[32] However, a dramatic turn toward the more definite convention the Committee of Ministers desired was about to occur.

On March 6, 1950, amendments to the convention were proposed to the committee of legal experts by the United Kingdom.[33] These proposed articles flowed from the same draft international bill of rights that the United Kingdom had submitted to the United Nations Commission on Human Rights in 1947, but included many of the changes that had already made, to date, by the Commission.[34] The amendments included a specific right to habeas corpus, which provided, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[35] This language followed verbatim the amended habeas corpus article that had been reported out of the United Nations Commission on Human Rights in June 1949.[36]

After considering the United Kingdom's amendments, the legal experts decided to submit them to the Committee of Ministers along with the earlier, more general list of rights from the Assembly.[37] The experts referred to the former as "defining" rights, while the latter "enumerated" rights.[38] A conference of senior officials convened by the Ministers considered the two alternatives. In support of the more defined version, the representative from the Netherlands argued that there was no need for "general declarations for the instruction of the public."[39] In the end, the majority of senior officials agreed with this view.[40]

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32. 3 TRAVAUX, *supra* note 23, at 222.

33. *Id.* at 284.

34. *See* Text of Ltr. from Lord Dukeston, U.K. Rep. on Hum. Rts. Comm'n, to Sec.-Gen. of U.N., U.N. Doc E/CN.4/AC.1/4 (June 5, 1947) (containing the U.K.'s proposed articles for the international bill of rights). For a discussion of the proposal in the United Nations, *see supra* § 3.1.1.

35. 3 TRAVAUX, *supra* note 23, at 284, art. 7(4).

36. Rep. of Comm'n on Hum. Rts., U.N. Doc. A/1371 at 31, annex I, art. 9(5) (June 23, 1949).

37. 4 TRAVAUX, *supra* note 23, at 16.

38. *Id.* at 52.

39. *Id.* at 108.

40. ROBERTSON & MERRILLS, *supra* note 18, at 8.

Both alternatives of the convention were referred back to the Assembly's Committee on Legal and Administrative Questions, which concurred with the senior officials' preference for the more defined United Kingdom alternative.[41] On August 7, 1950, the Ministers adopted this alternative,[42] and the Consultative Assembly expressed its approval nineteen days later.[43] The Committee of Ministers met again in early November and asked its legal experts to review and finalize the convention.[44] On November 4, 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms[45] was signed in Rome.

Only a year and half had passed from the founding of the Council of Europe to the signing of the European Convention, a fact that stands in stark contrast to the two decades that elapsed prior to adoption of the International Covenant on Civil and Political Rights by the United Nations General Assembly.[46] The language in the final version of the Convention varied little from the original amendments offered by the United Kingdom. The habeas corpus provision was unaltered and, like most individual articles, generated almost no discussion prior to its final adoption. The European Convention entered into force on September 3, 1953, after the requisite tenth ratification.[47]

As with the International Covenant on Civil and Political Rights, several states-parties to the European Convention have lodged declarations implicating the habeas corpus article. Generally, these limit application of Article 5 in its entirety to

41. 5 TRAVAUX, *supra* note 23, at 34.

42. *Id.* at 124.

43. 6 TRAVAUX, *supra* note 23, at 202. The Assembly offered several amendments at this stage, including the addition of certain rights. *Id*. at 232.

44. 7 TRAVAUX, *supra* note 23, at 4.

45. 87 U.N.T.S. at 255 (entered into force Sept. 3, 1953) [hereinafter "European Convention"].

46. For a discussion of the history of the International Covenant on Civil and Political Rights, *see supra* § 3.1.

47. As of February 2013, 47 states had ratified the convention. COUNCIL OF EUROPE, SIMPLIFIED CHART OF SIGNATURES AND RATIFICATIONS, http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG.

members of the military.[48] Others state that Article 5 will be applied consistent with domestic provisions related to deprivation of liberty.[49]

4.1.2 Interpreting Article 5(4) of the European Convention

The European Convention originally established two enforcement institutions, a European Commission of Human Rights, which would be the first review stage, and a European Court of Human Rights.[50] With the introduction of Protocol 11 to the Convention in 1998, the Commission was abolished and the Court was restructured and made permanent.[51] Both the former Commission and the Court were charged with hearing individual complaints of violations of the Convention by states. In doing so, they have produced a sizeable body of case law and the articles of the Convention have been "extensively interpreted by the Convention institutions" and domestic courts, according to Buergenthal.[52]

Article 5(4) has been the subject of numerous cases before the European human rights institutions. This section surveys the seminal cases and decisions in which the European Court of Human Rights and European Commission of Human Rights have addressed Article 5(4). These cases and decisions help define individual terms of the article; they also provide detailed guidance on the manner in which the article as a whole is to be interpreted and applied.

What is the nature of the remedy guaranteed by Article 5(4)? As the European Court of Human Rights stated in *Brogan and Others v. United Kindom*,[53] Article 5(4) requires the availability of proceedings to review the lawfulness of a person's

48. *See* COUNCIL OF EUROPE, LIST OF DECLARATIONS MADE WITH RESPECT TO TREATY NO. 005, http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=&CL=ENG&VL=1. These states include Armenia, Azerbaijan, the Czech Republic, France, Moldova, Portugal, Russia, Slovakia, Spain, and Ukraine. *Id*.

49. *See id.* (declarations of Austria and Serbia).

50. European Convention art. 19 (original).

51. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. 155 (entered into force Jan. 11, 1998).

52. Buergenthal, *supra* note 4, at 792.

53. 145 Eur. Ct. H.R. (ser. A) (1988).

detention.[54] This article is considered *lex specialis* as related to the more general remedy provision contained in Article 13.[55] The Court noted in *De Wilde, Ooms and Versyp v. Belgium*[56] and subsequent cases that the right to this procedure is distinct from the prohibition on arbitrary detention under Article 5(1) of the Convention.[57] Every person is entitled to habeas corpus proceedings regardless of whether the detention is, in fact, legal. Thus, the unavailability of habeas corpus can result in a violation of Article 5(4) even if the person is lawfully detained pursuant to Article 5(1).[58]

The Court's jurisprudence delineates the state's obligation to provide for habeas corpus in their domestic law, and confirm that the unavailability of a certain, accessible, and effective judicial remedy in domestic law violates Article 5(4). In *Abdolkhani and Karimnia v. Turkey*[59] the Court found that the state's failure to show that applicants had any procedure at their disposal to review their detention violated Article 5(4).[60] In *Ryabikin v. Russia*[61] the absence of a domestic remedy was evidenced by the domestic court's eventual reliance on Article 5(4) of the Convention itself as a source of authority to review applicant's detention.[62] Article 5(4) requires that habeas corpus be applicable to all forms of detention. Specific forms of review limited to particular criminal or civil proceedings fall short of this general remedy.[63]

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54. *Id*. at 11, 24 (¶ 64). *See also* Evrim Çiftçi v. Turkey, App. No. 39449/98, ¶ 27 (Apr. 26, 2007). Unpublished decisions of the European Court are available at http://www.echr.coe.int/echr/en/hudoc.

55. Nasrulloyev v. Russia, App. No. 656/06, ¶ 79 (Oct. 11, 2007).

56. 12 Eur. Ct. H.R. (ser. A) (1971).

57. *Id*. at 39-40 (¶ 73); Douiyeb v. the Netherlands, App. No. 31464/96, ¶ 57 (Aug. 4, 1999). *See* European Convention, art. 5(1) (guaranteeing that "no one shall be deprived of his liberty" except in enumerated situations).

58. *Douiyeb*, App. No. 31464/96, ¶ 57.

59. App. No. 30471/08 (Jan. 3, 2009).

60. *Id*. ¶ 140.

61. App. No. 8320/04 (June 19, 2008).

62. *Id*. ¶¶ 138-41.

63. *See* Svetoslav Dimitrov v. Bulgaria, App. No. 55861/00, ¶ 71 (Feb. 7, 2008); Ismoilov & Others v. Russia, App. No. 2947/06, ¶¶ 145-52 (Apr. 24, 2008); Sadaykov v. Bulgaria, App. No. 75157/01, ¶ 35 (May 22, 2008); Soldatenko v. Ukraine, App. No. 2440/07, ¶¶ 126-27 (Oct. 23, 2008).

A degree of leeway is given to individual states to tailor a remedy to fit domestic legal frameworks. In *Weeks v. United Kingdom*,[64] the Court found that the possibility of appeal or judicial review of an administrative decision may satisfy the requirements of Article 5(4).[65] However, as the Court emphasized in *Artico v. Italy*,[66] the remedy guaranteed by Article 5(4) must not be "theoretical or illusory, but . . . practical and effective."[67] The availability of a remedy in law does not satisfy Article 5(4) if it is not available in practice.[68] According to Fiona de Londras, this requires as real-life, working assessment of effectiveness.[69] For example, if a person is detained incommunicado, as was the case in *Öcalan v. Turkey*,[70] the existence of a remedy in law is irrelevant.[71] The principle of "effective judicial review" requires that sufficient reasons be provided if detention is continued.[72]

The state carries the obligation to ensure that its judicial system is structured so as to make the remedy available in practice. In *R.M.D. v. Switzerland*,[73] the applicant was arrested and transferred between seven Swiss cantons over a period of two months due to pending charges in each.[74] Because each canton's courts had

64. 114 Eur. Ct. H.R. (ser. A) (1987).

65. *Id*. at 32-33 (¶ 69). *See also* McGoff v. Sweden, 83 Eur. Ct. H.R. (ser. A) 20, 27 (¶¶ 28-29) (1984). Such a proceeding is not an adequate substitution, however, if it does not fulfill all the requirements of Article 5(4). *See* Galliani v. Romania, App. No. 69273/01, ¶¶ 47, 61 (June 10, 2008) (appeal did not satisfy Article 5(4) because applicant faced imminent deportation).

66. 37 Eur. Ct. H.R. (ser. A) (1980).

67. *Id.* at 15-16 (¶ 33). *See also* Kharchenko v. Ukraine, App. No. 40107/02, ¶ 85 (Feb. 10, 2011) (violation where reviewing court simply reiterated standard set of grounds for detention); Nart v. Turkey, App. No. 20817/04, ¶ 38 (May 6, 2008) (violation where application for review receives no serious consideration by court).

68. Sakik & Others v. Turkey, 1997-VII Eur. Ct. H.R. 2609, 2625 (¶¶ 52-53). *See also* Aşan & Others v. Turkey, App. No. 56003/00, ¶¶ 110-15 (July 31, 2007); Çetinkaya & Çağlayan v. Turkey, App. No. 3921/02, 35003/02, & 17261/03, ¶ 43 (Jan. 23, 2007); Sabeur Ben Ali v. Malta, App. No. 35892/97, ¶ 39 (June 29, 2000).

69. Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists*, 12 J. CONFLICT & SEC. L. 223, 254 (2007).

70. 2005-IV Eur. Ct. H.R. 985.

71. *Id*. at 1013-14 (¶¶ 70-72).

72. Svipsta v. Latvia, App. No. 66820/01, ¶¶ 133-34 (Mar. 9, 2006).

73. 1997-VI Eur. Ct. H.R. 2003.

74. *Id*. at 10-12 (¶¶ 43-55).

jurisdiction to review the lawfulness of his detention only while the applicant was physically present in that canton, the applicant was unable to secure a determination of the lawfulness of his detention.[75] The Court found that the lack of jurisdiction of the cantonal courts did not excuse the failure to provide habeas corpus proceedings because the state had the obligation to ensure its federal judicial system was structured in a way to allow its courts to comply with Article 5(4).[76]

The Court has made clear that while Article 5(4) guarantees a specific proceeding its fundamental concern is that the detention of any individual is subjected to judicial supervision. As a result, in some situations, distinct "proceedings" may not be required if other guarantees of judicial oversight exist, such as the concept of "incorporated supervision" discussed later in this chapter.[77]

The availability of judicial oversight may also mitigate a state's derogation from other obligations during an emergency.[78] In *Brannigan and McBride v. United Kingdom*,[79] the Court addressed the legality of the United Kingdom's derogation under Article 15 from Article 5(3) of the Convention, requiring that a detained person be brought promptly before a judge.[80] The U.K. derogation was based on its position that it could not identify a satisfactory procedure to satisfy Article 5(3) in Northern Ireland given the emergency situation that existed there.[81] The two applicants in *Brannigan* were detained for periods that would violate the requirements of Article 5(3) if it were in effect.[82] Thus, the question before the Court was whether the U.K.'s derogation was valid, thus excusing it from the normal Article 5(3) requirements. The Court held that the derogation was valid, in part because safeguards existed against abuse of the extended detention regime.[83] Foremost of these safeguards was the

75. *Id*.

76. *Id*. *See also* Garabeyev v. Russia, App. No. 38411/02 (Jan. 3, 2008).

77. *See infra* § 4.1.2 (describing the concept of incorporated supervision).

78. Derogation from habeas corpus itself will be discussed *infra* at § 5.2.

79. 258 Eur. Ct. H.R. (ser. A) 29 (1993).

80. *Id*. at 45-46 (¶¶ 30-32).

81. *Id*. at 38, 45-46 (¶¶ 12, 30-32).

82. *Id*. at 37 (¶¶ 10-11).

83. *Id*. at 55-56 (¶¶ 61-65).

availability of habeas corpus.[84] The *Brannigan* case suggests, then, that the availability of habeas corpus makes derogation from other paragraphs of Article 5 more tolerable. And while other safeguards may be relevant, Edward Crysler asserts that the European Court's cases can be read to establish habeas corpus as a "minimum safeguard."[85] This hints at the important role that habeas corpus plays in regulating state conduct during emergencies, a role that will be discussed at length in Chapter 6.

Article 5(4) provides that "[e]veryone who is deprived of his liberty by arrest or detention" is guaranteed access to habeas corpus. The definition of the term "everyone" is read broadly in light of Articles 1 and 14 of the Convention. Article 1 makes the Convention applicable to "everyone within [a state's] jurisdiction.[86] Article 14 secures the rights of the Convention to all persons "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[87] In *Chahal v. United Kingdom*,[88] the Court have made clear that the remedy is available to illegal aliens.[89]

The only limitation placed on access to habeas corpus is that the individual seeking the remedy must be "deprived of his liberty by arrest or detention," a phrase that will be revisited later in this chapter. For purposes of determining access to the remedy, the legality of the deprivation is irrelevant. In *Winterwerp v. the Netherlands*,[90] the Court found that a violation of Article 5(4) because the state required an individual to allege "substantial and well-founded grounds for denying the lawfulness of [the] detention" prior to making the remedy available.[91] The mere fact

84. *Id*. at 55 (¶ 63). The Court pointed out that the applicants had dropped their complaint of a breach of Article 5(4).

85. Edward Crysler, Brannigan and McBride v. U.K.: *A New Direction on Article 15 Derogations under the European Convention on Human Rights?*, 65 NORDIC J. INT'L L. 91, 116 (1996).

86. European Convention art. 1.

87. *Id*. art. 14. *See also*, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Eur. T.S. 177 (entered into force Apr. 1, 2005).

88. 1996-V Eur. Ct. H.R. 1831.

89. *Id*. at 1865-67 (¶¶ 124-33).

90. 33 Eur. Ct. H.R. (ser A) (1979).

91. *Id*. at 26 (¶¶ 65-66).

that the deprivation exists is the only showing that a person should be required to make to take proceedings under Article 5(4). The remedy must, therefore, be made available even to a person who concedes that he or she is being lawfully detained.

In some cases, it may seem that the Court has placed significance on the individual's status in determining whether he or she is entitled to take proceedings under Article 5(4), such as in the case of a member of the military or a child.[92] It is important to note, however, that in these cases the Court has not found Article 5(4) inapplicable simply because of the individual's membership in a certain category. Instead, the person's circumstances are relevant in determining whether deprivation of liberty has occurred.

In *Nielsen v. Denmark*, for example, the Court considered an alleged violation of Article 5(4) involving a child involuntarily hospitalized.[93] Although the Court observed that the term "everyone" includes children,[94] it found that no "deprivation of liberty" occurred because the hospitalization was a responsible exercise of parental rights.[95] In other words, the fact that the applicant was a child would not categorically prevent application of Article 5(4), but was relevant to determining that certain restrictions did not amount to a deprivation of liberty given the parent-child relationship.

Likewise, the Court considered the status of members of the military in *Engel and Others v. the Netherlands*.[96] It noted that while the Convention applies to members of the military, the "particular characteristics of military life" must be considered when applying the Convention.[97] This suggests that, like in *Nielsen*, restrictions that might be considered deprivation of liberty in another context might not amount to deprivation in the context of military life. Again, the relevant inquiry in such situations is not whether "everyone" includes service members; it certainly does and Article 5(4) is available to them. Instead, the question is whether the

92. *See, e.g.*, Engel & Others v. the Netherlands, 22 Eur. Ct. H.R. (ser. A) (1976); Nielsen v. Denmark, 144 Eur. Ct. H.R. (ser. A) (1988).

93. 144 Eur. Ct. H.R. (ser. A) at 9 (¶ 13) (1988).

94. *Id.* at 22 (¶ 58) (discussing the term "everyone" as it appears in Article 5(5)).

95. *Id*. at 26-27 (¶ 73).

96. 22 Eur. Ct. H.R. (ser. A) at 6-7 (¶ 12) (1976).

97. *Id*. at 23 (¶ 54).

restrictions placed on the individual will be considered a deprivation of liberty given the characteristics of military life.

A related question is whether Article 5(4) proceedings can be initiated by a third party. The Court has emphasized the importance of Article 5(4) in preventing "disappearances," the unacknowledged detention of an individual by the state, and has found a violation of Article 5(4) in such circumstances.[98] The violation resulted from the failure of the state to provide access to habeas corpus to the detained individual, however, and the Court has not suggested that Article 5(4) requires that another person be allowed to initiate proceedings on behalf of the disappeared person.[99]

Article 5(4) guarantees proceedings for a person "deprived of his liberty by arrest or detention." As previously noted, the word "liberty" can be read to encompass broad notions of freedom from any form of restriction.[100] It is clear, however, that as applied in Article 5 of the Convention the term specifically refers to "liberty and security of person."[101] The European Court of Human Rights made clear in *Guzzardi v. Italy*[102] that this contemplates the physical liberty of the person, as opposed to restrictions on liberty of movement.[103] A person must be deprived of this limited sense of liberty to before proceedings must be made available pursuant to Article 5(4).[104]

Article 5(4) provides a further potential qualification – that a person must be deprived of liberty "by arrest or detention." The *travaux préparatoire* of the Convention does not reveal whether the phrase "by arrest or detention" was meant to limit application of the article to situations where the deprivation of liberty occurred

98. Taş v. Turkey, App. No. 24396/94, ¶¶ 84-85 (Nov. 14, 2000).

99. *See also* Shtukatorov v. Russia, App. No. 44009/05, ¶¶ 123-25 (June 27, 2008) (violation where applicant could not initiate proceedings himself due to finding of legal incapacity).

100. *See supra* § 3.2.2 (considering the meaning of the term "liberty" as used in Article 9(4) of the International Covenant on Civil and Political Rights).

101. European Convention art. 5(1). For a discussion of the meaning of the term "liberty of person," *see* supra s 3.2.2.

102. 39 Eur. Ct. H.R. (ser. A) (1980).

103. *Id*. at 33 (¶ 92).

104. Likewise, an applicant has no right to obtain, after release, a declaration that previous detention was unlawful. *See* Stephens v. Malta, App. No. 11956/07, ¶ 102 (Sept. 14, 2009).

in a certain manner. Interestingly, some guidance can be gleaned from the *travaux préparatoire* of the International Covenant on Civil and Political Rights. During the drafting of the Covenant, this phrase gave rise to disagreement between those who believed "arrest or detention" qualified the types of deprivation of liberty to which habeas corpus applied, and others who felt that every deprivation of liberty took the form of either an "arrest or detention."[105] The United Kingdom adopted the latter approach which matched the final text of Article 5(4) of the European Convention.[106] This suggests that the original authors of the article intended "arrest or detention" to encompass every instance of deprivation of liberty, and is consistent with the approach of the European Court of Human Rights. Its cases show that the relevant inquiry is whether "deprivation of liberty" has occurred. The Court has specifically held in *Van der Leer v. the Netherlands*[107] that Article 5(4) "does not make any distinction as between persons deprived of their liberty on the basis of whether they have been arrested or detained."[108]

Most deprivations of liberty occur in the classic sense of a person forcibly held in a secure detention center by police or security authorities. Article 5(4), however, is not limited to criminal cases;[109] instead, it applies to any "deprivation of liberty."[110] The Court's cases provide guidance as to when "deprivation" occurs. In *Guzzardi*, the Court wrote that

> In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

105. The debate regarding the meaning of "arrest or detention" in the United Nations is detailed *supra* at § 3.2.2.

106. *See* U.N. GAOR, 13th Sess., 863rd mtg. of Third Cmte., at 135, U.N. Doc. A/C.3/SR.863 (October 27, 1958).

107. 170 Eur. Ct. H.R. (ser. A) (1990).

108. *Id*. at 3, 13 (¶ 28).

109. *See id.* (Article 5(4) is not limited to criminal proceedings). *See also* Nasrulloyev v. Russia, App. No. 656/06 (Oct. 11, 2007) (deprivation of liberty occurs when a person is held for extradition even when criminal charges are not pending in the detaining state); Nielsen v. Denmark, 144 Eur. Ct. H.R. (ser. A) (1988) (deprivation of liberty can include hospitalization).

110. In *Nielsen* the Court suggested that "deprivation of liberty" could even extend to actions by a private person. *Id*. at 26-27 (¶¶ 72-73).

> . . . .
>
> The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.[111]

The Court then engaged in a fact-driven analysis of the applicant's situation. It determined that the confinement of the applicant to one portion of an island occupied primarily by other detainees and police officers with limited outside social contacts, the implementation of a curfew, and supervision of telephone calls, amounted to "deprivation of liberty" despite his ability to communicate with the outside world and make occasional trips to the mainland.[112]

A person's "concrete situation" can mitigate against a finding of deprivation in seemingly restrictive situations. For example, the Court found in *Nielsen v. Denmark*[113] that involuntary hospitalization did not result in deprivation of liberty when the patient was a child and hospitalization was approved by a parent.[114] The Court observed that the child was subjected to "no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital" and emphasized the parental prerogative to make such decisions.[115] In contrast, the Court held in *X. v. United Kingdom*[116] that involuntary hospitalization of adults did result in deprivation of liberty.[117]

The Court has also considered cases in which the "concrete situation" of the individual is unknown. In *Taş v. Turkey*, the Court faced a situation where an individual was taken into custody and not subsequently seen.[118] The Court stressed

111. Guzzardi v. Italy, 39 Eur. Ct. H.R. (ser. A) at 33 (¶¶ 92-93) (1980) (citations omitted).

112. *Id.* at 34-35 (¶ 95) (determining "deprivation of liberty" for purposes of Article 5(1)).

113. 144 Eur. Ct. H.R. (ser. A) (1988).

114. *Id.* at 26 (¶ 72).

115. *Id.*

116. 46 Eur. Ct. H.R. (ser A) (1981).

117. *See id. See also* Stanev v. Bulgaria, App. No. 36750/06 (Jan. 17, 2012).

118. App. No. 24396/94, ¶¶ 84-85 (Nov. 14, 2000).

the responsibility of authorities to account for persons in their control, and in the absence of a plausible explanation of the individual's whereabouts and fate, found that his disappearance amounted to a deprivation of liberty in violation of Article 5.[119]

Article 5(4) provides a means for a court to decide the "lawfulness" of a person's detention. The terms "law" and "lawful" also appear in Article 5(1), which prohibits the deprivation of liberty except in accordance with the "law."[120] Determining what law is to be considered when determining "lawfulness" is an important initial step to understanding the guarantees of Article 5. The cases of the European Court of Human Rights show that this determination of "lawfulness" consists of both domestic law and European human rights law components.[121]

As the Court explained in *Benham v. United Kingdom*,[122] "lawfulness" essentially refers back to national law.[123] The national laws, of course, must conform to the requirements of the Convention.[124] A domestic court reviewing the lawfulness of a person's detention must ensure compliance with both procedural and substantive rules of national law.[125] Both the procedural and substantive national laws must be sufficiently precise and foreseeable.[126] The Court stated in *Brogan and Others v. United Kingdom*[127] that compliance with substantive national law requires an examination of the "reasonableness of the suspicion grounding the arrest and the

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119. *Id*. Some evidence must exist, however, that the "disappeared" person is actually in state custody. Testimony that persons detaining an individual identified themselves as police officers must be supplemented by additional evidence that the persons were, in fact, government agents. *See* Osmanoğlu v. Turkey, App. No. 48804/99, ¶¶ 53, 100-04 (Jan. 24, 2008).

120. The Court has confirmed that "lawful" has the same meaning in Articles 5(1) as in Article 5(4). Brogan & Others v. United Kingdom, 145 Eur. Ct. H.R. (ser. A) 11, 34-35 (¶ 65) (1988).

121. *See, e.g.*, Svetoslav Dimitrov v. Bulgaria, App. No. 55861/00, ¶ 65 (Feb. 7, 2008).

122. 1996-III Eur. Ct. H.R. 738.

123. *Id*. at 752-53 (¶ 40).

124. *Id*. at 753 (¶ 41).

125. Chitayev v. Russia, App. No. 59334/00, ¶ 177 (Jan. 18, 2007); Steel & Others v. United Kingdom, 1998-VII Eur. Ct. H.R. 2719, 2735 (¶ 54).

126. *Id*.

127. 145 Eur. Ct. H.R. (ser. A) 11 (1988).

legitimacy of the purpose pursued by the arrest and the ensuing detention."[128] It specified in *X. v. United Kingdom*[129] that this review should "be wide enough to bear on those conditions which . . . are essential for the 'lawful' detention of a person."[130] Specific facts bearing on the decision to detain or release an individual must be addressed.[131]

The Court's judgment in *Benham* shows that the initial determination of compliance with national law is left to domestic judicial systems.[132] Some deference is given to domestic courts' interpretation and application of its own national law because, the Court observed in *X.*, they are better placed to evaluate the evidence before them.[133] However, in *Steel and Others v. United Kingdom*[134] the Court rejected the notion that it should simply accept the findings of national courts in cases before it.[135] Instead, the Court has asserted that it "should exercise a certain power to review" whether there was, in fact, compliance with national law.[136]

Any deprivation of liberty must also be consistent with the purpose of Article 5 of the Convention, which the Court described in *Benham* as being the protection of individuals from arbitrariness.[137] Thus, regardless of conformity with national law, "no detention that is arbitrary can ever be regarded as 'lawful'" under the

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128. *Id*. at 34-35 (¶ 65). *See also* Garcia Alva v. Germany, App. No. 23541/94, at ¶ 39 (Feb. 13, 2001); Ječius v. Lithuania, 2000-IX Eur. Ct. H.R. 235, 260-61 (¶ 100). The Court has rejected the notion that determination of the substantive lawfulness of detention in a criminal case would amount to "prejudging" guilt or innocence. It notes that numerous procedural solutions exist which allow for such a determination while still guaranteeing impartiality in a criminal trial. Ilijkov v. Bulgaria, App. No. 33977/96, ¶ 95-98 (July 26, 2001). *See also* Bochev v. Bulgaria, App. No. 73481/01, ¶ 66 (Nov. 13, 2008) (rejecting "prejudgment" as basis for circumscribing extent of review).

129. 46 Eur. Ct. H.R. (ser A) (1981)

130. *Id*. at 25 (¶ 58).

131. Svershov v. Ukraine, App. No. 35231/02, ¶ 71 (Nov. 27, 2008). In *Giorgi Nikolaishvili v. Georgia*, the Court found a violation of Article 5(4) where the court issued an order that was clearly a template with pre-printed findings. *See* App. No. 37048/04 (Jan. 13, 2009).

132. Benham v. United Kingdom, 1996-III Eur. Ct. H.R. 738, 753 (¶ 41).

133. *X.*, 46 Eur. Ct. H.R. (ser A) at 19-20 (¶ 43).

134. 1998-VII Eur. Ct. H.R. 2719.

135. *Id*. at 2736 (¶ 56).

136. *Benham*, 1996-III Eur. Ct. H.R. at 753 (¶ 41).

137. *Id*. at 752-53 (¶ 40).

Convention.[138] Although it has not specifically defined arbitrariness, the Court noted its relationship to the absence of oversight and accountability in *Çakici v. Turkey*.[139] Unacknowledged detention, for example, has been referred to as a "complete negation" of the guarantee against arbitrary detention.[140]

The review of the lawfulness of a person's detention contemplated by Article 5(4) must be conducted by a national "court." The term "court" is not defined in the Convention, nor was it subject to discussion during the drafting process. That said, its meaning has been discussed at length by the European Court of Human Rights. The Court has made clear that the determination of whether a body is a "court" has little to do with that body's formal label. In *X. v. United Kingdom*,[141] the Court noted, "the word 'court' is not necessarily to be understood as signifying a court of law in the classic sense, integrated within the standard judicial machinery of the country."[142] Gerald Neuman suggests that this interpretation is wise, particularly in the modern security environment where the Convention must be implemented in a wide range of contexts.[143] Instead, the relevant inquiry is whether the decision-making body has certain fundamental features of a "judicial character."[144]

The most important of these fundamental features was identified in the Court's early cases. In 1968, the Court wrote in *Neumeister v. Austria*[145] that in Article 5(4), the "term [court] implies only that the authority called upon to decide [the lawfulness of detention] must possess a judicial character; that is to say, be independent both of the executive and of the parties to the case."[146] The Court's more recent cases confirm that independence is "the most important" feature of a "court."[147]

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138. *X.*, 46 Eur. Ct. H.R. (ser A) at 19-20 (¶ 43).

139. 1999-IV Eur. Ct. H.R. 583, 615 (¶ 104).

140. Baysayeva v. Russia, App. No. 74237/01, ¶ 145 (Apr. 5, 2007).

141. 46 Eur. Ct. H.R. (ser A) (1981).

142. *Id.* at 23 (¶ 53).

143. Gerald Neuman, *Counter-terrorist Operations and the Rule of Law*, EUR. J. INT'L L. 1019, 1028 (2004).

144. A & Others v. United Kingdom, 2009 Eur. Ct. H.R. at 76 (¶ 203).

145. 8 Eur. Ct. H.R. (ser. A) (1968).

146. *Id*. at 19-20 (¶ 24). *See also* Sadaykov v. Bulgaria, App. No. 75157/01, ¶ 35 (May 22, 2008) (Minister of Internal Affairs is not independent of executive and not a court for purposes of Article

While the *Neumeister* judgment suggested that independence might be the only necessary feature of a "court," other fundamental features have been identified in more recent cases. Although *Neumeister* went so far as to conclude that the term "court" in Article 5(4) "in no way relates to the procedures to be followed,"[148] the Court subsequently retreated from this view. It now considers another fundamental feature of a "court" to be the presence of "judicial procedures" appropriate to the type of deprivation of liberty in question.[149]

A third fundamental feature of a "court" is impartiality. The Court explained in *D.N. v. Switzerland*[150] that the determination of impartiality involves both a subjective test and an objective test.[151] The subjective test examines the basis of the personal conviction of a judge in a particular case.[152] The objective test considers whether, irrespective of the judge's personal conduct, guarantees exist to eliminate any doubt as to the impartiality of the judge.[153] The Court has noted that appearances have a certain importance in the latter inquiry.[154]

In addition to these features, it is critical that the court reviewing the legality of a person's detention actually have the power to determine lawfulness and order release.[155] In *Weeks v. United Kingdom*,[156] for example, the Court found that a parole

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5(4)); Vodeničarov v. Slovakia, App. No. 24530/94, ¶ 37 (Dec. 21, 2000) (holding a public prosecutor "lacks judicial character" and cannot be considered a court).

147. *X*., 46 Eur. Ct. H.R. (ser A) at 23 (¶ 53). *See also* D.N. v. Switzerland, 2001-III Eur. Ct. H.R. at 13-14 (¶ 42); Weeks v. United Kingdom, 114 Eur. Ct. H.R. (ser. A) at 30 (¶ 62) (1987); De Wilde, Ooms & Versyp v. Belgium, 12 Eur. Ct. H.R. (ser. A) at 41-42 (¶ 78) (1971).

148. *Neumeister*, 8 Eur. Ct. H.R. (ser. A) at 43-44 (¶ 24). The Court wrote that it was not possible to justify the application of the principle of "equality of arms" to Article 5(4) proceedings, and suggested that full written proceedings or an oral hearing were not required. *Id*.

149. The procedures required in Article 5(4) proceedings are discussed in the next section. *See infra* § 4.1.2.

150. 2001-III Eur. Ct. H.R.

151. *Id.* at 14 (¶ 44).

152. *Id*.

153. *Id*. at 14 (¶¶ 44, 46).

154. *Id*. at 14 (¶ 46).

155. X. v. United Kingdom, 46 Eur. Ct. H.R. (ser A) at 26 (¶ 61) (1981).

156. 114 Eur. Ct. H.R. (ser. A) (1987).

board was sufficiently independent and impartial to potentially be considered a "court" in those situations where it had power to release or recall prisoners.[157] In other situations, however, the parole board only fulfilled an advisory role and lacked binding power to regulate detentions.[158] In these situations, there was no possibility that the parole board could be considered a "court."

As discussed above, one of the fundamental features of a "court" that satisfies Article 5(4) is that it provides adequate guarantees of judicial procedure. The Convention, however, does not specify what guarantees are required for Article 5(4) proceedings. The European Court held in *A. and Others v. United Kingdom*[159] that Article 5(4) requires "procedural fairness" but that this does not impose "a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances."[160] It specifically rejected the contention that all of the fair trial guarantees contained in Article 6(1) are always required.[161] Instead, as it stated in *Garcia Alva v. Germany*,[162] Article 5(4) proceedings should meet fair trial requirements "to the largest extent possible under the circumstances of an on-going investigation."[163]

The Court has evaluated the need for a particular guarantee based on the facts of individual cases. Proceedings must provide guarantees appropriate to the type of deprivation of liberty in question.[164] The Court stated in 1971 in *De Wilde, Ooms and*

157. *Id*. at 30-31 (¶¶ 62-64). The Court went on to determine that, despite its power to release, the parole board could not be considered a "court" because it lacked requisite judicial procedures. *Id*. at 32 (¶ 66).

158. *Id*. at 31 (¶ 64).

159. 2009 Eur. Ct. H.R.

160. *Id*. at 76 (¶ 203).

161. *Id*.; Reinprecht v. Austria, 2005-XII Eur. Ct. H.R. at 9 (¶ 46); Neumeister v. Austria, 8 Eur. Ct. H.R. (ser. A) at 43 (¶ 23) (1968). The Court has observed that full proceedings under Article 6 would make it difficult for a court to make a speedy decision regarding the lawfulness of detention. *Neumeister*, at 43-44 (¶ 24). *See also* Kawka v. Poland, App. No. 2587/94, ¶57 (Jan. 9, 2001); Niedbała v. Poland, App. No. 27915/95, ¶ 66 (July 4, 2000); Megyeri v. Germany, 237 Eur. Ct. H.R. (ser. A) 1, 11-12 (¶ 22) (1992).

162. App. No. 23541/94 (Feb. 13, 2001).

163. *Id*. ¶ 39. *See also* Migoń v. Poland, App. No. 24244/94, ¶ 79 (June 25, 2002); Chruściński v. Poland, App. No. 22755/04, ¶ 55 (Nov. 6, 2007).

164. *A. & Others*, 2009 Eur. Ct. H.R. at 76 (¶ 203).

Versyp v. Belgium[165] that "in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceedings take place."[166]

Some guarantees are required in all situations. The Court has repeatedly made clear that all proceedings pursuant to Article 5(4) must be adversarial.[167] As explained in *Sanchez-Reisse v. Switzerland*,[168] this requires that the detainee is permitted to participate and present his or her case to the reviewing court.[169] States are given a degree of flexibility in crafting procedures to meet this requirement. For example, the Court accepted in *A. and Others* that fully adversarial procedures might be restricted in light of important public interests, such as national security, as long as the restrictions are sufficient counterbalanced.[170] In *Sanchez-Reisse* the Court also suggested that, in some situations, adversarial proceedings can occur in an all-written manner without the need for a personal appearance. [171]

In addition, in cases such as *Sanchez-Reisse* and *Reinprecht* the Court has emphasized that proceedings must ensure "equality of arms" between the parties at all times.[172] This principle contemplates that each party is afforded the opportunity to present its case under conditions that do not place it at a disadvantage vis-à-vis its

165. 12 Eur. Ct. H.R. (ser. A) (1971).

166. *Id*. at 41-42 (¶ 78).

167. *A. & Others*, 2009 Eur. Ct. H.R. at 76-77 (¶ 204); *Reinprecht*, 2005-XII Eur. Ct. H.R. at 9 (¶ 46); Toth v. Austria, 224 Eur. Ct. H.R. (ser. A) at 23 (¶ 84) (1991); Sanchez-Reisse v. Switzerland, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51) (1986); Weeks v. United Kingdom, 114 Eur. Ct. H.R. (ser. A) at 32 (¶ 66) (1987).

168. 107 Eur. Ct. H.R. (ser. A) (1986)

169. *Id.* at 19 (¶ 51).

170. *A & Others*, 2009 Eur. Ct. H.R. at 77 (¶ 205).

171. *Sanchez-Reisse*, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51). If proceedings are in writing, both parties must be made aware of communications between the court and the other party. Giorgi Nikolaishvili v. Georgia, App. No. 37048/04, ¶ (Jan. 13, 2009) (applicant was not given opportunity for written submission or oral argument); Bochev v. Bulgaria, App. No. 73481/01, ¶ 69 (Nov. 13, 2008) (violation because applicant was not allowed to see written submissions made by prosecutor). *But see* Vrenčev v. Serbia, App. No. 2361/05, ¶ 84 (Sept. 23, 2008) (absence of oral hearing resulted in violation).

172. *A & Others*, 2009 Eur. Ct. H.R. at 76 (¶ 203); *Reinprecht*, 2005-XII Eur. Ct. H.R. at 9 (¶ 46). *See also Kawka*, App. No. 2587/94, at ¶57; *Niedbała*, App. No. 279915/95, at ¶ 66; Nikolova v. Bulgaria, 1999-II Eur. Ct. H.R. at 16 (¶ 59). The Court's position on this issue has evolved since it found in *Neumeister v. Austria* in 1968 that no justification existed for application of the principle of equality of arms to Article 5(4) proceedings. 8 Eur. Ct. H.R. (ser. A) at 43-44 (¶ 24) (1968).

opponent.[173] Equality of arms is not ensured when a habeas corpus applicant is denied access to documents in an investigative file that are essential to effectively challenging the lawfulness of detention.[174] If full disclosure is not possible due to public interest, as was the case in *A. and Others*, as much information about the allegations and evidence should be disclosed as possible, with appropriate procedural counterbalances to ensure that the detainee can effectively challenge the allegations.[175]

The Court held in *Lanz v. Austria*[176] that the principle of equality of arms was violated when a detainee was not presented with and given the opportunity to respond to statements made to the reviewing court by the state.[177] The Court noted that even appearances of inequality in this regard should be avoided.[178] In *Van der Leer v. the Netherlands*[179] the Court determined that it is essential that the person be informed of the reason for his or her detention.[180]

The Court has found some guarantees to be necessary in some situations but not in others. As stated in *A. and Others*, the right to call and question witnesses may be required when the deprivation of liberty is serious or the grounds for detention may change with the passage of time.[181] Likewise, while the Court has stated that the opportunity to appear before the reviewing court in-person is not a necessity in all cases, it may be required when questions exist regarding the person's character, mental state, maturity, or personality,[182] or when concerns have been raised about the

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173. Lanz v. Austria, App. No. 24430/94, ¶ 57 (Jan. 31, 2002).

174. Łaszkiewicz v. Poland, App. No. 28481/03, ¶ 77 (Jan. 15, 2008); Lamy v. Belgium, 151 Eur. Ct. H.R. (ser. A) at 16-17 (¶ 29) (1989); *Weeks*, 114 Eur. Ct. H.R. (ser. A) at 32 (¶ 66).

175. *A & Others*, 2009 Eur. Ct. H.R. at 81 (¶ 218).

176. App. No. 24430/94 (Jan. 31, 2002).

177. *Id.* at ¶ 62. This also meant that the state must ensure that the detainee is notified of the upcoming hearing. Fodale v. Italy, App. No. 70148/01, ¶ 43 (June 1, 2006).

178. *Lanz*, App. No. 24430/94, ¶ 57.

179. 170 Eur. Ct. H.R. (ser. A) 3 (1990).

180. Id. at 13 (¶ 28).

181. *A & Others*, 2009 Eur. Ct. H.R. at 76-77 (¶ 204); Singh v. United Kingdom, 1996-I Eur. Ct. H.R. 280, 300 (¶¶ 67-68).

182. Mamedova v. Russia, App. No. 7064/05, ¶¶ 91-92 (June 1, 2006); *Singh*, 1996-I Eur. Ct. H.R. at 300 (¶¶ 67-68); Kremzow v. Austria, 268 Eur. Ct. H.R. (ser. A) 27, 45 (¶ 67) (1993).

conditions of detention.[183] A hearing is also required when a person is detained on reasonable suspicion of committing a crime.[184] In *A. and Others*, the Court considered the procedural guarantees appropriate to a case of "lengthy – and what appeared at that time to be indefinite – deprivation of liberty" for national security purposes.[185] Given the dramatic impact on the applicant's fundamental rights and the unavailability of other judicial controls, the Court found that under the circumstances Article 5(4) required "substantially the same fair trial guarantees at Article 6(1) in its criminal aspect."[186] It is likely that the Court would expect more robust procedural guarantees in situations where the state maintains habeas corpus as a safeguard to allow it to derogate from other provisions related to liberty and security, as illustrated in *Brannigan and McBride v. United Kingdom.*[187]

Finally, some procedures have not been found to be necessary guarantees under Article 5(4). In *Reinprecht*, the Court rejected the argument that habeas corpus proceedings must be public.[188] It has also held that there is no guaranteed right to appeal from a habeas corpus decision.[189] The proceedings contemplated by Article 5(4) are fully satisfied by trial court proceedings.[190]

Article 5(4) does not address the right to representation by counsel. The right to counsel has not been considered by the Court to be an absolute right in all situations, but has been understood to depend on the circumstances. In *Winterwerp v.*

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183. *Mamedova*, App. No. 7064/05, ¶ 91.

184. Nikolova v. Bulgaria, 1999-II Eur. Ct. H.R. at 15-16 (¶ 58); Reinprecht v. Austria, 2005-XII Eur. Ct. H.R. at 9 (¶ 46); Kampanis v. Greece, 318 Eur. Ct. H.R. at 45 (¶ 47) (1995); Sanchez-Reisse v. Switzerland, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51) (1986).

185. 2009 Eur. Ct. H.R. at 81 (¶ 217).

186. *Id*.

187. 258 Eur. Ct. H.R. (ser. A) 29 (1993). For a discussion of this case, *see supra* text accompanying notes 80-84.

188. Reinprecht v. Austria, 2005-XII Eur. Ct. H.R. at 8 (¶ 41).

189. Ječius v. Lithuania, 2000-IX Eur. Ct. H.R. 235, 260-61 (¶ 100); Toth v. Austria, 224 Eur. Ct. H.R. (ser. A) at 23 (¶ 84) (1991).

190. *Ječius*, 2000-IX Eur. Ct. H.R. at 260-61 (¶ 100). If, however, national law does permit for appeal from the habeas corpus decision, the appellate procedures must be adversarial, provide for equality of arms, and conform to the other procedural requirements of Article 5(4). *Toth*, 224 Eur. Ct. H.R. (ser. A) at 23 (¶ 84).

the Netherlands[191] the Court acknowledged that representation might be required in certain situations.[192] In *Singh v. United Kingdom*,[193] the Court found that representation by counsel was required because the danger the applicant presented was in question and a substantial term of imprisonment was at stake.[194] The European Commission on Human Rights highlighted the importance of factual circumstances in *Woukam Moudefou v. France*,[195] stating that the determination of whether the right to counsel was a fundamental procedural requirement when imprisonment was at stake "raises complex issues" which required an examination on the merits.[196]

When an applicant is, in fact, represented by counsel, he or she is entitled to effective representation. In *Bouamar v. Belgium*,[197] the Court held that the absence of applicant's lawyers from a hearing denied him effective representation, thus violating Article 5(4).[198] In *Castravet v. Moldova*,[199] the applicant complained that he was denied an effective representation due to his inability to communicate confidentially with his attorney regarding his habeas corpus proceedings.[200] The Court found that this interference negatively impacted the applicant's representation and violated the procedural guarantees of Article 5(4).[201]

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191. 33 Eur. Ct. H.R. (ser A) (1979).

192. Id. at 24 (¶ 60).

193. 1996-I Eur. Ct. H.R. 280.

194. *Id.* at 300 (¶¶ 67-68).

195. App. No. 10868/84, 51 Eur. Comm'n Dec. & Rep. 73 (1987).

196. *Id*. at 82.

197. 129 Eur. Ct. H.R. (ser. A) (1988).

198. *Id*. at 24 (¶ 60).

199. App. No. 23393/05 (Mar. 13, 2007).

200. *Id*. ¶. The applicant alleged was separated from his attorney by a glass partition during meetings, making it impossible for him to review documents or speak confidentially. *Id*.

201. *Id*. *See also* Istratii and Others v. Moldova, App. No. 8721/05, 8705/05, & 8742/05, ¶¶ 85-101 (Mar. 27, 2007) (founded believe that conversation might be overhead violates Article 5(4) even if evesdropping did not in fact take place; glass partition violates Article 5(4) absent evidence that detainee poses risk of violence); *but cf.* Krocher and Moller v. Switzerland, App. No. 8463/78, 26 Eur. Comm'n Dec. & Rep. 24, 52-53 (1981) (for purposes of Article 6, glass partition separating attorney and client may be appropriate where client is dangerous and has a criminal history). Portions of *Castravet* might be read to suggest that the right to counsel might now be absolute in habeas corpus proceedings. For example, the Court observed that "[t]he guarantees of Article 6 concerning access to a lawyer have been found to be applicable in habeas corpus proceedings." *Castravet*. App. No.

Representation by counsel does involve a potential tradeoff. In *Sanchez-Reisse v. Switzerland,*[202] the Court found that applicant did not have the right to conduct his own defense because he had representation of a lawyer.[203] This holding confirms that the guarantee of adversarial proceedings only requires that a party is able to present its case, but does not guarantee the right to present it both personally and through counsel.[204]

The English text of Article 5(4) requires that a court decide the lawfulness of a person's detention "speedily"[205] It is important to recognize that two distinct time periods exist in the context of a speedy decision.[206] The first is the time that passes after a person is deprived of his or her liberty but before her or she is allowed the opportunity to initiate habeas corpus proceedings by filing an application. The second is the time that elapses between the filing of an application and the reviewing court's issuance of a decision.

The timeframe for availability of habeas corpus requires little analysis when applied to the first time period, because access to a court under Article 5(4) is available *immediately* upon the initiation of detention.[207] A person's entitlement to "take proceedings" is triggered by the fact that his or her liberty has been deprived; no time need pass before this right accrues.[208] As a result, procedural rules or practical obstacles limiting how soon an application for habeas corpus may be filed would

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23393/05, ¶ 47. While this statement could be taken as an indication that the right to counsel has been found to be applicable in *all* habeas corpus proceedings, the citation to the 1979 judgment in *Winterwerp v .the Netherlands* suggests that it is simply an observation that the right has been found to be applicable in *some* cases. In *Winterwerp* the Court noted that a person might be entitled to representation "where necessary." 33 Eur. Ct. H.R. (ser A) at 24 (¶ 60) (1979).

202 . 107 Eur. Ct. H.R. (ser. A) (1986).

203. *Id*. at 20-21 (¶¶ 46-47).

204. *Id*. at 19 (¶ 51).

205. European Convention art. 5(4). The French text reads "afin qu'il statue à bref délai."

206. Khudyakova v. Russia, App. No. 13476/04, ¶ 97 (Jan. 8, 2009).

207. *Id*.; Weeks v. United Kingdom, 114 Eur. Ct. H.R. (ser. A) at 28-29 (¶ 58) (1987); De Jong, Baljet, & Van den Brink v. the Netherlands, 77 Eur. Ct. H.R. (ser. A) at 25-27 (¶¶ 57-58) (1984). This discussion relates only to the filing of an application triggered by the initial deprivation of liberty. For a discussion of the frequency of subsequent filings for a person who remains in detention, *see infra*.

208. The Court has rejected the argument that habeas corpus is available only after an arrested person is "brought promptly before a judge" pursuant to Article 5(3). *De Jong*, 77 Eur. Ct. H.R. (ser. A) at 25-27 (¶¶ 57-58).

presumptively violate Article 5(4). The Court held in *De Jong, Baljet and Van den Brink v. the Netherlands*[209] that the denial of access to initiate habeas corpus proceedings for even six days violates Article 5(4).[210] It is difficult to imagine that the passage of an even shorter time would not also result in a violation.

It is the second time period, between the filing of an application and the reviewing court's decision, in which the term "speedily" is most salient. No bright line exists to determine whether a decision is rendered speedily in a given case. Instead, the Court held in *Sanchez-Reisse v. Switzerland*[211] that this determination is made "in light of the circumstances of each case."[212] The complexity of the case is a relevant consideration, although the Court emphasized in *Baranowski v. Poland*[213] that no level of complexity, even exceptional, absolves the national authorities from their "essential obligation" under the provision.[214] The purpose of detention is also relevant, as pretrial detention may require greater urgency than the detention of a convicted person.[215] In *Bezicheri v. Italy*,[216] however, the Court ruled that the caseload of the national court does not provide an excuse for any delay because the state has an obligation to organize its legal system to comply with the Convention.[217] Finally, a state's compliance with its domestic procedural law is relevant.[218]

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209. 77 Eur. Ct. H.R. (ser. A) (1984).

210. *Id.* at 25-27 (¶¶ 57-58) (unavailability for periods of 6, 7, and 11 days violated Article 5(4)). *See also* Sakik & Others v. Turkey, 1997-VII Eur. Ct. H.R. 2609, 2625 (¶ 52) (denial of access for 12 and 14 days resulted in violations).

211. 107 Eur. Ct. H.R. (ser. A) (1986).

212. *Id*. at 20 (¶ 55).

213. 2000-III Eur. Ct. H.R. 241.

214. *Id*. at 261 (¶ 72). *See also* Iłowiecki v. Poland, App. No. 27504/95, ¶ 75 (Oct. 4, 2001) (need for medical evidence did not excuse delay of three to seven months); Musiał v. Poland, 1999-II Eur. Ct. H.R. 155, 168 (¶ 47) (primary responsibility for ensuring compliance rests with state).

215. Kharchenko v. Ukraine, App. No. 40107/02, ¶ 86 (Feb. 10, 2011).

216. 164 Eur. Ct. H.R. (ser. A) (1989).

217. *Id*. at 11-12 (¶¶ 22-26). Likewise, delay for administrative reasons is not justification for delay. Sarban v. Moldova, App. No. 3456/05, ¶ 120-21 (Oct. 4, 2005) (twenty-one day delay not excused by court's consideration whether to join related cases into one); E. v. Norway, 181-A Eur. Ct. H.R. (ser. A) at 24-25 (¶ 66) (1990) (state must make the necessary administrative arrangements, even during a vacation period, to ensure that urgent matters are dealt with speedily).

218. Vrenčev v. Serbia, App. No. 2361/05, ¶ 84 (Sept. 23, 2008) (violation for exceeding state's own 48-hour rule); Khudoyorov v. Russia, App. No. 6847/02, ¶¶ 198-99 (Nov. 8, 2005) (violation occurred

The case law of the Court shows that its decisions are highly dependent on the facts of each case. In both *Bezicheri* and *Letellier v. France*,[219] the Court was called on to determine whether decisions were issued speedily in cases of pretrial detention. The *Bezicheri* judgment held that a decision issued after five and a half months while the applicant was detained on remand early in the investigation was not speedy.[220] In *Letellier*, on the other hand, a decision issued after almost eighteen months was found to satisfy the requirement because six other applications were ruled on during that time confirming the legality of applicant's detention.[221]

In *Sanchez-Reisse*, the Court held that thirty-one days was excessive for the issuance of a decision when the reviewing court was simply conducting a file review, it had all the information available, and had to decide solely whether to continue detention pending extradition.[222] Twenty-six days was found excessive for a review of pretrial detention where the applicant raised concerns about the conditions of detention in *Kostadinov v. Bulgaria*,[223] and a final decision after fifty-days on remand where no complex issues existed resulted in a violation in *Khudyakova v. Russia*.[224] The Court found that the passage of seventeen days while applicant awaited extradition violated Article 5(4) in *Kadem v. Malta*.[225] The judgment in *Van der Leer v. Netherlands*[226] found five months excessive for issuance of a decision regarding the detention of applicant in a psychiatric hospital when she had never been informed of the reason for her detention, despite the fact that she absconded during that time.[227]

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where state could not justify noncompliance with domestic law that application be heard within fourteen days).

219. 207 Eur. Ct. H.R. (ser. A) (1991).

220. *Bezicheri*, 164 Eur. Ct. H.R. (ser. A) at 11-12 (¶¶ 22-26). *See also* Rehbock v. Slovenia, 2000-XII Eur. Ct. H.R. at 14 (¶¶ 85-86) (dismissal of application after twenty-three days not "speedy" examination).

221. *Letellier*, 207 Eur. Ct. H.R. (ser. A) at 21-22 (¶¶ 54-57).

222. Sanchez-Reisse v. Switzerland, 107 Eur. Ct. H.R. (ser. A) at 21-22 (¶¶ 57-60) (1986).

223. App. No. 55712/00, ¶ 88 (Feb. 7, 2008).

224. App. No. 13476/04, ¶¶ 99-101 (Jan. 8, 2009). This time period included an appeal.

225. App. No. 55263/00, ¶¶ 44-45 (Jan. 9, 2003).

226. 170 Eur. Ct. H.R. (ser. A) 3 (1990).

227. *Id*. at 15 (¶ 36). *See also* Musiał v. Poland, 1997-II Eur. Ct. H.R. at 10, 12 (¶¶ 44, 53) (no exceptional circumstances existed to justify delay of over one year and eight months).

Although no absolute rules emerge from these cases, the Court is clearly driven by concerns about the existence of some judicial control over detentions based on the facts of individual cases. The long delay in *Letellier*, for example, appeared to be mitigated by the fact that applicant's detention was being reviewed in other judicial proceedings. Conversely, the *Van der Leer* decision finding a violation of Article 5(4) highlighted the absence of any judicial involvement in applicant's detention, and the non-criminal nature of the detention.

A unique feature of habeas corpus under the European Convention is the principle of "incorporated supervision." Under this principle, another judicial decision can be deemed to satisfy the review requirement of Article 5(4). While this limits access to the remedy of habeas corpus, it is consistent with the Court's view that the overarching purpose of Article 5 is to protect individuals from arbitrary detention by ensuring judicial oversight. As the Court explained in *De Wilde, Ooms and Versyp v. Belgium*,[228] the principle of incorporated supervision applies when a national court issues a decision to detain an individual at the close of proceedings.[229] The right to habeas corpus is not negated, but habeas corpus proceedings are considered "incorporated" into the decision to detain if that decision was made by a court that meets the requirements of Article 5(4).[230] The decision to detain then serves as the initial decision regarding the lawfulness of detention that a person would otherwise be entitled to.

A decision to detain can take many forms. Imposition of a sentence after a criminal conviction, a pretrial detention order pursuant to Article 5(3), and hospitalization ordered due to mental illness can all be considered decisions to detain.[231] Each would satisfy the guarantee of habeas corpus through incorporated supervision as long as it was issued by an entity meeting the definition of "court" and otherwise met the requirements of Article 5(4).

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228. 12 Eur. Ct. H.R. (ser. A) (1971).

229. *Id*. at 40-41 (¶ 76).

230. De Jong, Baljet, & Van den Brink v. the Netherlands, 77 Eur. Ct. H.R. (ser. A) at 25-27 (¶ 57-58) (1984); *De Wilde*, 12 Eur. Ct. H.R. (ser. A) at 40-41 (¶ 76). For a discussion of the characteristics of a court and the procedures required in an Article 5(4) proceeding, *see supra*.

231. *See, e.g.*, *De Jong*, 77 Eur. Ct. H.R. (ser. A) at 25-27 (¶ 57-58); *De Wilde*, 12 Eur. Ct. H.R. (ser. A) at 40-41 (¶ 76). It is important to note, however, that the right to apply for bail does not satisfy Article 5(4) because the question of bail "com[es] into play only when the detention is lawful." Sabeur Ben Ali v. Malta, App. No. 35892/97, ¶ 41 (June 29, 2000).

The Court scrutinizes state claims that access to habeas corpus was unnecessary because of incorporated supervision. For example, in *T. v. United Kingdom*,[232] the Court held that incorporated supervision could not exist because the decision to detain was issued by the Home Secretary, a member of the executive.[233] In *Shamayev and Others v. Georgia and Russia*,[234] the Court found that a decision to detain taken in one country cannot provide the basis for incorporated supervision in another.[235] In the absence of incorporated supervision, a detained person must have the opportunity to initiate proceedings under Article 5(4), as established in *Van der Leer v. the Netherlands*.[236]

It is important to note, finally, that a detained person is sometimes entitled to take proceedings under Article 5(4) again after he or she is initially detained, a point that will be discussed in the next subsection. In these situations, incorporated supervision only satisfies the initial determination of the lawfulness of a person's detention.[237] When a person in continued detention becomes entitled to another review due to his or her continued detention, a new proceeding must take place.

As previously explained, a person is entitled to take habeas corpus proceedings immediately upon being deprived of his or her liberty.[238] However, this raises several related questions. Are habeas corpus proceedings available only once, triggered by the initiation of detention? Does the right cease to exist after an initial decision on the lawfulness of decision has issued? Or does a person who remains in detention have the right to initiate proceedings at any given time during his or her detention?

The case law of European Court shows that in certain situations a person is entitled to take subsequent habeas corpus proceedings after an initial decision on the

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232. App. No. 24724/94 (Dec. 16, 1999).

233. *Id*. ¶ 119.

234. 2005-III Eur. Ct. H.R. 1.

235. *Id*. at 272 (¶ 431).

236. 170 Eur. Ct. H.R. (ser. A) 3, 14 (¶ 33) (1990).

237. Weeks v. United Kingdom, 114 Eur. Ct. H.R. (ser. A) at 28 (¶ 56) (1987).

238. *See supra* § 4.1.2 (discussing delay in proceedings).

lawfulness of detention.[239] In *Weeks v. United Kingdom*,[240] the Court held that subsequent proceedings must be available if, during the ensuing period of detention, "new issues affecting the lawfulness of detention might arise."[241] If it is possible that new issues could arise, then proceedings that comply with Article 5(4) must be available.[242] It is important to note that this rule requires access only if new issues *might* arise; the applicant is not required to demonstrate that new issues *have in fact* arisen.[243] For example, the Court seemed to accept that the passage of twenty months was sufficient reason to believe that new issues might have arisen in *Ismoilov & Others v. Russia*.[244]

The nature and purpose of a person's detention, the reasons for his or her detention, and the individual's personal circumstances are relevant factors in determining whether new issues affecting the lawfulness of detention might arise.[245] The Court has identified several categories of cases in which new issues are likely to arise and, therefore, habeas corpus proceedings must be available after an initial decision. In *X. v. United Kingdom*[246] the Court considered that a person detained on account of mental illness may no longer be a threat to himself or herself or to the community with the passage of time or with treatment, resulting in changed circumstances.[247] In *Thynne, Wilson and Gunnell v. United Kingdom*[248] it noted that the circumstances and reasons for detention are prone to change in the case of an

239. *See Weeks*, 114 Eur. Ct. H.R. (ser. A) at 28-29 (¶ 58); Luberti v. Italy, 75 Eur. Ct. H.R. (ser. A) at 15 (¶¶ 31-32) (1984).

240. 114 Eur. Ct. H.R. (ser. A) (1987).

241. *Id.* at 28 (¶ 56).

242. If a violation of Article 5(4) is alleged, the European Court of Human Rights is entitled to make a determination of whether new issues of lawfulness could have arisen based on the circumstances of the case. *Id*.

243. Ismoilov & Others v. Russia, App. No. 2947/06, ¶ 146 (Apr. 24, 2008).

244. *Id*.

245. Singh v. United Kingdom, 1996-I Eur. Ct. H.R. 280, 299 (¶ 62); Thynne, Wilson & Gunnell v. United Kingdom, 190 Eur. Ct. H.R. (ser. A) 3, 27 (¶ 69) (1990); X. v. United Kingdom, 46 Eur. Ct. H.R. (ser A) at 22-23 (¶ 52) (1981).

246. 46 Eur. Ct. H.R. (ser A) (1981).

247. *Id.* at 22-23 (¶ 52).

248. 190 Eur. Ct. H.R. (ser. A) 3 (1990).

indeterminate criminal sentence where continued detention is discretionary, based on factors such the danger posed by the defendant or the risk to the community.[249] Changed circumstances are also likely when a juvenile is detained at the discretion of state authorities, such as the juvenile held "at Her Majesty's pleasure" in *Singh v. United Kingdom*.[250] Finally, the Court has held that new issues may arise in pretrial detention because such detention is, by its nature, to be limited.[251]

Conversely, no new issues affecting the lawfulness of detention are likely during the determinate, punitive portion of a criminal sentence. Following the initial determination of the legality of detention under Article 5(4), typically incorporated into the criminal sentencing proceedings via the doctrine of incorporated supervision, no subsequent proceedings would categorically be required. Because of the Court's concern with judicial oversight, however, it is reasonable to believe that access to subsequent habeas corpus proceedings during such a sentence might still be required in individual cases. These would probably be limited to narrow situations where new issues regarding the lawfulness of detention could arise because of an inmate's serious physical or mental illness, the discovery of new evidence tending to exonerate the defendant, inhumane conditions of incarceration, or the mistreatment of an inmate.

If a person who has already had an initial determination of the lawfulness of detention is entitled to take subsequent proceedings during his or her continued detention, access to these proceedings does not necessarily have to be immediate and constant. The Court acknowledged in *Winterwerp v. the Netherlands*[252] that limitations on the frequency of subsequent applications can constitute legitimate restrictions on access to habeas corpus under Article 5(4).[253] The Court has held that

249. *Id.* at 27 (¶ 69); Hussain v. United Kingdom, 1996-I Eur. Ct. H.R. 252, 269-70 (¶ 54). In the case of such a sentence, the Court has held that proceedings are required after the punitive portion of a sentence, known as the "tariff" in the British system, has been satisfied. *See also* Svetoslav Dimitrov v. Bulgaria, App. No. 55861/00, ¶ 69 (Feb. 7, 2008) (review required to determine whether applicant had effectively served sentence).

250. 1996-I Eur. Ct. H.R. 280, 299 (¶ 61-62).

251. Bezicheri v. Italy, 164 Eur. Ct. H.R. (ser. A) at 10-11 (¶ 21) (1989).

252. 33 Eur. Ct. H.R. (ser A) (1979).

253. *Id*. at 25 (¶ 63).

such restrictions on access to subsequent proceedings are valid as long as a detained person is allowed to initiate proceedings at "reasonable intervals."[254]

In determining the length of a "reasonable interval," the Court has rejected setting rigid maximum durations, but instead considers the circumstances of the case and the nature of the detention.[255] Thus, the Court held in *Bezicheri v. Italy*,[256] that access to subsequent proceedings during pretrial detention should be granted at short intervals because of the limited nature of the detention.[257] It found an interval of one month "not unreasonable" in the context of pretrial detention.[258] In the case of discretionary life sentences based on risk to the public, the Court observed in *Oldham v. United Kingdom*[259] that it has accepted intervals of less than one year but found intervals of more than one year unreasonable.[260] In *Herczegfalvy v. Austria*,[261] the Court held that intervals of between fifteen months and two years were not reasonable in the context of detention based on mental illness.[262]

The standard of "speediness" of the determination may be less stringent in subsequent proceedings as well, particularly if domestic law provides that subsequent proceedings take the form of an appeal. In *Starokadomskiy v. Russia*,[263] the Court observed that concern over the arbitrariness of detention is reduced in subsequent

254. *Singh*, 1996-I Eur. Ct. H.R. at 299 (¶ 62); Weeks v. United Kingdom, 114 Eur. Ct. H.R. (ser. A) at 28-29 (¶ 58) (1987); Luberti v. Italy, 75 Eur. Ct. H.R. at 15 (¶¶ 31-32) (1984); X. v. United Kingdom, 46 Eur. Ct. H.R. (ser A) at 22-23 (¶ 52) (1981). This is a distinct issue from how "speedily" a decision on the lawfulness of detention must be issued after the filing of an application, as discussed *supra*, although commentators sometimes blur the two concepts.

255. Oldham v. United Kingdom, 2000-X Eur. Ct. H.R. 1, 10 (¶ 31).

256. 164 Eur. Ct. H.R. (ser. A).

257. *Id.* at 10-11 (¶ 21).

258. *Id.*

259. 2000-X Eur. Ct. H.R.

260. *Id.* at 10 (¶ 32).

261. 244 Eur. Ct. H.R (1992).

262. *Id.* at 24-25 (¶ 77).

263. App. No. 42239/02 (July 31, 2008).

proceedings, but only if a valid initial judicial determination has already been made.[264]

Although Article 5(4) contemplates that habeas corpus proceedings will be initiated by the detainee, the Court found in *Koendjbiharie v. the Netherlands*[265] and in *Winterwerp* that the right to subsequent proceedings under Article 5(4) may be satisfied by automatic reviews initiated by the state.[266] In these situations the Court found that a detainee's right to initiate proceedings himself or herself can legitimately be restricted as long as automatic reviews comply with the procedural requirements of Article 5(4) and occur within reasonable intervals.[267] However, in some recent cases the Court has emphasized that the individual should be able to initiate proceedings.

In *Gorshkov v. Ukraine*,[268] the Court addressed an alleged violation of Article 5(4) despite a system of periodic review. [269] It noted that a patient should be able to seek review "on his or her own motion" rather than relying on the "good will of the detaining authority."[270] Turning to the automatic review regime, the Court noted that while such a system "constitutes an important safeguard against arbitrary detention, it is insufficient on its own. Such surplus guarantees do not eliminate the need for an independent right of individual application by the patient."[271] The Court found a violation of Article 5(4) due to the applicant's inability to independently initiate proceedings.[272] Nonetheless, the Court's recent decision in *Shtukaturov v. Russia*[273] suggests that automatic review may still be acceptable.[274]

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264. *Id*. ¶ 80 (finding passage of three to nine months before appellate decision violated Article 5(4) because initial determination was not sufficient). *See also* Mamedova v. Russia, App. No. 7064/05, ¶ 95 (June 1, 2006) (passage of 29 to 36 days before appellate decision excessive under circumstances).

265. 185 Eur. Ct. H.R. (ser. A) 31, 40 (¶ 27) (1990).

266. *Id*. at 40 (¶ 27) (1990); Winterwerp v. the Netherlands, 33 Eur. Ct. H.R. (ser A) at 22-23 (¶ 55) (1979).

267. *Oldham*, 2000-X Eur. Ct. H.R. at 10 (¶ 30). It is worth noting that when detention is routinely extended via regular automatic reviews, as in cases of mental illness, the automatic review decision must be issued before the last order for detention has expired. *Koendjbiharie*, 185 Eur. Ct. H.R. (ser. A) at 51 (¶ 69).

268. App. No. 67531/01 (Nov. 8, 2005).

269. *Id*. ¶¶ 44-46.

270. *Id*. ¶ 44.

271. *Id*. ¶ 45.

272. *Id*. ¶ 46. *See also* Kucheruk v. Ukraine, App. No. 2570/04, ¶¶ 195-99 (Sept. 6, 2007).

As Neuman observes, the European Court has compiled a substantial body of case law related to Article 5(4) over the years. [275] Guidance exists, therefore on the scope of the right and the manner in which it should be applied, even though this will often depend on the circumstance of the case. The European law of habeas corpus is fairly developed compared to the corresponding jurisprudence of the Inter-American institutions.

4.2 Inter-American Human Rights System

While the American Declaration of the Rights and Duties of Man[276] predates both the Universal Declaration of Human Rights and the European Convention, the Inter-American human rights system is less mature than its European counterpart. The early adoption of the American Declaration was followed by a long absence of meaningful human rights activity at the regional level. It was not until 1960 that a monitoring system was implemented, and 1978 before a binding human rights treaty came into force.[277]

The promotion and protection of human rights in the Americas has been hampered by a history of political instability across much of Latin America. Judge Buergenthal, former President of the Inter-American Court of Human Rights, observed that the Americas "continue[] to suffer from widespread poverty, corruption, discrimination, and illiteracy, not to mention archaic judicial systems that are badly in need of reform."[278] These challenges are compounded by the fact Canada and the United States, two democracies with strong legal traditions, have not ratified the

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273. App. No. 44009/05 (June 27, 2008).

274. In *Shtukaturov* the Court found a violation because there was no right to initiate proceedings *or* automatic review, seeming to suggest that the automatic review alone would satisfy Article 5(4). *Id*. at 24-25 (¶¶ 123-25).

275. Neuman, *supra* note 143, at 1023.

276. O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter "American Declaration"].

277. *See generally* Thomas Buergenthal, *The OAS and the Protection of Rights*, 3 EMORY J. INT'L DISP. RES. 1 (1988).

278. Buergenthal, *supra* note 4, at 797.

American Convention on Human Rights.[279] Thus, the Inter-American system lacks both the general stability of civil society and the broad regional consensus on participation that have made the European system so effective.

The political instability that has often existed in Latin America presents unique human rights issues. Among these has been the widespread use of state-sanctioned kidnappings known as "disappearances."[280] Reed Brody and Felipe González explain that disappeared persons are typically political opponents or grassroots activists.[281] The Inter-American Commission on Human Rights described the nature of disappearances in *Castillo Pezo v. Peru*.[282] Disappearances are usually carried out by heavily armed security or military personnel, often in uniform and often in front of witnesses, followed by official denial of the detention.[283] The disappeared person is often tortured and, if death has not already resulted, "executed in a summary, extrajudicial fashion."[284]

As Brody and González relate, the practice of disappearances was widely used by military regimes throughout Latin America during the 1970s and 1980s.[285] The Inter-American Court commented on the prevalence of this scourge in the *Velásquez Rodríguez Case*[286] in the late 1980s:

> Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity, and fear, is a recent phenomenon. Although this practice

279. 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter "American Convention"].

280. Castillo Pezo v. Peru, Case 10.471, Inter-Am. Comm'n H.R., Report No. 51/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 75 (1999). *See generally* Juan Mendez & Jose Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507 (1990).

281. Reed Brody & Felipe González, *Nunca Más: An Analysis of International Instruments on "Disappearances,"* 19 HUM. RTS. Q. 365, 366 (1997).

282. *See Castillo Pezo*, Case 10.471.

283. *Id.* ¶¶ 80-83.

284. *Id.* ¶ 84.

285. Brody & González, *supra* note 281, at 366.

286. 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

> exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years.[287]

The Inter-American Commission noted in *Castillo Pezo* that the government of Peru acknowledged that 5,000 complaints of disappearances were reported between 1983 and 1991 in that state alone.[288]

The surge in disappearances corresponded with the formative years of the Inter-American human rights system. This intersection had implications for many aspects of Inter-American jurisprudence. Among the more significant impacts was that on the right to habeas corpus. On one hand, the widespread use of disappearances underscored the inviolability of the right to habeas corpus, which was already a prominent feature in most American legal systems. As the bulwark against arbitrary detention at the hands of government, the remedy was viewed as the front line in the struggle against disappearances. As we will see, this has led to an elevation of habeas corpus to the ranks of the most protected rights in the Inter-American system. On the other hand, the cases of the Inter-American Court and Commission have focused primarily on whether habeas corpus is available at all.[289] In the majority of these cases, a violation of the right was found because a disappeared person was not able to exercise the right. As a result, judicial interpretation of specific terms of the habeas corpus provisions and its implementation is somewhat lacking.

The right to habeas corpus is guaranteed in both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. Article XXV of the American Declaration provides, in part, that

> 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 . . .[290]

Article 7(6) of the American Convention also guarantees the right to habeas corpus, as follows:

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287. *Id*. ¶149.

288. Castillo Pezo v. Peru, Case 10.471, Inter-Am. Comm'n H.R., Report No. 51/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 72 (1999).

289. Questions regarding the availability of habeas corpus during armed conflict, its derogability, and its extraterritorial reach will be addressed in Chapter 5.

290. American Declaration art. XXV.

> Anyone 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. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.[291]

4.2.1 Drafting History of the American Declaration

Charles Fenwick writes that the First International Conference of American States in 1890 was the first of a series of periodic meetings held by the states of the Western Hemisphere to discuss matters of trade and cooperation.[292] During the early twentieth century, these conferences increasingly addressed matters of mutual defense and interstate consultation. As World War II drew to a close, the prospect of a new postwar international order prompted the convening of the Inter-American Conference on the Problems of War and Peace in Mexico City.[293] The conference contemplated the formation of a regional intergovernmental organization and participation of the American states in the United Nations.

The final act of the Mexico City conference, known as the Act of Chapultepec, contained several resolutions furthering this goal. Resolution IX called for the appointment of a special committee to draft an "organic pact" which would serve as the basis of a permanent regional intergovernmental organization.[294] The revised version of the "organic pact" would ultimately be adopted as the Charter of the Organization of American States by the Ninth International Conference of American States in Bogotá in 1948.[295]

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291. American Convention art. 7(6).

292. Charles Fenwick, *The Inter-American Regional System: Fifty Years of Progress*, 50 AM. J. INT'L L. 18, 19 (1956).

293. *Id*. at 23-24.

294. *Id*. at 26.

295. 119 U.N.T.S. 3 (entered into force Dec. 13, 1951) [hereinafter "O.A.S. Charter"].

Resolution XL tasked the Inter-American Juridicial Council with preparing a draft Declaration of the International Rights and Duties of Man.[296] According to Francisco Campos, F. Nieto del Rio, Fenwick, and Gómez Robledo, this resolution contemplated the adoption of the Declaration as a formal convention.[297] The Council's initial draft declaration prepared pursuant to Resolution XL included the right to be free from arbitrary arrest,[298] but did not include a specific right to habeas corpus.[299] A final draft, still without a habeas corpus provision, was submitted for consideration at the Bogotá Conference.[300]

Numerous proposals were submitted by states for consideration at the conference. Among these was a Panamanian proposal to add an article guaranteeing all detained persons the right to a judicial determination of the legality of their detention.[301] This proposal was considered by the working group on human rights, and was incorporated into its proposed text dated April 17, 1948, essentially in its final form.[302] The American Declaration of the Rights and Duties of Man was adopted as a resolution of the Bogotá Conference in April 1948,[303] nearly eight months before the adoption of the Universal Declaration of Human Rights.

The American Declaration was adopted as a non-binding declaration and not as a treaty.[304] However, following the amendment of the Charter by the Protocol of Buenos Aires,[305] Buergenthal argues that the Declaration, "at the very least,

296. Francisco Campos, F. Nieto del Rio, Charles Fenwick & A. Gómez Robledo, *Report to Accompany the Draft Declaration of the International Rights and Duties of Man*, 40 AM. J. INT'L L. SUP. 100, 100 (1946).

297. *Id*. It was proposed that the Declaration could be annexed to the organization's charter to allow for future revision without need to amend the entire charter. *Id*. at 110-11.

298. Inter-American Juridicial Council, *Draft Declaration of the International Rights and Duties of Man*, 40 AM. J. INT'L. L. 93, 96 (1946).

299. *Id*. at 93-99.

300. 5 MINISTERIO DE RELACIONES EXTERIORES DE COLOMBIA, NOVENA CONFERENCIA INTERNACIONAL AMERICANA: ACTAS Y DOCUMENTOS 449-54 (1953).

301. *Id*. at 471.

302. *Id*. at 482.

303. *Id*. at 508.

304. 1 MINISTERIO DE RELACIONES EXTERIORES DE COLOMBIA, NOVENA CONFERENCIA INTERNACIONAL AMERICANA: ACTAS Y DOCUMENTOS, 235-36 (1953).

305. 721 U.N.T.S. 324 (entered into force March 12, 1970).

constitutes an authoritative interpretation and definition of the human rights obligations binding on OAS member states under the Charter of the Organization."[306] The Inter-American Court of Human Rights confirmed in a 1989 advisory opinion that the "Declaration is the text that defines the human rights referred to in the Charter" and is therefore "a source of international obligations related to the Charter of the Organization" for those states.[307]

4.2.2 Interpreting Article XXV of the American Declaration

The original Charter of the Organization of American States (O.A.S.) did not create any human rights institutions.[308] In 1959 the Inter-American Commission on Human Rights was established as an autonomous entity of the O.A.S. and was charged with furthering respect for human rights in the Inter-American system.[309] A limited petition system was established in 1966 allowing the Commission to receive individual communications.[310] The Commission became a charter organ in 1970 when amendments to the Charter under the Protocol of Buenos Aires took effect.[311]

The Charter-based human rights system applies to all O.A.S. member states regardless of whether they have ratified the American Convention.[312] For member states that are not party to the American Convention, the Commission has the competence to receive communications related to provisions of the American

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306. Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 7 (1985).

307. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Arcticle 64 of the American Convention on Human Rights, Advisory Opinion, 1989 Inter-Am. Ct. H.R. (Ser. A) No. 10, ¶ 45 (July 14, 1989). *See also* Thomas Buergenthal, T*he Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828 (1975) (arguing that the Declaration is incorporated into the revised Charter).

308. *See* OAS Charter (original version), *reprinted in* 56 Am. J. Int'l L. Sup. 43 (1952).

309. Final Act, Fifth Meeting of the Consultation of Ministers of Foreign Affairs, Doc. 89 rev. 2, at 10 (Oct. 12, 1959). *See Official Documents: Organization of American States*, 56 AM. J. INT'L L. 601, 613 (1963).

310. Buergenthal, *supra* note 278, at 794-95.

311. 721 U.N.T.S. 324 (entered into force March 12, 1970).

312. 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM § 2 at 4 (Thomas Buergenthal & Robert Norris eds., 1993).

Declaration.[313] William Schabas writes that in this capacity, the Commission essentially serves as the interpreter of the terms of the American Declaration.[314] The Commission's cases involving Article XXV provide some guidance as to the scope and application of that article.

The Commission commented on the underlying purpose of the habeas corpus guarantee in Article XXV in *Ferrer-Mazorra v. United States*,[315] stating that it "cannot overemphasize the significance of ensuring effective supervisory control over detention as an effective safeguard. . . ." [316] Quoting a resolution of the United Nations General Assembly, the Commission noted that habeas corpus plays a fundamental role in protecting against arbitrary arrest, clarifying the situation of missing persons, and may prevent the use of torture or other cruel, inhuman, or degrading treatment.[317] The remedy does so by providing an assurance that the detainee is not exclusively at the mercy of the detaining authority.[318]

Because of this essential role, states may not excuse themselves from the obligation to guarantee the right to habeas corpus under Article XXV. In *Coard v. United States*,[319] the Commission discussed the availability of the right to habeas corpus during the 1983 United States military operations in Grenada. It observed that "the requirement that detention not be left to the sole discretion of the state agents responsible for carrying it out is so fundamental *that it cannot be overlooked in any*

313. Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79) arts. 1(2)(b) & 20, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 93 (1992). *See also* Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Arcticle 64 of the American Convention on Human Rights, Advisory Opinion, 1989 Inter-Am. Ct. H.R. (Ser. A) No. 10, at ¶ 45 (July 14, 1989).

314. *See* WILLIAM SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 315 (3rd ed. 2002).

315. Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111 doc. 20 rev. (2001).

316. *Id*. at ¶ 211.

317. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 55, n. 28 (1999) (citing G.A. Res. 34/178, U.N. Doc. A/RES/34/178 (Dec. 17, 1979)).

318. *Coard*, Case 10.951, ¶ 55.

319. Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

context."[320] The Commission concluded by stating that habeas corpus "is not subject to abrogation."[321]

The Commission's cases provide a basic understanding of the procedural requirements of habeas corpus under the Declaration. Article XXV provides that the legality of a person's detention be decided by a "court." In *Coard* the Commission indicated that requirement could be met by a judicial authority or a "quasi-judicial" board.[322] The "court" must have the power to order production of the person detained and the power to release the person if the detention is unlawful.[323] In *Ferrer-Mazorra,* the Commission added that the decision maker must meet "currently prevailing standards of impartiality.[324]

The *Ferrer-Mazorra* decision clarified that habeas corpus proceedings must "at a minimum comply with the rules of procedural fairness.[325] In addition to the impartiality of the reviewing authority, procedural fairness requires an opportunity to present evidence and to know and meet the claims of the opposing party.[326] The detained person must also have an opportunity to be represented by counsel or some other representative.[327]

Article XXV requires that habeas corpus proceedings occur "without delay."[328] According to the Commission in *Coard*, this generally means "as soon as practicable."[329] The passage of six to nine days after the cessation of hostilities in Grenada without access to review was held to be inconsistent with the American

320. *Id*. ¶ 55 (emphasis added).

321. *Id*.

322. *Id*. ¶ 58.

323. *Id*. ¶¶ 56, 58.

324. *Ferrer-Mazorra*, Case 9903, ¶ 213.

325. *Id*.

326. *Id*.

327. *Id*.

328. American Declaration art. XXV.

329. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 57 (1999).

Declaration in *Coard*.[330] The Commission noted that the United Nations Human Rights Committee had found delays of even 48 hours to be "questionable."[331]

The Commission pointed out in *Ferrer-Mazorra* that the right to supervision of detention is ongoing. Citing the European Court of Human Rights, the Commission confirmed that in cases of continuing detention, the right to habeas corpus "necessarily includes supervision at regular intervals."[332] It did not, however, indicate the frequency with which subsequent proceedings should occur.

Finally, the Commission has addressed factors that should be considered in determining the "legality" of a person's detention. As the *Ferrer-Mazorra* decision made clear, this includes procedural compliance with the applicable domestic law.[333] In addition, the Commission has stated that "legality" requires an assessment of the quality of the law "in light of the fundamental norms under the Declaration."[334]

While the Commission's jurisprudence regarding Article XXV is somewhat limited, it is possible to ascertain the minimum requirements for habeas corpus proceedings. Failure to comply with these basic requirements was found in *Coard* to result in violation of Article XXV.[335] The unavailability of any habeas corpus proceeding[336] or failure of government authorities to produce a person in compliance with an order issued in habeas corpus proceedings would also result in a violation.[337]

4.2.3 Drafting History of the American Convention

330. *Id.*

331. *Id.* ¶57, n. 30.

332. Ferrer-Mazorra v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111, doc. 20 rev. ¶ 213 (2001) (citing Herczegfalvy v. Austria, 244 Eur. Ct. H.R. (1992)).

333. *Ferrer-Mazorra,* Case 9903, ¶ 235.

334. *Id.*

335. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 56 (1999).

336. Biscet v. Cuba, Case 12.476, Inter-Am. Comm'n H.R., Report No. 67/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2007).

337. Mignone v. Argentina, Case 2209, Inter-Am. Comm'n H.R., Report No. 21/78, OEA/Ser.L/V/II.50, doc. 13 rev. 1 (1980).

The 1948 Bogotá Conference saw the adoption of both the O.A.S. Charter and the American Declaration. The Conference's final act contemplated further action in terms of human rights protection, as Resolution XXXI recommended that a draft statute for a court of human rights be prepared.[338] This request was reaffirmed at the Tenth Inter-American Conference held in Caracas in 1954.[339]

In 1959 the Fifth Meeting of Consultation of Ministers of Foreign Affairs, meeting in Santiago, requested that the Inter-American Council of Jurists prepare a draft human rights convention for submission to the Eleventh Inter-American Conference.[340] The Council of Jurists, meeting in Santiago in August and September of 1959, began the preparation of draft articles immediately. It proposed a habeas corpus article that closely modeled that of the draft International Covenant on Civil and Political Rights, with the addition of a provision allowing the remedy to be invoked by a third party. It read,

> Anyone who is deprived of his liberty by arrest or detention, or believes himself to be in danger of such deprivation, shall be entitled to recourse to a Court, in order that such court may decide without delay on the lawfulness of his detention, or threat thereof, and if the detention is illegal it shall order his release. This proceeding may be brought by the detained person or by another person acting in his stead.[341]

The Eleventh Conference, at which the draft convention was to be considered, never occurred and the draft was instead taken up in the Second Specialized Inter-American Conference held in Rio de Janeiro in 1965. Proposed articles were also submitted by the governments of Chile and Uruguay.[342] The habeas corpus

338. 6 MINISTERIO DE RELACIONES EXTERIORES DE COLOMBIA, NOVENA CONFERENCIA INTERNACIONAL AMERICANA: ACTAS Y DOCUMENTOS 302-03 (1953).

339. Final Act, Tenth Inter-American Conference, Res. XXIX at 36-37 (1954), *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 6 at 111.

340. Res. VII, 5th Mtg. of Consultation of Ministers of Foreign Affairs, OEA/Ser.C/II.5 at 11-12, *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 6 at 138.

341. Inter-American Council of Jurists, Doc. 128 Rev. 8 at art. 5, ¶ 4 (Sept. 8, 1959), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 16.1 at 3.

342. OEA/SER.E/XIII.1, art. 7, ¶ 4 (Sept. 30, 1965) (proposal by Chile) *reprinted in* 3 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 16.1 at 41; OEA/SER.E/XIII.1, art. 6(4) (Nov. 18, 1965) (proposal by Uruguay) *reprinted in* 3 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 16.1 at 65.

guarantees in these two proposals were substantially similar to that of the Council of Jurists draft, with only one notable difference. The Uruguayan proposal replaced the requirement that the court make its decision on lawfulness "without delay" with a 48-hour time limit.[343] The delegates to the Rio de Janeiro Conference recommended that the issue of a human rights convention be considered by a specialized conference.[344] The draft convention prepared by the Council of Jurists, together with the drafts submitted by Chile and Uruguay, was forwarded to the Council of the O.A.S. for its consideration.[345]

The Council of the O.A.S. referred the drafts to the Inter-American Commission on Human Rights and the Committee on Juridicial-Political Affairs.[346] The latter body expressed concern about the relationship between the draft convention and the recently-passed International Covenant on Civil and Political Rights.[347] The Council therefore asked the Commission to revise the Council of Jurists draft to ensure harmony with the International Covenant.[348] The Commission's changes to the habeas corpus article drafted by the Council of Jurists were limited. The term "court" was replaced by the phrase "judge or court."[349] The Commission also clarified the role of the reviewing authority in cases where a threat of deprivation was made. Instead of deciding on the lawfulness of the threat of detention the judge or court was charged with determining "the existence of threat of unlawful arrest."[350] On October 2, 1968, the Council of the O.A.S. adopted the Commission's preliminary

343. OEA/SER.E/XIII.1, art. 6(4) (Nov. 18, 1965) (proposal by Uruguay) *reprinted in* 3 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 16.1 at 65.

344. Final Act, Second Special Inter-American Conference, Res. XXIV, OEA/Ser.C/I/13 at 35-37, *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 6 at 166.

345. *Id*.

346. OEA/Ser.L/V/II.19/Doc. 53 (Mar. 21, 1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 13 at 29.

347. *Id*.

348. *Id*. at 31.

349. *Id*. at 40.

350. *Id*.

draft as the working document for the contemplated specialized conference and transmitted it to member states for their consideration.[351]

State comments focused on the availability of habeas corpus in situations where detention was threatened, as opposed to actual detention. Ecuador noted that the proposed habeas corpus article allowed a person to seek recourse if he believed himself to be in danger of deprivation of liberty and, with the Commission's recent amendment, required the judge or court to decide on the existence of that threat, but did not provide a remedy. It proposed that the article be amended to give the judge or court the power to order "the cessation of the threat of detention, if that is not lawful."[352]

The inclusion of a remedy for threats of detention was a point of contention for the United States. It questioned "whether it is necessary to include provisions for those who feel in danger of illegal arrest," noting that no similar provision appeared in the International Covenant on Civil and Political Rights or the European Convention.[353] The United States proposed an amended article which only provided recourse for persons actually detained and eliminated any prospective relief.[354]

The working document and member state observations were compiled by the Secretariat of the O.A.S. in anticipation of the specialized conference that had been

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351. Doc. 5, Res. of Council of the O.A.S. (Oct. 2, 1968) *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 13 at iii. The habeas corpus article of the working document read:

> Anyone who is deprived of his liberty by arrest or detention, or believes himself to be in danger of such deprivation, shall be entitled to recourse to a judge or court, in order that such judge or court may decide without delay the lawfulness of his detention, or the existence of threat of unlawful arrest, and if the detention is not lawful, order his release. This remedy may be had by the detained person or by another person.

Doc. 5, Draft Inter-American Convention on Protection of Human Rights, art. 6(5) *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 13 at 4.

352. Doc. 23, Observations of Ecuador (Nov. 5, 1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 13 at 116.

353. Doc. 10, Observations of the United States (July 2, 1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 13 at 154.

354. *Id*. The United States proposed the following text:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to recourse to a judge or court, in order that such judge or court may decide without delay the lawfulness of his detention, and if the detention is not lawful, order his release. This remedy may be invoked by the detained person or by another person.

called for at the conclusion of the Rio de Janeiro conference in 1965.[355] The Specialized Inter-American Conference on Human Rights convened at San Jose, Costa Rica, on November 7, 1969. It was decided in the first plenary session that two committees should be formed to review the articles of the working document.[356] Articles 1 to 33 addressing "matters of protection," including the right to habeas corpus, were assigned to Committee I.[357]

The committee took up the right to habeas corpus on November 12, 1969, with debate focusing on whether a remedy should be available for threats of detention.[358] The United States criticized this aspect of the proposal, stating that it was not essential to the protection of individuals to be able to obtain an order prohibiting arrest in advance.[359] It noted that such a mechanism could be used to inhibit investigations or criminal proceedings.[360]

Although it was acknowledged that the language guaranteeing this prospective remedy was somewhat imprecise,[361] the United States won little support for its position.[362] Nicaragua explained that the guarantee against threats of restriction of

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355. Doc. 13, Draft Inter-American Convention on Protection of Human Rights and Observations and Comments of the American Governments (Sept. 22, 1969), *reprinted in* 3 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 14 at 22. The text of the habeas corpus provision contained slight changes from the working document that had been submitted for member state observations:

> Anyone who is deprived of his liberty by arrest or detention, or believes himself to be in danger of such deprivation, shall be entitled to recourse to a judge or court, in order that such judge or court may determine without delay the lawfulness of his detention, or the existence of a threat of unlawful arrest, and if the detention is not lawful, order his release. This remedy may be had by the detained person or by another person.

356. Doc. 27, Corr. 1 (Nov. 10, 1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 12 at 241.

357. *Id*.

358. Ecuador and Colombia both proposed amendments to the habeas corpus article, but these were in the context of wider amendments to the entirety of the general right to personal liberty. Neither amendment contained significant changes to the right to habeas corpus as contained in the working document. Doc. 43, Corr 1, Minutes of Committee I (Nov. 17, 1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 12 at 54-55.

359. *Id*. at 57.

360. *Id*.

361. Paraguay noted that the word "threat" (*"amenaza"*) was imprecise and suggested broadening the language to provide recourse for a person who "believes himself harmed or in imminent danger of being harmed." *Id*. at 57. It later withdrew the amendment. *Id*. at 59.

362. Only Trinidad and Tobago spoke in favor of the United States proposal. *Id*. at 57.

liberty was fundamental and a constitutional principle in its domestic law.[363] In the end, the proposed amendment by the United States was rejected.[364] The original language contained in the working document was approved by the committee.[365]

The habeas corpus article was considered by the second plenary session on November 20, 1969.[366] The United States reasserted its concern about the inclusion of a prospective remedy, but did not argue for its outright exclusion. Instead, it proposed that in states where this remedy already existed, it could not be restricted or abolished.[367] This compromise was accepted by the plenary, and the amended article was approved.[368] The American Convention on Human Rights was adopted by the conference on November 21, 1969.[369]

The American Convention entered into force on July 18, 1978, upon ratification by the eleventh state party.[370] There are currently twenty-four states parties to the Convention.[371] No states have lodged declarations or reservations specifically related to the right to habeas corpus, codified at Article 7(6) of the Convention.[372]

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363. Doc. 43, Corr 1, Minutes of Committee I (Nov. 17, 1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 12 at 59.

364. *Id*.

365. *Id*.

366. Doc. 86, Corr. 1, Minutes of the Second Plenary Session (Jan. 30, 1970), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 12 at 243.

367. *Id*. at 250.

368. *Id*.

369. U.S. Delegation Report on the Inter-American Human Rights Conference, *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 15 at 1.

370. American Convention art. 74(2).

371. ORGANIZATION OF AMERICAN STATES, GENERAL INFORMATION ON THE AMERICAN CONVENTION ON HUMAN RIGHTS, http://www.oas.org/juridico/English/sigs/b-32.html. Trinidad and Tobago ratified the Convention but denounced it in 1998. *Id*.

372. *Id*.

4.2.4 Interpreting Article 7(6) of the American Convention

The American Convention provided for the establishment of the Inter-American Court of Human Rights, which came into being with the election of its first judges in 1979.[373] The Court is granted both contentious jurisdiction and advisory jurisdiction.[374] Contentious cases must be submitted to the Court by either the Inter-American Commission on Human Rights or by a state party.[375] States parties must consent to the Court's jurisdiction[376] and are bound to comply with its judgments.[377]

While the Inter-American Court's contentious cases have often dealt with violations of Article 7, the Court has had limited opportunity to define the specific terms of Article 7(4) as the vast majority of these cases involve disappearances. Violations 7(4) in these situations are usually found because a disappeared person has no access to habeas corpus. Therefore, the Inter-American Court has had fewer occasions to define the scope and application of the right to habeas corpus than the European Court of Human Rights, even though the right is arguably more relevant in the American context. This dearth of contentious cases has, however, been supplemented by the Inter-American Court's advisory opinions which have set forth basic attributes of Article 7(6).

The Inter-American Court of Human Rights, in its advisory opinion *Habeas Corpus in Emergency Situations*,[378] described habeas corpus in its "classical form" as:

> a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before

373. JO PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 7 (2003).

374. American Convention arts. 62, 64.

375. *Id*. art. 61.

376. *Id*. art. 62. States parties may submit a declaration consenting ipso facto to the Court's jurisdiction. Such a declaration may be unconditional, or may limit jurisdiction to a specified period or to specific cases. A state party that has not made such a declaration may also consent to jurisdiction by special agreement. *Id*. art. 62.

377. *Id*. art. 68(1).

378. Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, (Jan. 30, 1987).

> a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.[379]

By providing judicial oversight, 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."[380]

The drafters of the Convention observed that habeas corpus is a specific remedy and is distinct from the general remedy of *amparo* found in Article 25.[381] As such, the Court considers habeas corpus the normal means of finding a person presumably detained by the authorities, determining whether he is legally detained, and obtaining his release if appropriate.[382] In the *Neira-Alegría Case*[383] it referred to habeas corpus as the "ideal procedure" for this type of inquiry.[384]

A primary obligation of the state is to ensure that a detained person has access to the remedy of habeas corpus.[385] The right to habeas corpus is denied to persons unable to invoke the right due to the circumstances under which their liberty is deprived. For this reason, it is clear that a forced disappearance in which the government denies having custody of a person violates Article 7(6).[386] Incommunicado detention also clearly violates the right to habeas corpus.[387] The

379. *Id*. ¶ 33.

380. *Id*. ¶ 35.

381. Doc. 43, Corr 1, Minutes of Committee I (Nov. 17, 1969), *reprinted in* 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 312, § 12 at 57.

382. Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶65 (July 29, 1988); Godínez Cruz Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 68 (Jan. 20, 1989); Farién Garbi & Solís Corrales Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 6, ¶ 90 (Mar. 15, 1989); Caballero Delgado & Santana Case, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 64 (Dec. 8, 1995).

383. 1995 Inter-Am. Ct. H.R. (ser. C) No. 21 (Jan. 19, 1995).

384. *Id*. ¶ 77.

385. Juan Humberto Sánchez Case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 85 (June 7, 2003).

386. *Velásquez Rodríguez*, 1988 Inter-Am. Ct. H.R. No. 4, ¶¶155, 186; *Godínez Cruz*, 1989 Inter-Am. Ct. H.R. No. 5, ¶ 163, 196; *Farién Garbi*, 1989 Inter-Am. Ct. H.R. No. 6, ¶ 148; Bámaca Velásquez Case, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 142 (Nov. 25, 2000).

387. Levoyer Jiménez v. Ecuador, Case 11.992, Inter-Am. Comm'n H.R., Report No. 66/01, OEA/Ser./L/V/II.114 doc. 5 rev. ¶ 67-68 (2001).

remedy made available must be real, and not just be provided for by the law.[388] It is not enough for the remedy to exist formally; it is necessary that it also be effective.[389] The Court has stated that a remedy that proves illusory "due to the general situation in the country or even the particular circumstances of any given case" cannot be considered effective.[390]

Issuing its first judgment in a contentious case in the *Velásquez Rodríguez Case*,[391] the Court heard extensive evidence regarding the situation in Honduras at the time of the applicant's habeas corpus petitions. Members of the Legislative Assembly of Honduras, Honduran lawyers, formerly disappeared persons, and relatives of disappeared persons testified that the legal remedies available at the time were ineffective.[392] There was also testimony that lawyers who brought habeas corpus proceedings were intimidated, and that judges charged with executing writs of habeas corpus were prevented from entering or inspecting places of detention.[393] The Court observed that procedural requirements that make habeas corpus powerless to compel authorities or present a danger to those who invoke it render the remedy ineffective.[394] It thus held that while legal remedies were theoretically available in Honduras, they were ineffective because imprisonment was clandestine, formal requirements made them inapplicable in practice, authorities ignored them, and attorneys and judges were threatened by authorities.[395] Thus, Honduras violated Article 7(6).[396]

388. Loayza-Tamayo Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 57 (Sept. 17, 1997); Castillo-Petruzzi Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 197 (May 30, 1999); Cantoral-Benavides Case, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 164 (Aug. 18, 2000); Tibi v. Ecuador, 2007 Inter-Am Ct. H.R. (ser. C) No. 114, ¶ 131 (Sept. 7, 2007).

389. Acosta Calderón Case, 2005 Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 93 (June 24, 2005).

390. Martiza Urrutia Case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 116 (Nov. 27, 2003).

391. 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

392. *Id*. ¶ 76.

393. *Id*. ¶ 78.

394. *Id*. ¶ 66; *see also* Farien Garbi & Solis Corrales Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 6, ¶ 91 (Mar. 15, 1989).

395. Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶80 (July 29, 1988).

396. *Id*. ¶ 155.

At the same time, the fact that a remedy is not successful does not mean it is ineffective. In the *Caballero Delgado and Santana Case*[397] a violation of the guarantee of judicial protection was alleged because habeas corpus proceedings failed to locate a missing person.[398] The Court found that no violation occurred because the petition for habeas corpus had been processed by the domestic court and that the police and prison officials to whom it was directed answered that the person sought was not to be found in their custody.[399]

The guarantees of the American Convention apply to all persons subject to a state-party's jurisdiction.[400] The term "person" is defined by the Convention as "every human being."[401] The Convention applies "without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."[402] The only qualification placed on access to habeas corpus in the text is that in order to invoke the remedy the person must be "deprived of his liberty."[403]

A unique feature of the right to habeas corpus in the Inter-American system is that proceedings can be initiated by a third party. Unlike the habeas corpus guarantees in the International Covenant on Civil and Political Rights and the European Convention, Article 7(6) of the American Convention leaves no doubt that proceedings can be initiated by another person on behalf of the detained person.[404]

The initiation of habeas corpus proceedings by a third party is a common feature in American domestic legal systems, and is highly responsive to the reality of the circumstances that prevailed across much of Latin America in the latter half of the twentieth century. Almost all of the Inter-American Court's contentious cases related

397. 1995 Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995).

398. *Id*. ¶ 34.

399. *Id*. ¶ 66.

400. American Convention art. 1(1).

401. *Id*. art. 1(2).

402. *Id*. art. 1(1).

403. *Id*. art. 7(6).

404. *Id*. *See supra* § 3.2.1and § 4.1.2 for a discussion of the comparable provisions of the ICCPR and European Convention.

to Article 7(6) have involved disappearances. Because a disappeared person does not have access to legal remedies, it is critical that another person be allowed to invoke remedies on his or her behalf. By so providing, Article 7(6) affords the disappeared person a much more effective remedy.

Article 7(6) is available to a person "deprived of his liberty."[405] As with other international and regional habeas corpus guarantees, the term "liberty" here can be read to refer to the concept of physical liberty as opposed to broader notions of freedom of movement.[406] This is confirmed by the placement of the guarantee in Article 7, which is concerned with "personal liberty."[407]

The American habeas corpus provision departs from its counterparts by making the remedy available to a person who is "deprived of his liberty" without the additional qualifying phrase "by arrest or detention," which appears in the International Covenant and European Convention.[408] The inclusion of the phrase "by arrest or detention" in those instruments gives rise to the possibility that habeas corpus might not be available for every deprivation of liberty, but only for those that occur in a certain manner.[409] While this narrow reading has generally been rejected in interpretations of the International Covenant and European Convention,[410] the outright omission of this qualifying phrase at the beginning of Article 7(6) removes any doubt in the American Convention.[411] This reading is borne out by the Inter-American Commission's statement in *Manuel García Franco v. Ecuador*[412] that "the right to habeas corpus applies regardless of the reason for the deprivation of liberty."[413]

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405. American Convention art. 7(6).

406. *Cf. id.* art. 22 (freedom of movement and residence); *see supra* § 3.2.2 and § 4.1.2 (considering this question under the ICCPR and European Convention).

407. American Convention art. 7.

408. *Compare id. with* ICCPR, art. 9(4) *and* European Convention, art. 5(4).

409. *See supra* § 3.2.2 and § 4.1.2.

410. *See id.*

411. The phrase does appear later in Article 7(6), which provides that a court shall determine the lawfulness of a person's "arrest or detention." American Convention art. 7(6).

412. Case 10.258, Inter-Am. Comm'n H.R., Report No. 1/97, OEA/Ser.L/V/II.98 doc. 6 rev. (1997).

413. *Id.* ¶ 56.

Of particular significance in the American context is the Inter-American Court's consistent view that a disappeared person is "deprived of his liberty." The Court expressly held in the *Bámaca Velásquez Case*[414] that the forced disappearance of a person "represents a phenomenon of arbitrary deprivation of liberty [and] an infringement of a detainee's right to . . . invoke the appropriate procedures to review the legality of the arrest" via habeas corpus.[415] The clandestine nature of disappearances led the Court in *Velásquez Rodríguez* to hold the state accountable for the deprivation of a person's liberty on minimal evidence when it occurred against the background of a systematic practice of disappearances.[416]

The Inter-American Court indicated in a 1988 advisory opinion that the terms "law" and "laws" are used in different manners throughout the American Convention and, therefore, their meaning must be specifically determined for individual articles.[417] Article 7(2) of the American Convention prohibits deprivation of liberty except for reasons and under conditions "established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."[418] It follows that the determination of "lawfulness" to be made under Article 7(6) would first turn on these sources.

The Court has suggested that lawfulness also requires compliance with Article 7 of the American Convention. In the *Cesti Hurtado Case*[419] the Court stated that the judicial authority considering a habeas corpus petition should have determined whether the detention was "arbitrary," as proscribed by Article 7(3) of the Convention.[420] According to the Court, the factors to be considered in making this

414. 2000 Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

415. *Id*. ¶ 142. *See also* Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 155 (July 29, 1988); Godínez Cruz Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 163 (Jan. 20, 1989).

416. *See Velásquez Rodríguez*, 1988 Inter-Am. Ct. H.R. No. 4, ¶¶ 147-48 (pattern of disappearances lent strong inference that government was responsible for kidnapping).

417. The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion, 1986 Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 16 (May 9, 1986).

418. American Convention art. 7(2).

419. 1999 Inter-Am. Ct. H.R. (ser. C) No. 56 (Sept. 29, 1999).

420. *Id*. ¶ 130.

decision included the competence of the authority issuing an arrest warrant and the regularity of the proceedings under which the order would be issued.[421]

In considering the regularity of proceedings, it appears that Article 7(6) requires conformity with both substantive and procedural law, much like its international and European counterparts. This is reinforced by the Article 7(2) requirement that detention occur only "for the reasons" and "under the conditions" previously established in domestic law.[422]

Although limited, the Inter-American institutions have provided some guidance as to what constitutes a "competent court" to hear a habeas corpus case under Article 7(6). The Court held in *Cesti Hutardo* that the judicial authority must have the "necessary independence to render impartial decisions."[423] It followed by specifying in *Durand and Ugarte*[424] that the determination of the legality of detention should be made by a different judicial authority than the one ordering and implementing the detention.[425] In *Levoyer Jiménez v. Ecuador*[426] the Inter-American Commission found that an administrative authority lacked the characteristics of a "competent court."[427] Under the Ecuadorian Constitution, the mayor of a municipality was charged with determining the legality of arrests.[428] Without expressly addressing concerns regarding the independence of an administrative authority, the Commission found that a mayor lacked the "proper legal training and authority to exercise judicial functions."[429] The Commission found a violation of Article 7(6).

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421. *Id.*

422. American Convention art. 7(2).

423. *Cesti Hutardo*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 56, ¶ 125.

424. 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, (Aug. 16, 2000).

425. *Id.* ¶ 93.

426. Case No. 11.992, Inter-Am. Comm'n H.R., Report No. 66/01, OEA/Ser./L/V/II.114 doc. 5 rev. (2001).

427. *Id.* ¶¶ 78-79.

428. *Id.* ¶ 78.

429. *Id.* ¶ 79.

Finally, a court must have the means to carry out its judgments.[430] In the *Fairén Garbi and Solís Corrales Case*[431] the Inter-American Court observed that a court must have the power to compel the authorities.[432] The fact that military authorities would be unlikely to comply with the orders of an ordinary judge indicated that the remedy would have little meaningful effect.[433]

The Inter-American Commission attaches the right to habeas corpus at the time of detention.[434] The Inter-American Court confirmed in the *Cesti Hurtado Case*[435] that a detained person has the right to petition for habeas corpus "at all times."[436] The remedy must be available, even when a person is held in exceptional circumstances of solitary confinement established by law.[437]

Article 7(6) requires that the reviewing court decide "without delay" on the lawfulness of a person's detention.[438] While the Inter-American Court has not established a bright-line rule as to what constitutes "delay," it is possible to discern some general guidelines from the cases of the Court and Commission. To begin, it is clear that this mandate requires compliance with domestic law. The Court found in the *Acosta Calderon Case*[439] that Article 7(6) was violated when a petition for habeas corpus was not ruled on within the 48-hour time limit set under domestic law in Ecuador.[440] In *Nativí and Martínez v. Honduras*[441] the Inter-American Commission

430. *Cesti Hurtado Case*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 56, ¶ 125 (Sept. 29, 1999).

431. 1989 Inter-Am. Ct. H.R. (ser. C) No. 6 (Mar. 15, 1989).

432. *Id*. ¶ 91.

433. *Id*. ¶ 105.

434. Manuel García Franco v. Ecuador, Case No. 10.258, Inter-Am. Comm'n H.R., Report No. 1/97, OEA/Ser.L/V/II.98 doc. 6 rev. ¶ 56 (1997).

435. 1999 Inter-Am. Ct. H.R. (ser. C) No. 56 (Sept. 29, 1999).

436. *Id*. ¶ 123.

437. *Id*.; Suárez Rosero Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 59 (Nov. 12, 1997).

438. American Convention art. 7(6). The Spanish text reads "sin demora."

439. 2005 Inter-Am. Ct. H.R. (ser. C) No. 129 (June 24, 2005).

440. *Id*. ¶ 97.

441. Case No. 7864, Inter-Am. Comm'n H.R., Report No. 4/87, OEA/Ser.L/V/II.71 Doc. 9 rev. 1 (1987).

observed that five days represented a "very long delay" for a habeas corpus decision given the serious nature of an alleged disappearance.[442] While it has not yet addressed the question of "delay" under Article 7(6), it is likely that the Inter-American Court will look to the jurisprudence of the European Court of Human Rights, as it did in determining what constitutes the right to trial within a "reasonable time" in the context of the Articles 7(5) and 8(1) of the American Convention in the *Suárez Rosero Case*.[443] The European Court has emphasized that the determination of speediness in determining the legality of detention under Article 5(4) of the European Convention turns on the circumstances of an individual case.[444]

As noted earlier, the Inter-American Court's cases involving Article 7(6) have almost exclusively involved disappearance situations, leaving the Court few opportunities to expressly discuss the specific procedural requirements for habeas corpus proceedings. Thus, it is impossible to define with any particularity the extent to which the fair trial rights set forth in Article 8(2) or other guarantees might be applicable to Article 7(6) proceedings. It is likely that, as with the European Court, the Inter-American Court would find that procedural requirements are dependent on the circumstances of each individual case.[445]

Article 8(1) of the American Convention does guarantee every person a hearing with "due guarantees" in the determination of his or her rights.[446] This basic guarantee applies to habeas corpus proceedings.[447] The Inter-American Court indicated in its advisory opinion *Exceptions to the Exhaustion of Domestic*

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442. *Id.*

443. 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 72 (Nov. 12, 1997). The Inter-American Court followed the European Court's lead by finding that the complexity of the case, the procedural activity of the interested party, and the conduct of judicial authorities were relevant factors in determining a "reasonable time." *Id.*; Genie Lacayo Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 77 (Jan. 29, 1997) (*citing* Motta v. Italy, 195-A Eur. Ct. H.R. (ser. A) at 9-10 (1991); Ruiz-Mateos v. Spain, 262 Eur. Ct. H.R. (ser. A) at 18, 20-23 (1993)).

444. *See supra* § 4.1.2 (discussing the determination of speedy proceedings under Article 5(4) in the European context).

445. *See supra* § 4.1.2 (discussing the procedural requirements for Article 5(4) proceedings under the European Convention).

446. American Convention art. 8(1).

447. These guarantees apply to anyone in "the determination of his rights and obligations of a civil . . . or any other nature." *Id.* A habeas corpus proceeding is clearly a determination of a person's right to personal liberty as guaranteed by Article 7 of the Convention.

Remedies[448] that the "due guarantees" requirement equates to a right to a "fair hearing."[449] In that opinion the Court considered whether a "fair hearing" required legal representation. It determined that this was dependent on the circumstances of a particular case or proceeding, including "its significance, its legal character, and its context in a particular legal system."[450]

It is worth noting that the Inter-American Commission has indicated that Article XXV of the American Declaration does require that habeas corpus proceedings under that instrument comply with the rules of procedural fairness.[451] This includes providing an opportunity for the petitioner to present evidence, to meet the opposing party's claims, and to be represented by counsel or some other representative.[452] The Inter-American Court held that states-parties to the American Convention "cannot escape the obligations they have as members of the OAS under the Declaration."[453] It is likely, therefore, that Article 7(6) of the Convention would be found to contain at least the same procedural guarantees as the corresponding provision of the Declaration.

Article 46(1)(a) of the American Convention requires that a party exhaust domestic remedies prior to filing a petition in the Inter-American system under the Convention.[454] This requirement is not applicable, however, when domestic legislation does not provide due process for protection of a right, when a petitioner is denied access to remedies under domestic law or is prevented from exhausting the remedy, or when there is an unwarranted delay in judgment under an available remedy.[455] States have objected on numerous occasions to allegations of Article 7(6) violations on the basis that the petitioner failed to exhaust domestic remedies.

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448. Advisory Opinion, 1990 Inter-Am. Ct. H.R. (ser. A) No. 11 (Aug. 10, 1990).

449. *Id*. ¶ 28.

450. *Id*.

451. *See supra* § 4.2.2 (interpreting Article XXV of the American Declaration).

452. *See id*.

453. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 46 (July 14, 1989).

454. American Convention art. 46(1)(a).

455. American Convention art. 46(2).

In the *Velásquez Rodríguez Case*[456] the Inter-American Court held that the parties were not required to exhaust domestic remedies

> when it is shown that remedies are denied for trivial reasons or without an examination on the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality.[457]

The parties were, thus, excused from the exhaustion of remedies requirement.[458]

The Court has also ruled that there is no obligation to exhaust domestic remedies if no remedies exist. In the *Fairén Garbi and Solis Corrales Case*[459] the Honduran government affirmed that it had carried out a careful investigation and concluded that the person was not in its territory and had never been in state custody.[460] Given those assurances, the Court found that the government had recognized there could be no remedy and, therefore, the applicant could not be expected to exhaust domestic remedies.[461]

In its advisory opinion *Exceptions to the Exhaustion of Domestic Remedies*[462] the Court held that in situations where a person needs counsel to effectively protect a right but either cannot afford to hire an attorney or is unable to secure representation because of a generalized fear in the legal community, there is no need to exhaust domestic remedies.[463] While the Court has never expressly held that the right to counsel is guaranteed in Article 7(6) proceedings, it is important to note that if it is guaranteed, a person's indigency or the existence of fear in the legal community could excuse that person from the requirement.

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456. 1988 Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988).

457. *Id*. at ¶ 68. *See also* Fairén Garbi & Solis Corrales Case, 1989 Inter-Am. Ct. H.R. (Ser. C) No. 6, at ¶ 94 (Mar. 15, 1989).

458. *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (Ser. C) No. 4, at ¶ 68.

459. 1989 Inter-Am. Ct. H.R. (Ser. C) No. 6 (Mar. 15, 1989).

460. *Id*. ¶ 110.

461. *Id*.

462. Advisory Opinion, 1990 Inter-Am. Ct. H.R. (ser. A) No. 11 (Aug. 10, 1990).

463. *Id*. ¶¶ 31, 35.

4. Regional Systems

Finally, it should be noted that the Court has observed that the mere fact that a domestic remedy fails to produce the desired result does not mean that a party has exhausted all domestic remedies. For example, the Court points out in *Velásquez Rodríguez* that a petitioner may not invoke the appropriate remedy in a timely fashion.[464] In that case, the petitioner cannot claim to have exhausted domestic remedies.

Conclusion

The European and Inter-American human rights systems have developed a substantial body of jurisprudence on the right to habeas corpus as guaranteed by their respective instruments. While the European cases have contributed to better definition of the procedural aspects of habeas corpus, the Inter-American system has focused more on guaranteeing the availability of the remedy. The regional systems, together with the international bodies that have interpreted Article 9(4) of the International Covenant discussed in the previous chapter, provide us with a solid foundation for understanding the location and scope of habeas corpus in international law. However, a number of challenges limit the availability and effectiveness of these habeas corpus guarantees. The next chapter identifies the most significant of these challenges.

464.1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 67 (July 29, 1988).

5

CHALLENGES TO THE EFFECTIVENESS OF HABEAS CORPUS

The preceding chapters have attempted to define the content of the habeas corpus guarantees found in the Universal Declaration of Human Rights,[1] the International Covenant on Civil and Political Rights,[2] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[3] the American Declaration of the Rights and Duties of Man,[4] and the American Convention on Human Rights,[5] by examining the *travaux préparatoires* of the instruments, the text of the habeas corpus provisions, and the interpretation and application of the provisions by the relevant human rights bodies.[6] The extent to which the content of these guarantees can be defined varies from system to system. For example, the procedural requirements for a habeas corpus proceeding are much more clearly defined in the European system than in the Inter-American system.[7]

In each of these systems, the effectiveness of habeas corpus is potentially limited by unanswered procedural questions. A greater threat to the effectiveness of habeas corpus comes from challenges to the scope of its availability under international law, challenges that go beyond the textual interpretation of the individual habeas corpus provisions. This is particularly true with regard to the applicability of habeas corpus provisions during the existence of an exception to the normal legal order due to armed conflict, civil unrest, or some other national emergency, or the tangible circumstances of the detention, such as location outside of a state's territorial jurisdiction. In such circumstances, the applicability of international habeas corpus

1. U.N. G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71, Dec. 10, 1948 [hereinafter "UDHR" or "Universal Declaration"].

2. 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR" or "Covenant"].

3. 213 U.N.T.S. 222 (entered into force on September 3, 1953) [hereinafter "European Convention"].

4. O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter "American Declaration"].

5. 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter "American Convention"].

6. *See supra* § 2 (UDHR); § 3 (ICCPR); § 4.1 (European Convention); § 4.2 (American Convention).

7. Compare § 4.1 (addressing the procedural guarantees of habeas corpus in the European Convention) with § 4.2 (describing the guarantees required by the American Convention).

guarantees is drawn into question. While attempts to limit its application are hardly new, the terrorist attacks of September 11, 2001, and the ensuing 'war on terror' have tested the limits of the legalist approach of the human rights regime.[8] As Joan Fitzpatrick notes,

> Governments that style themselves as champions of the rule of law against the absolutism or nihilism of terrorists have, at least temporarily, constructed 'rights free zones.' Bedrock principles have been displaced by legally meaningless terms, and energies are diverted to wrestling with legal phantoms.[9]

A central target of the assault on the rule of law has been the right to habeas corpus. Governments have denied the availability of habeas corpus for all of the reasons contemplated above.[10] Even when habeas corpus has been judicially or politically determined to be available, attempts have been made to procedurally eviscerate the remedy to essentially render it meaningless.[11] It is, of course, in these challenging situations that habeas corpus is most critical. Even the most well-defined habeas corpus guarantee is meaningless if a state denies the applicability of the human rights instrument which contains the guarantee. This chapter examines four phenomena which have the potential to limit the effectiveness of the international right to habeas corpus. It highlights the arguments made and practices employed by states to avoid the scrutiny of habeas corpus. In doing so, it identifies the challenges that exist in ensuring effective habeas corpus protection under international law.

5.1 Detention Review during Armed Conflict

While we have already reviewed the habeas corpus guarantees that exist under international human rights law, a second body of law – international humanitarian law – comes into force during situations of international and non-international armed

8. Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 242 (2003).

9. *Id*.

10. The United States government, for example, argued that detainees at Guantánamo Bay were not entitled to habeas corpus review based on its interpretation of the law of war and based on the fact that detainees were beyond the territorial jurisdiction of federal courts. *See infra* text accompanying notes 17, 274-279.

11. *See infra* § 5.4.

conflict. It is critical to understand, then, how human rights law is impacted by the existence of armed conflict and the triggering of international humanitarian law, what rules international humanitarian law establishes for detention review and in which situations they are applicable, and how the rules related to detention review contained in international humanitarian law and human rights law relate to one another.

This section begins by examining the general question of the applicability of human rights law during armed conflict when international humanitarian law is in force as *lex specialis*. It then introduces those provisions of international humanitarian law that govern detention during armed conflict to identify the situations in which they are applicable and how they operate. Next, it analyzes the relationship between detention review provisions contained in international humanitarian law and the habeas corpus guarantees under human rights law. Finally, it will draw conclusions as to the potential gaps that may exist in habeas corpus protection during armed conflict. It is important to note that this section focuses on how habeas corpus guarantees are impacted by the separate legal regime that is triggered by armed conflict, while subsequent sections address the related but distinct questions of derogations from habeas corpus or the extraterritorial application of habeas corpus that often coincide with armed conflict.

5.1.1 Relationship between Legal Regimes

As Theodor Meron explains, human rights law and international humanitarian law have different origins and purposes.[12] International humanitarian law dates to antiquity and primarily governs the relationship between a state and nationals of other states, including prisoners of war, residents of occupied territories, and enemy aliens, with the goal of making war more humane.[13] It is applicable in defined circumstances of international armed conflict, non-international armed conflict, and occupation. Human rights law is not silent during these periods and remains in force except in those narrowly-prescribed situations in which a state may derogate from its obligations. What, then, is the relationship between these two bodies of law in

12. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L. L. 239, 240 (2000).

13. *See id.*

situations where international humanitarian law is applicable and no derogation has been made from relevant human rights standards?

The traditional view, expressed by Jean Pictet and G.I.A.D. Draper, is that international humanitarian law and human rights law essentially operate in separate, clear-cut spheres, with the former applicable during times of armed conflict and the latter in peacetime.[14] As Noam Lubell explains, under this view, when the *lex specialis* of international humanitarian law becomes applicable it operates to automatically suspend the *lex generalis* of human rights law without need for derogation by the state under the principle of *lex specialis derogate legi generali*.[15] Françoise Hampson and Ibrahim Salama show that a minority of states – most notably the United States and Israel – have persisted in this position before international institutions.[16]

In its 2006 appearance before the Committee Against Torture the United States argued that the Convention Against Torture was not applicable to its detention operations in Afghanistan and Iraq or at Guantánamo Bay because took place in the context of an armed conflict and, thus, only the *lex specialis* of international humanitarian law applied.[17] This echoed the United States statement at the time the Convention was drafted that "the convention was never intended to apply to armed conflicts" and such application "would result in an overlap of the different treaties."[18] In support of this view, Michael Dennis points to the fact that since the adoption of the International Covenant on Civil and Political Rights no state has taken steps to

14. *See, e.g.*, JEAN PICTET, HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS 15 (1975) ("[H]umanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime."); G.I.A.D. Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y.B. HUM. RTS. 191 (1971).

15. Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISR. L. REV. 648, 655 (2007).

16. Françoise Hampson & Ibrahim Salama, Working Paper on the Relationship between Human Rights Law and International Humanitarian Law, U.N. Doc. E/CN.4/Sub.2/2005/14, ¶ 69 (June 21, 2005).

17. Statement of John B. Bellinger III, Legal Advisor, U.S. Dep't of State, May 5, 2006, http://www.state.gov/g/drl/rls/68557.htm.

18. Comm'n on Hum. Rts., Report on the Working Group on a Draft Convention Against Torture, ¶ 5, U.N. Doc. E/CN.4/1984/72 (Mar. 9, 1984).

derogate from application of the Covenant to an international armed conflict as evidence that states do not believe they are required to do so.[19]

Most authorities, however, suggest that human rights law remains applicable during armed conflict, a position that finds support in the *travaux préparatoires* of the International Covenant on Civil and Political Rights[20] and reiterated by the United Nations General Assembly at the Tehran Conference in 1968.[21] Such a view has evolved through the scholarship and decisions of international bodies, most notably the International Court of Justice. In its 1996 advisory opinion *Legality of the Threat or Use of Nuclear Weapons*, the Court wrote that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[22] At issue in the *Nuclear Weapons* case was the human right to not arbitrarily to be deprived of one's life. The Court indicated that during armed conflict the test for arbitrary deprivation of life, a human rights norm, should be determined by reference to the *lex specialis*, international humanitarian law.[23]

Eight years later the Court again considered the relationship between the two bodies of law in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Territory*.[24] Reaffirming that human rights law is not

19. Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISR. L. REV. 453, 477 (2007) (citing Multilateral Treaties Deposited With the Secretary General, ch. 4.4, http://untreaty.un.org/ENGLISH/bible/inglishinternetbible/partI/chapterIV/chapterIV.asp). This state practice could, however, have a different explanation as any situations of international armed conflict that takes place outside a state's borders implicates two distinct issues: 1) the relationship between international humanitarian law and human rights law, and 2) the extraterritorial application of human rights law. *See* Lubell, *supra* note 15, at 649.

20. The derogation provision in the Covenant was originally proposed by the United Kingdom, which wanted to ensure that states did not arbitrarily derogate from their human rights obligations during wartime. Hum. Rts. Comm'n, Working Grp. on Convention on Hum. Rts., 2nd Sess., 8th mtg., U.N. Doc. E.CN.4/AC.3/SR.8 at 10 (Dec. 10, 1947) (statement of U.K.).

21. International Conference on Human Rights, April 22 to May 13, 1968, Proclamation of Tehran, U.N. Doc. A/CONF.32/41 (Aug. 1, 1968).

22. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

23. *Id*.

24. Advisory Opinion, 2004 I.C.J. 136 (July 9).

suspended during armed conflict, it contemplated how these legal regimes interacted, observing that

> some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[25]

Hampson explains that in this situation, "*lex specialis* is not being used to displace [human rights law]. It is rather an indication that human rights bodies should interpret a human rights norm in the light of [international humanitarian law]."[26] Lubell concurs that under the Court's reasoning, both bodies of law remain applicable but the more specific provision helps inform the interpretation of the more general provision.[27] The Court's 2005 decision in *DRC v. Uganda*[28] seemed to confirm its view that the two bodies of law are complementary.

Other international and regional institutions have also concluded that international humanitarian law and human rights law both apply during armed conflict. The Inter-American Commission on Human Rights determined in *Abella v. Argentina*[29] that "human rights treaties apply both in peacetime, and during situations of armed conflict."[30] Recognizing that "humanitarian law generally afford[s] victims of armed conflict greater or more specific protection than do the more generally phrased guarantees in the American Convention [on Human Rights] and other human rights instruments,"[31] the Commission found that it must "necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kind of claims alleging

25. *Id.* ¶ 106.

26. Hampson & Salama, supra note 16, ¶ 57.

27. Lubell, *supra* note 15, at 655.

28. Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116, ¶¶ 216-17 (Dec. 19).

29. Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. 271 (1997).

30. *Id.* ¶ 158.

31. *Id.* ¶ 159.

violation of the American Convention in combat situations."[32] The Commission further considered how to approach differences between legal standards in international humanitarian law and human rights law. In such cases, it concluded that it was bound to give effect to the provision of that treaty with the higher standard applicable to the right or freedom in question.[33]

In the *Las Palmeras Case*[34] the Inter-American Court of Human Rights addressed an objection to its consideration of a claim based on Common Article 3 of the 1949 Geneva Conventions.[35] The Court confirmed the co-applicability of international humanitarian law and the American Convention. At the same time, it clarified that it would not adjudicate violations of the Geneva Conventions themselves because it lacked competence to do so.[36] It found that it was, however, competent to determine whether the state's application of international humanitarian law norms was compatible with the American Convention.[37] It stated that to do so it "interprets the norm in question and analyzes it in the light of the provisions of the [American] Convention."[38]

Shortly thereafter, in the *Bámaca Velásquez Case,*[39] the Court again visited the relationship between provisions of the American Convention and Common Article 3 of the Geneva Conventions. The Court reiterated that the existence of an armed conflict in which international humanitarian law applied did not relieve the state of its human rights obligations.[40] Pursuant to its decision in the *Las Palmeras Case* it declined to decide whether the Geneva Conventions had been directly violated but

32. *Id.* ¶ 161.

33. *Id*. ¶¶ 164-65 (relying on Article 29(b)'s "most-favorable-to-the-individual" clause). *Id*. ¶ 164.

34. Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000).

35. The same language appears in Article 3 of each of the four Geneva Conventions of 1949.

36. *Las Palmeras*, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 32-33.

37. *Id*.

38. *Id*. ¶33.

39. Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

40. *Id*. ¶ 207.

held that "the relevant provision of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention."[41]

Most recently, the Inter-American Commission on Human Rights considered the relationship between international humanitarian law and the American Declaration of Human Rights[42] in a request for precautionary measures for persons detained by the United States at the Guantánamo Bay Naval Base. It noted that "the protections under international human rights and humanitarian law may complement and reinforce one another."[43] The Commission then observed that in certain instances,

> the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in a time of peace. In such situations, international law including the jurisprudence of the Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.[44]

The applicability of the European Convention during armed conflict can be discerned in the text of Article 15 of the Convention.[45] The European Court of Human Rights and Commission on Human Rights have on numerous occasions been presented with claims of violations of the European Convention arising from situations of both international and non-international armed conflict.[46] In *Cyprus v. Turkey*,[47] the European Commission confirmed that the existence of armed conflict is not a barrier to the applicability of the European Convention, and made clear that

41. *Id*. ¶ 209.

42. O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82, doc.6 rev.1 at 17 (1992).

43. Decision on Request for Precautionary Measures, Mar. 12, 2002, *reprinted in* 41 I.L.M. 532, 533 (2002).

44. *Id*.

45. European Convention art. 15 (allowing derogation "in time of war or other public emergency"). *See* Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian law in Armed Conflict, in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 204 (Orna Ben-Naftali ed. 2011).

46. *See, e.g.*, Isayeva & Others v. Russia, App. Nos. 57947/00, 57948/00 & 57949/00 (Feb. 24, 2005); Isayeva v. Russia, App. No. 57950/00 (Feb. 24, 2005); Cyprus v. Turkey, 2001-IV Eur. Ct. H.R.; Banković v. Belgium, 2001-XII Eur. Ct. H.R. (admissibility decision); Cyprus v. Turkey, App. No. 25781/94, 23 Eur. H.R. Rep. 244 (1997); Cyprus v. Turkey, App. No. 8007/77, 15 Eur. H.R. Rep. 509 (1993); Cyprus v. Turkey, App. Nos. 6780/74 & 6950/75, 4 Eur. H.R. Rep. 482 (1992).

47. 4 Eur. H.R. Rep. 482.

suspension of the Convention only occurs when a state formally takes measures to derogate pursuant to Article 15.[48] Andrea Gioia writes that it is "now universally acknowledged" that the European Convention continues to apply when a state party is engaged in armed conflict.[49]

The European institutions have thus provided limited guidance as to how norms from these two bodies of law interact, however. According to Gioia,

> [the Court] has shown a remarkable reluctance to clarify the relationship between the [European Convention and international humanitarian law] and, indeed, has often preferred to ignore all explicit references to [international humanitarian law] altogether, as if the existence of an armed conflict had no impact on the law applicable by the Court.[50]

William Abresch asserts that while the Court has relied on humanitarian law principles,[51] it has preferred to directly apply human rights law in situations of armed conflict.[52] International humanitarian law has been invoked in only a handful of cases.

In *Cyprus* the Commission accepted that both Cyprus and Turkey were parties to the Third Geneva Convention, and found, therefore, it was not necessary "to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war."[53] In *Al-Jedda v. United Kingdom*,[54] the Court determined that the provisions in Article 5(1), prohibiting arbitrary detention, were not displaced by international humanitarian law.[55] In *Isayev and Others v. Russia*,[56] the Court held that a violation of international

48. *Id.* at 552-58 (¶¶ 506-532).

49. Gioia, *supra* note 45, at 204.

50. *Id*. at 203.

51. William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 742, 746 (2005).

52. Abresch notes that the European Court has applied doctrines developed on the use of force by law enforcement to "large battles involving thousands of insurgents, artillery attacks, and aerial bombardment" in a manner that is "not only without reference to humanitarian law but also in a manner that is at odds with humanitarian law." *Id*. at 742.

53. *Id*. at 533.

54. App. No. 27021/08 (July 7, 2011).

55. *Id*. ¶¶ 107, 110.

humanitarian law obligated the state to conduct an investigation pursuant to Article 2.[57]

The United Nations Human Rights Committee has determined that the application of international humanitarian law does not impede application of the International Covenant on Civil and Political Rights.[58] It has briefly touched on the relationship between these bodies of law in its General Comments. In General Comment 29, it stated that during armed conflict, rules of international humanitarian law become applicable, together with the Covenant, to help prevent the abuse of state emergency powers.[59] In General Comment 31, the Committee observed that "in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of the Covenant rights."[60]

In addition to these human rights bodies, the International Committee of the Red Cross has indicated that the two legal regimes are complementary. A 2011 institutional report confirmed that "[t]he ICRC believes that the international law of human rights applies both in times of peace and armed conflict,"[61] and that

> There is no doubt that [international humanitarian law] and human rights law share some of the same aims, that is to protect the lives, health and dignity of persons. It is also generally accepted that IHL and human rights law are complementary legal regimes, albeit with a different scope of application. While human rights law is deemed to apply at all times (and thus constitutes the *lex generalis*), the application of IHL is triggered by the occurrence of the armed conflict (thus constituting *lex specialis*).[62]

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56. App. Nos. 57947/00, 57948/00, & 57949/00 (Feb. 24, 2005).

57. *Id*. at 208-25.

58. Concluding Observations of the Human Rights Committee: Israel, ¶ 10, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003).

59. General Comment No. 29, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

60. General Comment No. 31, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

61. INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING LEGAL PROTECTION FOR VICTIMS OF ARMED CONFLICT 7 (2011), http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf.

62. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 14 (2011), http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

The ICRC writes that while the two branches of law are complementary as a general matter, the doctrine of *lex specialis* can be useful in determining the interplay between the rules of each applicable to a given situation.[63]

Reviewing the debate, Lubell concludes that the continued applicability of human rights law during armed conflict is "firmly determined,"[64] a conclusion by Marco Sassòli and Laura Olson, Alexander Orakhelashvili, Fiona de Londras, Hampson and Salama, William Schabas, and Dietrich Schindler, among others.[65] Orna Ben-Naftali writes that the confluence of the regimes "currently enjoys the status of the new orthodoxy."[66] No distinction exists in this regard between international and non-international armed conflict. As Hampson and Salama observe in their United Nations working paper, "either the applicability of [international humanitarian law] displaces that of [human rights law] or it does not. The overwhelming evidence is that it does not."[67] Nonetheless, some do seem to draw a distinction between the continued applicability of human rights law during international versus non-international armed conflict [68] This is due to the

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63. *Id*.

64. Lubell, *supra* note 15, at 650.

65. *See* Marco Sassòli & Laura Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 603 (2008); Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUR. J. INT'L L. 161, 162 (2008); Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists*, 12 J. CONFLICT & SEC. L. 223, 236 (2007); Hamspon & Salama, *supra* note16, ¶ 76; William Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 ISR. L. REV. 592, 593 (2007); Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 935, 938 (1981). In their United Nations working paper on the relationship between human rights law and international humanitarian law, Françoise Hampson and Ibrahim Salama also examine possible reliance by the United States and Israel on the persistent objector principle, concluding that it is not persuasive. Hamspon & Salama, *supra* note 1626, ¶ 70.

66. Orna Ben-Naftali, *Introduction: International Humanitarian Law and International Human Rights Law – Pas de Deux*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 5 (Orna Ben-Naftali ed. 2011).

67. Hamspon & Salama, *supra* note 16, ¶ 77.

68. For example, Michael Dennis, though skeptical of the applicability of human rights law during international armed conflict, acknowledges that a majority of states accept the continued application of human rights law during internal armed conflict. Dennis, *supra* note 19, at 455.

compounding of two distinct questions: 1) the co-application of human rights law and international humanitarian law during armed conflict, and 2) the extraterritorial application of human rights law. It is important to recognize that it is only the latter inquiry, which will be addressed separately,[69] which could result in a possibility of different conclusions for international or internal armed conflicts.

5.1.2 Humanitarian Law Provisions Related to Detention Review

International humanitarian law springs from both customary and conventional sources, which include The Hague Conventions and the four Geneva Conventions of 1949 and their Additional Protocols. Two of the Geneva Conventions contain provisions addressing detention review during international armed conflict.

The first is the Geneva Convention Relative to the Treatment of Prisoners of War[70] that provides for the detention and treatment of prisoners of war. For purposes of the Convention, the term "prisoner of war" applies to persons who belong to one of several categories set forth in Article 4 and have fallen into the power of the enemy.[71] These categories include members of the armed forces, organized volunteer corps meeting certain criteria, civilian crews and contractors, war correspondents, members of the merchant marine, and persons spontaneously taking up arms to resist invasion.[72] The Convention provides that prisoners of war may be subject to internment until the cessation of active hostilities.[73]

Under Article 5 of the Third Geneva Convention,

> should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[74]

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69. *See infra* § 5.3.

70. 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter "Third Geneva Convention"].

71. *Id.* art. 4.

72. *Id*. art. 4(A).

73. *Id*. arts. 21 & 118.

74. *Id*. art. 5.

This article provides the only means by which a person potentially subject to internment under the Third Geneva Convention is able to have the legal basis for detention, that is, his or her status as a prisoner of war, reviewed. According to Pictet's Commentary, this provision was primarily envisioned as allowing a means for a deserter or person without identification to seek the benefit of prisoner of war status.[75]

The second treaty containing detention review provisions is the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[76] The Convention defines those persons protected by it provisions in Article 4. Essentially, these protected persons fall into two main classes: enemy nationals within the national territory of a party to the conflict, and the population of an occupied territory.[77] The Convention provides for the internment of protected persons as "a preventative administrative measure," as well as for the review of such internments.[78]

Aliens within the territory of a party to the conflict can be interned pursuant to Article 42 if security concerns make it "absolutely necessary."[79] All persons interned pursuant to this article shall be entitled to seek review of the detaining power's decision as set forth in Article 43.[80] The review is not automatic, but must be initiated by the detainee.[81] This review is to be conducted by an "appropriate court or administrative board"[82] offering guarantees of independence and impartiality.[83] The

75. JEAN PICTET, COMMENTARY – III GENEVA CONVENTION RELATIVE TO PRISONERS OF WAR 77 (A.P de Henry trans., 1960). The Commentary notes, for example, that a person taking part in hostilities who does not fall into the Article 4 definition might be prosecuted for murder. *Id*.

76. 75 U.N.T.S. 287 (entered into force Oct. 21,1950) [hereinafter "Fourth Geneva Convention"].

77. JEAN PICTET, COMMENTARY – IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 46 (Ronald Griffin & C.W. Dumbleton trans., 1958) (construing Article 4 of the Fourth Geneva Convention).

78. *Id*. at 343. While noting that internment is not a penal sanction, the Convention does contemplate the "internment or simple imprisonment" of persons committing crimes. Fourth Geneva Convention, art. 68. The Commentary observes that the inclusion of internment was a humane decision allowing persons committing minor crimes the benefit of the more favorable conditions of internment. *Id.* at 341-42.

79. Fourth Geneva Convention, art. 42. A person may also voluntarily demand internment. *Id*.

80. *Id*. art. 43.

81. PICTET, *supra* note 77, at 260.

82. Fourth Geneva Convention, art. 43.

review process is initiated by the internee and must occur at the "earliest possible moment."[84] If the internment is maintained, it must be reviewed by a court or administrative board "periodically, and at least twice yearly."[85] These periodic reviews are automatic.

A very similar process exists with regard to persons living in occupied territories. Article 78 allows an occupying power to subject protected persons to "assigned residence or internment" for "imperative reasons of security."[86] The decision to do so must be made according to a regular procedure and consistent with the provisions set forth in Article 43.[87] An interned person is given the right to appeal the decision.[88] Consistent with the provisions of Article 43, the appeal is to be considered by a court or administrative board[89] with "the least possible delay."[90] If the decision is upheld on appeal, it is subject to periodic review at a recommended interval of every six months.[91] Ashley Deeks suggests that the greater flexibility in the frequency of subsequent review under Article 78 compared to Article 43 is because the drafters presumed a state will generally have greater control of its own territory than occupied territory.[92]

The foregoing provisions of the Third and Fourth Geneva Conventions are relatively narrow and apply to prisoners of war whose status is in doubt, enemy nationals, and occupied populations respectively. Temporally, the prisoner of war provision is applicable from the time the prisoner falls into enemy hands until release

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83. PICTET, *supra* note 77, at 260. The Commentary observes that the use of the term "administrative board" means that review by a single administrative official is not permitted. *Id.*

84. *Id.*

85. Fourth Geneva Convention, art. 43.

86. *Id.* art. 78.

87. *Id.* The Commentary makes clear that Article 78 proceedings must "observe the stipulations of Article 43." PICTET, *supra* note 77, at 368.

88. Fourth Geneva Convention, art. 78.

89. PICTET, *supra* note 77, at 369.

90. Fourth Geneva Convention, art. 78.

91. *Id.*

92. Ashley Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 411 (2009).

and repatriation.[93] Application of the civilian provisions begins at the onset of the conflict and ends with the "general close of military operations," or, in the case of occupation, one year after the close of military operations.[94]

It is important to note that these detention review provisions in the Third and Fourth Geneva Conventions only apply to situations of *international* armed conflict and occupation.[95] While international humanitarian law also clearly contemplates detention during *non-international* armed conflict, it does not establish the grounds for internment or the applicable procedural rights.[96] As the International Committee of the Red Cross (ICRC) wrote in a 2011 report, "there are no international humanitarian law treaty provisions on procedural safeguards for internment in non-international armed conflicts."[97] The non-binding commentary to the ICRC's study on customary humanitarian law asserts that the customary prohibition on arbitrary deprivation of liberty implies "an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention" during non-international armed conflict.[98]

International humanitarian law, therefore, provides procedures for the review of detention in *international* armed conflicts in three specific situations. It also anticipates detention in *non-international* armed conflict and may even recognize a general customary obligation to make habeas corpus available. At the same time, no treaty provisions establish procedures for the review of detention during non-international armed conflict. The next section will analyze how the habeas corpus guarantees of human rights law interact with the international humanitarian law rules that are applicable during international and how they operate in the absence of specific international humanitarian law rules during non-international armed conflict.

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93. Third Geneva Convention, art. 5.

94. Fourth Geneva Convention, art. 6.

95. Third Geneva Convention, art. 2; Fourth Geneva Convention, art. 2.

96. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 62, at 17.

97. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 61, at 10. *See also* Sassòli & Olson, *supra* note 65, at 618.

98. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 348-51 (2005).

5.1.3 Interplay of Detention Review Provisions in International Armed Conflict

Robert Goldman, the United Nations independent expert on human rights and counterterrorism, observes that there is no "common approach on how human rights law relates to rules of international humanitarian law. . ."[99] The relevant rules from human rights law and international humanitarian law could lead to different outcomes if applied independently. Schabas argues that a civilian death during an aggressive war may be determined to be lawful under international humanitarian law, with its acceptance of non-combatant casualties in some circumstances, but could violate human rights law's prohibition on the deprivation of life absent a legitimate purpose.[100] The ICRC states that "[w]hile these two branches of international law are complementary as a general matter, the notion of complementarity does not provide a reply to the sometimes intricate legal questions of interplay that arise on the ground in concrete cases."[101] This interplay must be examined and resolved based on the specific rules at issue, with the debate shifting "from the relationship between the two regimes as such, to the relationship between the particular norms belonging to the two regimes that control specific factual situations."[102] Gioia concurs, and suggests that the correct approach is to look at the relationship between individual norms on a case-by-case basis.[103] This section will consider the availability of detention review during international armed conflict given the interplay of human rights law and international humanitarian law.

The judicial review provisions of the Fourth Geneva Convention are included as a part of rules allowing for the internment of civilians under certain circumstances during international armed conflict. The first set of rules permits the internment of foreign nationals in enemy territory[104] while the second permits the internment of

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99. Hum. Rts. Comm'n, Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, ¶¶ 29-30, U.N. Doc. E/CN.4/2005/103 (Feb. 7, 2005).

100. Schabas, *supra* note 65, at 612.

101. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 62, at 14.

102. Marko Milanović, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 98 (Orna Ben-Naftali ed. 2011).

103. Gioia, *supra* note 45, at 214.

104. Fourth Geneva Convention, art. 42 *et seq*.

persons in occupied territories.[105] Article 43 provides for the review of detentions in the former situation, while Article 78 governs the latter. The review proceedings for each category are nearly identical. In both cases, an internee is entitled to have the internment decision reviewed by a court or "administrative board."[106] Review by a single administrative official is not sufficient.[107] The court or administrative board must possess guarantees of independence and impartiality.[108] The review must occur without delay and, if the internment is maintained, at least every six months thereafter.[109]

The reviews contemplated by Articles 43 and 78 largely serve the same role as habeas corpus proceedings under international human rights law. Jelena Pejic writes that "[w]hile the Convention does not specifically speak of these actions as challenges to the lawfulness of detention, that is what they essentially are."[110] While the international humanitarian law system and human rights system are similar here, differences do exist. For example, the Fourth Geneva Convention provisions do not require that reviews be conducted by a judicial body, but instead allow them to be conducted by an "administrative board" so long as it possesses guarantees of independence and impartiality. This deviates from the requirement in human rights law that review be conducted by a "court," enough for Marko Milanović to conclude that a substantively and practically unresolvable norm conflict exists which requires improvement in the normative framework.[111] As Deeks points out, the Geneva provisions leave unanswered a number of additional procedural question, including the makeup of the reviewing board, the information considered in assessing continued detention, the right for the detainee to appear in person, and the standard to be applied by the court.[112]

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105. *Id*. art. 78 *et seq*.

106. *Id*. arts. 43, 78.

107. PICTET, *supra* note 77, at 260.

108. *Id*.

109. Fourth Geneva Convention, arts. 43, 78.

110. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 386 (2005).

111. Milanović, *supra* note 102, at 118, 125.

112. Deeks, *supra* note 92, at 409.

Still, the ICRC argues that this specific interplay can be resolved by reference to the *lex specialis*, which consists of the more specific rules of international humanitarian law designed for this situation and agreed on by the states party to the treaty.[113] This position seems correct, bearing in mind that the provisions of the Geneva Conventions are intended to establish the "minimum" level of review.[114] The greater flexibility afforded by Articles 43 and 78 may be warranted in some situations due to the practicalities of military operations. However, Pejic urges that these procedures should be as robust as the circumstances will allow. She asserts that the authority that initially ordered detention must not be the same as the reviewing body for this procedure to be effective.[115] Noting that judicial supervision would more likely comply with the requirements of independence and impartiality, Pejic argues that "judicial supervision would be preferable to an administrative board and should be organized wherever possible,"[116] and further notes that while Article 43 does not mandate representation by counsel, the right to legal assistance is today considered a basic procedural safeguard, and that the detainee should generally be personally present for review hearing.[117] Significantly, Pejic's proposals were adopted as the institutional position of the ICRC.[118]

The Third Geneva Convention contains the other treaty framework for the detention of persons in international armed conflict. It provides that persons who qualify as prisoners of war, as defined by Article 4, are subject to internment until the end of hostilities. This framework also includes a review mechanism of sorts. Article 5 provides that if a person's status as a prisoner of war is in doubt, the person shall enjoy the protection of the prisoner of war rules "until such time as their status has been determined by a competent tribunal."

Again, the ICRC asserts that the specific rules of the Third Geneva Convention should take precedence as *lex specialis* over human rights law. The

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113. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 62, at 17.

114. *See* PICTET, *supra* note 77, at 261.

115. Pejic, *supra* note 110, at 386.

116. *Id.* at 387.

117. *Id.* at 388-89.

118. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 61, at 11.

European Commission seemed to accept this position in *Cyprus v. Turkey*,[119] when it declined to consider the applicability of the habeas corpus provision of the European Convention to prisoners of war held under the Geneva framework.[120] Schabas agrees that application of international humanitarian law as *lex specialis* "would seem entirely suited to resolving differences" with human rights law in this situation.[121] Sassòli also concludes that the Third Geneva Convention process prevails over comparable human rights law provisions.[122] This view is reinforced by the fact that a proposal to expressly exclude prisoners of war from habeas corpus review under Article 9(4) of the International Covenant on Civil and Political Rights was deemed unnecessary and withdrawn.[123] In 2002, the U.N. Working Group on Arbitrary Detention declined comment on whether the International Covenant on Civil and Political Rights was relevant in interpreting Article 5 of the Third Geneva Convention, leaving open the possibility that it did not view the Covenant as being relevant in this determination.[124]

Again, this position is reasonable. While the Article 5 review available to determine whether an individual qualifies for prisoner of war status is quite limited compared to a full habeas corpus proceeding, it accomplishes the same purpose of establishing the legality of the individual's detention. It should be borne in mind that the status of prisoner of war in an international armed conflict is one of privilege. As John Bellinger and Vijay Padmanabhan observe, combatants benefit from the protections linked to their status, creating "a powerful incentive to admit to that status."[125] Once an individual is determined to be a prisoner of war, international

119. 4 Eur. H.R. Rep. 482.

120. *See id.*

121. Schabas, *supra* note 65, at 612.

122. Marco Sassòli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts, in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 92 (Orna Ben-Naftali ed. 2011).

123. Proposed Australian Amendment to Draft International Covenant on Human Rights, U.N. Doc. E/CN.4/201 (May 19, 1949); Hum. Rts. Comm'n, 5th Sess., 100th mtg. at 9, U.N. Doc. E/CN.4/SR.100 (May 25, 1949).

124. Report of the Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, ¶ 64, U.N. Doc. E/CN.4/2003/8 (Dec. 16, 2002).

125. John Bellinger & Vijay Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Laws*, 105 AM. J. INT'L L. 201, 222 (2011).

humanitarian law provides that he or she can be detained until the cessation of hostilities pursuant to Article 118 of the Third Geneva Convention.[126] In other words, the basis for his or her detention is not subject to change. Given the fact that the only issue in question relates to military classification, that battlefield detentions may occur in large number at once, and that they may occur in remote locales where combat operations are still occurring, it is perhaps not surprising that the Third Geneva Convention creates a special review structure specifically tailored to the narrow question at hand. It is important to note that the prisoner of war framework laid out in the Third Geneva Convention contains a monitoring mechanism that provides protection against violations of other fundamental rights. This system provides for the inspection of places of internment, interviews with prisoners, and punishes breaches of the Convention.[127] At least in theory, the presence of this system fulfills one of the purposes that make the availability of habeas corpus essential in most situations.

While the Article 5 process is an acceptable procedure for determining whether an individual is entitled to prisoner of war status and subject to detention for the duration of hostilities, the same procedure is not appropriate for use as a sole means of establishing lawful detention for an individual who does not qualify for prisoner of war status. Bellinger and Padmanabhan note that the Article 5 procedure as implemented in Combat Status Review Tribunals at Guantánamo Bay was criticized for failing to "prescribe adequate procedures to govern tribunals making status determinations."[128] It is important to recognize that this criticism was largely driven by the fact that the proceedings in question were not just used to determine whether an individual was entitled to prisoner of war status, they were also used as a basis to detain individuals who were not entitled to prisoner of war status without access to habeas corpus.[129]

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126. *See* Third Geneva Convention, art. 118.

127. *See* Third Geneva Convention, arts. 126-132.

128. Bellinger & Padmanabhan, *supra* note 125, at 224.

129. See Brian Foley, *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 CRIM. L. & CRIMINOLOGY 1009, 1034-35 (2007).

5. Challenges to Habeas Corpus

This raises an important point – that while the detention review provisions of the Third and Fourth Geneva Conventions will take precedence over the habeas corpus provisions of human rights law as *lex specialis*, they will only do so for individuals who fall within the relevant internment schemes. Outside of those three schemes, international humanitarian law does not does not provide specific rules for the review of detention during international armed conflict; detention for other reasons and any required review proceedings would be governed by applicable human rights law.[130] Goldman rightly concludes that habeas corpus proceedings pursuant to human rights law would therefore be available to persons deprived of their liberty whose continued detentions are not subject to one of the three internment frameworks of the Geneva Conventions.[131] Sassòli agrees this would include persons "rightly or wrongly denied POW status" following an Article 5 hearing,[132] who Deeks asserts may still face detention without criminal charge for the duration of hostilities.[133]

5.1.4 Detention Review during Non-International Armed Conflict

While international humanitarian law provides for specific internment frameworks during international armed conflict, it does provide any similar rules applicable during non-international armed conflict.[134] While the customary prohibition on arbitrary deprivation of liberty arguably includes an obligation to provide for detention review, no specific rules have been established.[135] Since the international humanitarian law applicable to non-international conflicts clearly does

130. Derogation or jurisdictional issues may, of course, impact the applicability of human rights law. These, however, are distinct questions which will be addressed separately. *See infra* §§ 5(2) & 5(3).

131. Robert Goldman, *Extraterritorial Application of the Human Rights to Live and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 121 (Robert Kolb & Gloria Gaggioli eds. 2013).

132. Sassòli, *supra* note 122, at 73. *See also* Report of Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, ¶ 64, U.N. Doc. E/CN.4/2003/8 (Dec. 16, 2002).

133. Deeks, *supra* note 92, at 404 (citing Ex parte Quirin, 317 U.S. 1 (1942)).

134. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 61, at 10. *See also* Sassòli & Olson, *supra* note 65, at 618.

135. HENCKAERTS & DOSWALD-BECK, *supra* note 98, at 348-51.

contemplate that detentions will occur,[136] this begs the question – what rules operate to provide an individual with an opportunity to challenge the lawfulness of his or her detention? The weight of authority suggests that the habeas corpus guarantees of human rights law operate in this situation.

Expressing the institutional position of the ICRC, Pejic writes that in the "absence of rules for the internment of individuals in non-international armed conflicts, it is necessary to draw on human rights law in devising a list of procedural principles and safeguards to govern internment in such conflicts."[137] Therefore, she concludes that habeas corpus is the appropriate form of judicial oversight for detention during non-international armed conflict,[138] and notes that habeas corpus is non-derogable.[139] Pejic notes that this requires review by a "court" rather than the administrative body allowed in the Fourth Geneva Convention framework during international armed conflict.[140] It may also mean the existence of a right to counsel, the ability to file multiple petitions, and the right to attend proceedings in person.[141] A 2011 ICRC report confirms that habeas corpus is the mechanism for review during non-international armed conflict,[142] but is not definitive on the non-derogability of habeas corpus. While it acknowledges that some authorities argue that habeas corpus can never be derogated from, it submits that this "cannot always accommodate the reality of armed conflict."[143]

Sassòli and Olson agree with the conclusion that human rights govern detention during non-international armed conflict and argue that because the international humanitarian law applicable during non-international armed conflict is silent on the procedural regulation of internment, "it would seem clear . . . human

136. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 62, at 17.

137. Pejic, *supra* note 110, at 378.

138. *Id*. at 387.

139. Id.

140. *Id*.

141. *Id*. at 288-89.

142. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 62, at 17.

143. *Id*. at 18.

right should step in to fill the gap."[144] They note that the ICRC study on customary international law adopted this approach.[145] In their view, the fact that internees, unlike persons attacked during armed conflict, are always under the control of their captors, reinforces the human rights approach.[146] Sassòli and Olson assert that, strictly speaking, the only exceptions in which international humanitarian law would take precedence would occur if the parties to the conflict, as encouraged by Common Article 3(3), agreed to apply the detention review rules of the Geneva Conventions, or if a state in a non-international armed conflict unilaterally granted prisoner of war status to detained fighters.[147] The latter detainees would lose access to habeas corpus, but would gain the monitoring mechanisms of the Third Geneva Convention, immunity against prosecution, and the right to be released at the close of hostilities.[148]

From a practical standpoint, however, Sassòli and Olson identify potential difficulties with the human rights approach. One issue is whether states would have the capacity to conduct habeas corpus review without delay during a non-international armed conflict when thousands of people may be detained.[149] Perhaps even more important is the fact that at least one party to a non-international armed conflict will be a non-state actor. While both state and non-state actors are bound by international humanitarian law, it is not clear whether non-state actors can be bound by human rights.[150] Certainly, it will be difficult for the non-state actor to establish a "court" capable of providing habeas corpus review, or to establish the legal basis for detention, which is usually done in domestic law.[151]

The difficulties with applying human rights law in these situations has led some to advocate for a different approach. Deeks concedes that the rules of

144 . Sassòli & Olson, *supra* note 65, at 621.

145. *Id*.

146. *Id*.

147. *Id*. at 621-22.

148. Sassòli, *supra* note 122, at 92.

149. Sassòli & Olson, *supra* note 65, at 622.

150. *Id*. *See* Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 INT'L REV. RED CROSS 655 (2007).

151. Sassòli & Olson, *supra* note 65, at 622.

international humanitarian law applicable during non-international armed conflict are sparse, and that detention in these situations is governed by domestic law, including a state's human rights obligations.[152] She argues, though, that Pejic's position is "ambitious" and that states would find these obligations difficult to meet on the battlefield.[153] Deeks instead advocates for the application of the core procedures contained in the Fourth Geneva Convention to regulate detention during all types of armed conflict.[154] She identifies these as a high standard to trigger detention, an initial review of detention by a court or board, the right to appeal, and periodic review.[155] In her view, these are more reflective of state practice and eliminate wrangling about how to categorize the conflict.[156]

Deeks's approach is consistent with others commentators who suggest less legal distinction between international and non-international armed conflict.[157] Sassòli and Olson observe that the international humanitarian law applicable to international armed conflict could be applied to non-international armed conflict "by analogy."[158] This would avoid any potential difficulties presented where a non-state actor is not obligated to or capable of providing habeas corpus review under human rights law.[159] It would also eliminate inconsistencies where the various members of multi-national coalitions are bound by different regional or international human rights norms.[160]

Sassòli accepts that practical considerations, such as the possibility of bringing thousands of detainees before a judge without delay, might make the application of the Fourth Geneva Convention rules during non-international armed conflict

152. Deeks, *supra* note 92, at 413.

153. *Id*. at 405.

154. *Id*.

155. *Id*. at 433.

156. *Id*. at 415, 435.

157. Sassòli & Olson, *supra* note 65, at 602.

158. *Id*. at 623.

159. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 62, at 18.

160. *Id*.

appealing.[161] These practical considerations, however, are not to supplant human rights law in favor of rules that are not expressly applicable. Sassòli points while application of international humanitarian law rules might be desirable for pragmatic reasons, "legally this is difficult to justify if [human rights law] applies at all."[162]

Some have suggested that the legal framework for governing detention during non-international armed conflict should be clarified or changed. The ICRC has noted that this could occur through the adoption of new rules of international humanitarian law.[163] Sassòli and Olson suggest that guidelines could be established to assess the relationship between human rights and international humanitarian norms.[164] Bellinger and Padmanabhan acknowledge that the execution of a new treaty would be difficult and admits that there is little support for the development of approaches by states in the "laboratory of ideas" following the post-2001 'war on terror.'[165] They instead suggest that states establish a common set of principles to guide detention procedures involving non-state actors.[166]

Steps in this direction were taken with the convening of the Copenhagen Process on the Handling of Detainees in International Military Operations, which culminated with the adoption of the Copenhagen Principles and Guidelines in 2012.[167] The process began in 2007 and involved representatives from twenty-four states and five international organizations.[168] Its purpose was to "develop principles to guide the implementation of the existing obligations with respect to detention in international military operations," without seeking to create new laws.[169] The Copenhagen

161. Sassòli, *supra* note 122, at 92.

162. *Id*. at 93.

163. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 62, at 18

164. Sassòli & Olson, *supra* note 65, at 627.

165. Bellinger & Padmanabhan, *supra* note 125, at 242.

166. *Id*.

167. COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS, THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES (2012) [hereinafter "Copenhagen Principles"], http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf.

168. *Id*. at 1.

169. *Id*.

Principles apply to peace operations and international military operations during non-international armed conflict.[170]

Principle Twelve touches on the process for review of detention. It states that "A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorized to determine the lawfulness and appropriateness of continued detention."[171] The commentary to Principle Twelve states that the reviewing authority must be impartial, but need not be outside the military and need not be a judge or lawyer.[172] The commentary further notes that detainees should have their detention reviewed periodically – generally every six months – or when new information becomes available.[173] Finally, it states that detainees should be assigned a personal representative "when feasible," and should be allowed to attend review sessions "when practically possible."[174]

It is worth noting that Principle Four specifies that "Detention of persons must be conducted in accordance with applicable international law."[175] The commentary to Principle Four includes the following explanation:

> The applicable law for treatment may vary depending on the type of military operation in which the person is being detained. Where a person is detained in situations of armed conflict the lex specialis will be international humanitarian law. That law may be supplemented or informed by human rights law depending on the detaining authority's legal obligations. In non-armed conflict situations applicable international human rights establishes rules and standards for the treatment of detainees.[176]

The Principles were met with criticism from Amnesty International, which called the standards "a muddled compromise that in some respects falls even below

170. *Id*. at 5.

171. *Id*. at 20.

172. *Id*.

173. COPENHAGEN PRINCIPLES, *supra* note 167, at 20.

174. *Id*.

175. *Id*. at 8.

176. *Id*.

the 'lowest common denominator' among participating states."[177] Unlike the habeas corpus guarantees contained in human rights law presumptively applicable during non-international armed conflict, the Principles do not contemplate review by a "court," a right to counsel, or the right to initiate subsequent review. In this way, Principle Twelve essentially adopts the Fourth Geneva Convention detention review procedure to make it applicable during non-international armed conflict. However, assuming the applicability of human rights law during non-international armed conflict, the Principles do arguably direct states to follow those norms since they have an obligation to operate "in accordance with applicable international law." As a result, the Principles provide little new guidance on the applicable detention review mechanism, but instead circle back to the original question of what process is specified under international law.

The answer to this question, it seems, is habeas corpus under applicable human rights law. The shortcoming of this framework, however, remains the potential gap that exists with regard to non-state actors, and to address this Sassòli and Olson offer a solution. They suggest the possibility of parallel application of human rights law and international humanitarian law while harmonizing the relevant rules based on the relationship between the bodies of law, their objectives, and the differences between state and non-state actors.[178] Under this approach, the detention review procedures of the Fourth Geneva Convention, applicable to international armed conflict, would apply to all parties to a non-international armed conflict.[179] This would establish a minimum level of detention review, consistent with the object of international humanitarian law.[180] A state could not go below this baseline of protection regardless of its human rights obligations, and this norm would apply to non-state actors.[181] The application of the international humanitarian law provisions would not preclude the parallel application of whatever human rights obligations a

177. Amnesty International, Copenhagen 'Principles' on Military Detainees Undermine Human Rights, Oct. 22, 2012, http://www.amnesty.org/en/news/copenhagen-principles-military-detainees-undermine-human-rights-2012-10-22.

178. Sassòli & Olson, *supra* note 65, at 626.

179. *Id.*

180. PICTET, *supra* note 77, at 261.

181. Sassòli & Olson, *supra* note 65, at 626.

state might have.[182] While it may seem unfair that the state is required to abide by additional obligations under human rights law, Sassòli and Olson point out that the only additional obligations are those that the state freely accepted.[183]

5.1.5 Summary

One challenge to effective operation of the right to habeas corpus is the persistence of some states and a handful of scholars who contend that human rights law is automatically displaced during armed conflict. This position has little support, and it is widely accepted that international human rights law remains applicable during armed conflict. Even so, questions remain about the correct interplay between the applicable norms of international humanitarian law and human rights law, even though the norms provide similar protections.

While it seems uncontroversial that the procedures contained in the Third and Fourth Geneva Conventions are the appropriate form of detention review in the relevant situations during international armed conflict, the procedural requirements of those protections are not well defined, and questions exist about the applicability of habeas corpus to other situations during international armed conflict. This is particularly true for individuals who have been determined not to be prisoners of war following an Article 5 hearing.

Differences of opinion exist about which detention review scheme operates during non-international armed conflict. While the law tends to support the proposition that the habeas corpus guarantees of human rights law prevail, a case can be made that international human rights norms should be utilized based on practical considerations. For example, human rights norms may not apply to non-state actors, or non-state actors may not be able to fulfill procedural guarantees such as the right to review by a court. Some commentators have thus called for new rules or guidelines in such situations.

The following concerns can therefore be identified regarding the effectiveness of habeas corpus during international and non-international armed conflict:

182. *Id.*

183. *Id.* at 625.

- The persistence of the view that the applicability of international humanitarian law acts to automatically suspend the operation of human rights law creates an environment in which detention review may improperly denied. This view is sometimes exacerbated by conflation of the issue of co-applicability with the issue of extraterritorial application of human rights law.

- The procedural requirements for the review mechanisms established in the Geneva Convention internment frameworks are not defined to the same degree as habeas corpus rights in human rights law.

- States must accept that human rights habeas corpus guarantees operate during international armed conflict in situations not covered by the Geneva Convention frameworks, particularly in determining the legality of detention of persons determined not to be prisoners of war under the Third Geneva Convention.

- The applicability of habeas corpus under human rights law during non-international armed conflict presents practical difficulties, particularly in allowing non-state actors to comply with its terms.

5.2. Derogation from Human Rights Obligations

Human rights law provides for the suspension of some basic rights during times of national crisis. Each of the main human rights treaties contains a derogation provision under which a state-party may excuse itself from certain obligations under the treaty in defined circumstances. This section will consider the limitations on habeas corpus protection that exist as a result of the derogation regime, and the potential problems presented by this regime. It will begin by looking at the historical and legal basis for derogation, and then examine the derogation provisions of human rights law in relation to habeas corpus. This section will then address the potential lacunae that exist in habeas corpus protection as a result of the existing derogation regime.

5.2.1 Development

Historically, law was ordained by the sovereign, who also held the power to amend or suspend the law. The legal order was easily altered as needed – or desired – by the sovereign. During times of emergency, such as a war or natural disaster,

Thomas Aquinas observes that the sovereign could simply issue a new law or grant dispensations from the existing law.[184]

Of course, such emergencies might not always be addressed by the sovereign. Legal theorists thus sought to reconcile the continued applicability of the law with situations where adherence to existing law was impossible or impractical. Aquinas writes that "[i]f there is, however, a sudden danger, regarding which there is no time for recourse to a higher authority, the very necessity carries a dispensation with it, for necessity is not subject to the law."[185] He reasoned that since law only had force and reason to serve the well-being of man, that when it failed to do so it lost its capacity to bind.[186] In such situations, according to Giorgio Agamben, the law was not suspended and the juridicial order remained intact, but the law carried no obligation because the reason or force of the law was not applicable.[187]

The advent of constitutional democracies in the late eighteenth century presented new challenges in the reconciliation of the law to emergency situations. Under the written constitutions of the revolutionary democracies, constitutionally guaranteed fundamental rights were outside the realm of regular legislative or executive action, and not subject to simple amendment or suspension. Thus, the constitutions provided for the suspension of certain fundamental rights within the constitutional framework.

The oldest written national constitution still in effect was adopted in the United States in 1787.[188] It addressed the suspension of just one right, providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[189] The French constitutional order went further. The constitution of 1799 provided that:

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184. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II (1st pt.), 3d no., Q. 96, art. 6, 74-75 (Fathers of English Dominican Province trans., 1915).

185. *Id*.

186. *Id*.

187. GIORGIO AGAMBEN, STATE OF EXCEPTION 25 (Kevin Attell trans., 2005).

188. H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1427 (1986).

189. U.S. CONST. art. I, § 9, cl. 2.

> In the case of armed revolt or disturbances that would threaten the security of the State, the law can, in the places and for the time that it determines, suspend the rule of the constitution. In such cases, this suspension can be provisionally declared by a decree of the government if the legislative body is in recess, provided that this body be convened as soon as possible by an article of the same decree.[190]

These constitutionally-based suspension provisions were widely imitated, and were taken into consideration as the post-war human rights instruments were crafted. Early in the drafting of the International Covenant on Civil and Political Rights, the United Kingdom proposed an article excusing a state from its obligations in times of war or public emergency.[191] The representative from Uruguay pointed out that the executive was authorized to suspend constitutional guarantees in most national systems.[192] A derogation article was included in the International Covenant[193] and later in the European Convention for the Protection of Human Rights and Fundamental Freedoms[194] and the American Convention on Human Rights.[195]

5.2.2 Derogation Provisions and Habeas Corpus

The derogation articles of the Covenant, European Convention, and American Convention permit a state to take steps derogating from certain obligations under the covenant.[196] Derogation is only permitted during times of public emergency which threaten the life of the nation,[197] and only to the extent strictly required by exigencies

190. CONST. OF THE YEAR VIII, art. 92 (Fr. 1799).

191. Hum. Rts. Comm'n, Working Grp. on Covenant on Hum. Rts., 2nd Sess., 8th mtg. at 10, U.N. Doc. E/CN.4/AC.3/SR.8 (Dec. 10, 1947).

192. Hum. Rts. Comm'n, 6th Sess., 195th mtg. at 11, U.N. Doc. E/CN.4/SR.195 (May 17, 1950) (statement of Uruguay).

193. ICCPR art. 4.

194. European Convention art. 15.

195. American Convention art. 27.

196. *See* ICCPR art. 4; European Convention art. 15; American Convention art. 27.

197. The Covenant permits derogation in "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." ICCPR art. 4(1). The European Convention permits derogation in "time of war or other public emergency threatening the life of the nation." European Convention art. 15(1). The American Convention permits derogation in "time of war, public danger, or other emergency that threatens the independence or security of a State Party." American Convention art. 27(1).

of situation.[198] A state must proclaim the emergency and provide notice of its derogation to other states parties.[199] The European institutions defined the meaning of "public emergency" in early cases such as *Lawless v. Ireland*[200] and *The Greek Case*.[201] In *Ireland v. United Kingdom*[202] the Court recognized that the Convention gives a state a wide margin of appreciation in determining such a public emergency exists.[203]

Not every right in the Covenant and European and American Conventions is subject to derogation. In each instrument, certain enumerated articles, such as those containing the right to life and the prohibition against torture, were deemed of such importance that they were expressly exempted from derogation.[204] In none of these instruments, however, is the right to habeas corpus explicitly listed as a non-derogable right.[205]

The American Convention, however, contains an additional prohibition on derogation from "the judicial guarantees essential for the protection of" enumerated non-derogable rights.[206] The Inter-American Court considered the relationship between this provision and the right to habeas corpus in one of its earliest advisory opinions. In *Habeas Corpus in Emergency Situations*[207] the Court was asked whether habeas corpus was one of the judicial guarantees from which derogation was not permitted under the final clause of Article 27(2).[208] Examining the nature of the remedy, the Court observed that habeas corpus "performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or

198. ICCPR art. 4(1); European Convention art. 15(1); American Convention art. 27(1).

199. ICCPR art. 4(3); European Convention art. 15(3); American Convention art. 27(3).

200. 3 Eur. Ct. H.R. (ser. A) (1961).

201. 12 Y.B. of Eur. Comm'n on Hum. Rts. (1969).

202. 25 Eur. Ct. H.R. (ser. A) (1978).

203. *Id.* at 78-97 (¶ 207).

204. *See* ICCPR art. 4(2); European Convention art. 15(2); American Convention art. 27(2).

205. *See* ICCPR art. 4(2); European Convention art. 15(2); American Convention art. 27(2).

206. American Convention art. 27(2).

207. *Habeas Corpus*, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8.

208. *Id.* ¶ 11.

the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment."[209]

The Court found that the right to life and the right to humane treatment are threatened when habeas corpus is unavailable.[210] It further found that habeas corpus served an important role in ensuring that any infringements on the right to personal liberty, which is a derogable right under Article 27, did not exceed the strict constraints of the derogation clause.[211] The Court concluded that Article 27 prohibits derogation from habeas corpus under any circumstances, and observed that domestic constitutions and laws authorizing the suspension of habeas corpus in emergency situations were incompatible with the Convention.[212]

The Court's subsequent cases have emphasized the essential nature of the right to habeas corpus in the Inter-American system. Less than a year after the *Habeas Corpus* advisory opinion, the Court affirmed the non-derogability of the remedy in its advisory opinion *Judicial Guarantees in States of Emergency*.[213] It noted that non-derogable guarantees such as habeas corpus served as a means of controlling other measures taken in emergency situations to ensure "they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it."[214]

In the *Neira Algería Case*[215] the Court found that while the declaration of a state of emergency and establishment of restricted military zones in Peru did not expressly suspend habeas corpus, it did leave the remedy ineffective.[216] This equated to an "implicit suspension of the habeas corpus action" which violated the prohibition on derogation.[217] The Court made clear in the *Cantoral Benavides Case*[218] that habeas corpus is non-derogable even in "exceptional circumstances."[219]

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209. *Id.* ¶ 35.

210. *Id.* ¶ 36.

211. *Id.* ¶¶ 37-40.

212. *Habeas Corpus*, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 42-43.

213. Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9, ¶¶ 38-39.

214. *Id.* ¶ 21; *see also* Durand & Ugarte Case, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, ¶ 99 (Aug. 16, 2000).

215. 1995 Inter-Am. Ct. H.R. (ser. C) No. 21 (Jan. 19, 1995).

216. *Id.* ¶77.

217. *Id.* ¶ 84. *See also Durand*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, ¶108.

5. Challenges to Habeas Corpus

Jo Pasqualucci writes that the "Court's determination in this area has effects not only in the Inter-American human right system, but throughout international human rights law and domestic law."[220] The Court's advisory opinions undoubtedly influenced the understanding of the habeas corpus guarantee in the International Convention on Civil and Political Rights. In 1992, the Commission on Human Rights adopted a resolution entitled "Habeas Corpus" which referenced the advisory opinion and called on states to maintain the right to habeas corpus "at all times and under all circumstances, including during states of emergency."[221] A 1994 report of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities examined the reasoning of the Inter-American Court and concluded that habeas corpus "should now be seen as non-derogable."[222] In the report, William Treat and Stanislav Chernichenko encouraged adoption of a draft third optional protocol to the Covenant which would expressly prohibit derogation from the right to habeas corpus in Article 9(4) of the Covenant[223] and a corresponding draft body of principles.[224] Shortly thereafter, the Human Rights Committee stated that it was "satisfied that States parties generally understand that the right to habeas corpus . . . should not be limited in situations of emergency."[225] The Committee actually urged against adoption of the third optional protocol due to the risk that it might "implicitly invite

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218. 2000 Inter-Am. Ct. H.R. (ser. C) No. 69 (Aug. 18, 2000).

219. Id. at ¶ 165.

220. JO PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 49 (2003).

221. Comm'n on Hum. Rts. Res. 1992/35, U.N. Doc. E/CN.4/RES/1992/35 (Feb. 28, 1992).

222. Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, ¶ 159, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994).

223. *See id*., annex I.

224. *See id.,* annex II, arts. 37-38.

225. Report of the Human Rights Committee, Recommendation Submitted by the Committee to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities Concerning a Draft Third Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 2 at 119, U.N. Doc. A/49/40, vol. I, annex XI (Sept. 21, 1994).

States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol."[226]

In 1997, a working group of the Sub-Committee noted that the right to habeas corpus "has gradually been recognized as non-derogable."[227] It pointed to the concluding observations of the Human Rights Committee, the evolution in the overall recognition of the role of habeas corpus, and the advisory opinions of the Inter-American Court.[228] The working group agreed to recommend that the Human Rights Committee consider adoption of a new general comment affirming the "developing consensus that habeas corpus and the related aspects of amparo, as well as cognate rights, should be considered to be non-derogable."[229]

In 2001 the Human Rights Committee issued a new general comment on states of emergency under Article 4 of the Covenant.[230] General Comment 29 replaced the Committee's earlier General Comment 5 and detailed the extent to which states may derogate from their obligations under the Covenant.[231] Among other issues, the Committee considered the role of procedural safeguards in the protection of non-derogable rights. It wrote,

> It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.
>
> . . . .
>
> 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

226. *Id*.

227. Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, Sessional Working Group on the Administration of Justice, The Administration of Justice and Human Rights, ¶ 23, U.N. Doc. E.CN.4/Sub.2/1997/21 (Aug. 19, 1997).

228. *Id*.

229. *Id*.

230. Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001).

231. *Id*. ¶ 1.

> lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.[232]

Echoing the Inter-American Court's approach, the Committee concluded that the habeas corpus guarantee contained in Article 9(4) the Covenant may not be diminished by derogation.[233] Sarah Joseph, however, characterizes this decision as "controversial,"[234] and at least one state subsequently conveyed notice of derogation from the whole of Article 9 of the Covenant, which contains the right to habeas corpus.[235]

The U.N.'s updated Principles to Combat Impunity followed the Committee's lead in 2005. Diane Orentlicher, the independent expert, specifies that "Habeas corpus, by whatever name it may be known, must be considered a non-derogable right."[236] The Principles were endorsed by the Commission on Human Rights.[237] Three years later the Working Group on Arbitrary Detention expressed its view that the non-derogability of habeas corpus represented a peremptory norm of customary international law, binding even on those states not party to the Covenant.[238] A 2010 study by four U.N. special rapporteurs urged that

> domestic legislative frameworks should not allow for any exceptions from habeas corpus, operating independently from the detaining authority and from the place and form of deprivation of liberty. The study has shown that judicial bodies play a crucial role in protecting people against secret detention. The law should forsee penalties for official who refuse to disclose relevant information during habeas corpus proceedings.[239]

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232. *Id*. ¶¶ 15-16.

233. *Id*. ¶ 16.

234. Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 HUM. RTS. L. REV. 81, 91 (2002).

235. U.N. TREATY COLLECTION, INT'L COVENANT ON CIVIL AND POL. RTS., http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. (Dec. 18, 2001, statement by U.K.). The notification of derogation was withdrawn on March 15, 2005, and the government reaffirmed the applicability of Article 9. *Id*. (Mar. 15, 2005 statement by U.K.). The Human Rights Committee did not consider a report from the United Kingdom during this time.

236. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Principle 36, at 18, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

237. Comm'n on Hum. Rts. Res. 2005/81, U.N. Doc. E/CN.4/RES/2005/81 (Apr. 20, 2005).

238. Report of the Working Group on Arbitrary Detention, ¶67, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008).

239. Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, ¶ 292(b), U.N. Doc. A/HRC/13/42 (Feb. 19, 2010).

A joint report by five U.N. rapporteurs on the situation of detainees at Guantanamo Bay also noted the non-deroability of Article 9(4).[240]

To date, the European Court of Human Rights has not expressly held the right to habeas corpus to be non-derogable. On several occasions in the past the European Court accepted the derogability of the habeas corpus provision in the European Convention. The Court expressly found in *Ireland* that Article 5(4) is one of the articles subject to the "right of derogation" by parties to the Convention.[241] In that case, the Court held that derogation from Article 5(4) did not exceed "the extent strictly required" by the conflict in Northern Ireland.[242] As recently as 1997 in *Sakik and Others v. Turkey*,[243] the Court recounted the fact that a state had derogated from Article 5 of the Convention, though it did not reach the issue of the derogation's validity.[244]

The Court has not considered the derogability of Article 5(4), however, since the United Nations Human Rights Committee issued General Comment 29 in 2001. An argument can be made in light of General Comment 29 that derogation from habeas corpus by a European state would violate Article 15 of the European Convention which prohibits derogations inconsistent with a state's other international law obligations.[245] Gerald Neuman recognizes this potential impact of the general comment on the derogability of Article 5(4), though he writes that it is a "complicated question, both procedurally and on the merits."[246] Mark Janis, Richard Kay, and Anthony Bradley argue that based on the Inter-American Court's advisory opinion, "no European state should be permitted to derogate from its duties under Article 5(4) of the European Convention, even though this is not expressly excluded by Article

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240. Comm'n on Hum. Rts., Joint Rep. on Situation of Detainees at Guantanamo Bay, ¶ 14, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

241. 25 Eur. Ct. H.R. (ser. A) at 78 (¶ 204).

242. *Id.* at 83-84 (¶ 220).

243. 1997-VII Eur. Ct. H.R. 2609.

244. *See id.* at 2622 (¶¶ 38-39).

245. *See* European Convention art. 15(1).

246. Gerald Neuman, *Counter-terrorist Operations and the Rule of Law*, EUR. J. INT'L L. 1019, 1027-28 (2004).

15(2),"[247] a position also held by Elizabeth Faulkner.[248] This conclusion "appears reasonable" to de Londras in light of General Comment 29.[249] Sassòli suggests that the European Court's earlier cases accepting the derogability of habeas corpus might be decided differently today as international practice has "developed toward recognizing the non-derogable nature of habeas corpus."[250] In 2006, the Council of Europe's Committee of Ministers recommended that derogation should not impact access to detention review for person in custody on remand.[251]

Although it has not expressly held that Article 5(4) is non-derogable, the Court has made clear that the availability of habeas corpus review pursuant to Article 5(4) will make derogations from other provisions of Article 5 more tolerable. As de Londras puts it, the Court "has never held that habeas corpus may not be suspended in times of emergency, but habeas has been high on the Court's list of considerations when assessing whether emergency detention measures comply with Article 5."[252] The Court's acceptance of the United Kingdom's derogation from Article 5(3) in *Brannigan and McBride v. United Kingdom*[253] was impacted by the availability of habeas corpus as a safeguard against abuse.[254] Conversely, the Court found the absence of habeas corpus to be a factor in its determination that derogation from the entirety of Article 5 exceeded the exigencies of the claimed emergency in *Aksoy v. Turkey*.[255] Thus, strong practical incentives exist for states to maintain the availability of habeas corpus during emergencies when they may wish to derogate from other Article 5 liberty and security guarantees.

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247. MARK JANIS, RICHARD KAY, ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 401 (2nd ed. 2000).

248. Elizabeth Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U. J. INT'L L. & POL'Y 653, 685-87 (1994).

249. De Londras, *supra* note 65, at 253.

250. Sassòli, *supra* note 122, at 91.

251. Recommendations of the Committee of Ministers to Member States on the Use of Remand in Custody, the Conditions in Which it Takes Place and the Provision of Safeguards Against Abuse, ¶ 20, Doc. Rec(2006)13 (Sept. 27, 2006).

252. De Londras, *supra* note 65, at 253.

253. 258 Eur. Ct. H.R. (ser. A) 29 (1993).

254. *Id*. at 55-56 (¶¶ 61-65).

255. 1996-VI Eur. Ct. H.R. at 22 (¶¶ 82-84).

5.2.3 Summary

The ability of a state to derogate from a particular human rights obligation has a significant impact on the protection of that right. The International Court of Justice observed in the *Nuclear Weapons Case* that the only way a right protected in the International Covenant on Civil and Political Rights is suspended is by valid derogation, even during wartime.[256] A non-derogable right is thus highly protected under human rights law; a fundamental and inalienable guarantee wherever the underlying treaty is applicable.

If a right is derogable, on the other hand, the possibility exists for its suspension. The major human rights instruments each contain a requirement of proportionality: a state may only take measures derogating from its obligations to the extent "strictly required by the exigencies of the situation."[257] However, as Joan Hartman notes, human rights institutions have tended to be deferential toward a state's decision that a given situation warrants derogation.[258] Examining the European Convention's derogation provision in *Ireland v. United Kingdom*,[259] the European Court of Human Rights wrote:

> It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to

256. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8). This statement may be subject to qualification in light of a 2007 European Court of Human Rights decision in which the Court declined to review certain claims based on state action taken pursuant to a U.N. Security Council resolution. *See* Behrami v. France, App. No. 71412/01, 356 Eur. Ct. H.R. (2007) (admissibility decision).

257. This same language appears in each treaty. *See* ICCPR art. 4; European Convention art. 15; American Convention art. 27.

258. *See, e.g.*, Joan Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L. J. 1 (1981).

259. 25 Eur. Ct. H.R. (ser. A) (1978).

> avert it. In this matter [the derogation provision] leaves those authorities a wide margin of appreciation.[260]

While Hartman and Fitzpatrick both point out that this deference may be understandable due to political sensitivities and the fact-finding limitation of a court,[261] a lack of scrutiny by human rights institutions creates the potential for abuse as it gives states a legal tool to avoid judicial oversight within the framework of human rights law. Agamben argues that this has occurred within domestic systems, with liberal democracies operating on the basis of emergency legislation almost uninterrupted since World War I.[262]

This phenomenon has reached new extents in the post-September 11, 2001, world. In particular, the shift from traditional armed conflict to an ongoing 'war on terror' has blurred the geographic and temporal boundaries of emergencies. As Fitzpatrick observes, governments now operate in a state of "permanent emergency" in which:

> No territory is contested; no peace talks are conceivable; progress is measured by the absence of attacks and success in applying control measures (arrests, intercepted communications, interrogations, and asset seizures). The duration of 'hostilities' is measured by the persistence of fear that the enemy retains the capacity to strike. Long periods without incident do not signify safety, because the enemy is known to operate 'sleeper cells.' The enemy may be of any nationality, occupation or residence, and is perceived as all the more dangerous for his seeming ordinariness. The war will end when the coalition decides, on the basis of unknown criteria. [263]

Derogation from human rights obligations for the duration of such an emergency allows the exception to effectively become the rule.

The existence of a permanent emergency is particularly concerning given the rights subject to curtailment through derogation. Under the text of Article 4 of the International Covenant, for example, the only provisions not subject to derogation are the right to life, the prohibition against torture, the prohibition against slavery, the

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260. *Id*. ¶ 207.

261. Hartman, *supra* note 258, at 2; JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCIES, 60-61 (1994).

262. AGAMBEN, *supra* note 187, at 86-87. For a discussion of this danger, *see infra* § 6.2.

263. Fitzpatrick, *supra* note 8, at 251-52 (footnote omitted).

prohibition on imprisonment for debts, the prohibition against ex post facto laws, the right to recognition as a legal person, and the right to freedom of thought and religion.[264] By derogating from all other guarantees in the Covenant for the duration of the indeterminate emergency, a state could legally practice indefinite, incommunicado detention without charge and without judicial oversight. Under such circumstances, the protections afforded by the remaining articles not subject to derogation under Article 4 guarantee nothing more than what Agamben refers to as "bare life."[265] It is in the face of this potential for "normless and exceptionless exception",[266] as Fitzpatrick puts it, that the availability of habeas corpus review takes on such significance.[267]

It is clear that states may no longer derogate from the habeas corpus provision of the American Convention in light of the *Habeas Corpus* and *Judicial Guarantees* advisory opinions. The Human Rights Committee stated in General Comment 29 that states may no longer derogate from the habeas corpus provision of the International Covenant on Civil and Political Rights. The European Court has not yet expressly held that habeas corpus is a non-derogable right, although there appears to be movement in that direction. The increased risks posed by the derogability of habeas corpus in recent years may lead to strengthened protection of the right. Given the propensity toward "permanent emergency," it seems inevitable that the European Court will be forced to squarely address the derogability of habeas corpus. Fitzpatrick predicts that the major human rights institutions may also reconsider the deferential approach taken in reviewing state claims that emergency conditions exists warranting derogation as well as the temporal element of emergencies.[268]

Given these considerations, the following points regarding habeas corpus and the derogation of human rights are of particular concern:

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264. ICCPR, art. 4(2).

265. AGAMBEN, *supra* note 187, at 86-87.

266. Fitzpatrick, *supra* note 7, at 251.

267. The significance of habeas corpus in regulating such exceptions is discussed *infra* at § 6.2.

268. Fitzpatrick, *supra* note 8, at 252. The Human Rights Committee indicated in General Comment 29 that it would more carefully scrutinize derogations. Human Rights Committee, General Comment 29, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

- States Parties to the International Covenant may contend that General Comment 29 is merely interpretive and is not binding law. Indeed, one state already purported to derogate from Article 9 after the adoption of General Comment 29.

- While a number of authorities persuasively suggest that the right to habeas corpus under the European Convention is moving toward or has already achieved non-derogable status, the Court has yet to unambiguously confirm this.

- The deference afforded to states by human rights institutions in determining the existence of an emergency severely limits the effectiveness of habeas corpus to the extent the right remains derogable.

- The tendency toward indeterminate emergencies poses serious danger to habeas corpus protection to the extent the right remains derogable.

The possibility that habeas corpus remains derogable in any system presents one of the greatest gaps in habeas corpus protection under international law.

5.3 Territorial Limits of Habeas Corpus Guarantees

Another challenge to the effectiveness of habeas corpus protection under international law relates to the applicability of a state's human rights obligations, including access to habeas corpus, outside of its own territory. This section begins by considering why this issue is so critical to the protection offered by habeas corpus. It then examines the text of the relevant human rights instruments and the decisions of human rights institutions related to extraterritorial application of human rights obligations. Next, it considers the relationship between these principles and the right to habeas corpus. Finally, it identifies gaps in habeas corpus protection that may exist in light of existing law related to the extraterritorial application of human rights.

5.3.1 The Dilemma of Extraterritorial Detention

The right to habeas corpus allows an individual to seek a judicial determination of the legality of his or her detention, and to secure release if no legal basis exists. Because the jailer was historically commanded to present the detainee to the court in person and demonstrate the legality of the detention, the writ of habeas corpus was directed to the specific person with actual physical custody of the detainee

rather than simply to the executive branch of government on whose behalf the jailer acted. Unfortunately, this created a situation in which the executive could circumvent access to habeas corpus by ensuring the detainee and his or her jailer were beyond the jurisdictional reach of the inquiring court.

As R.J. Sharpe and William Duker explain, prisoners in seventeenth century England were sometimes transferred to Scotland or overseas to place them, and their jailers, beyond the reach of writs of habeas corpus issued by English courts.[269] This practice was one of the abuses of habeas corpus that eventually led Parliament to pass the Habeas Corpus Act of 1679.[270] The Act included a provision that outlawed the imprisonment of subjects in Scotland, Ireland, the islands, or "places beyond the seas."[271] It also restricted the movement of prisoners between locations.[272]

The strategy of physically placing prisoners and their jailers beyond the reach of a court's habeas corpus jurisdiction is far from being a historical novelty. When the United States government announced that Guantánamo Bay Naval Base in Cuba would be used a location to detain suspected terrorists captured in Afghanistan and elsewhere following the September 11 attacks, experts speculated that this was an attempt to place them beyond the jurisdictional reach of judicial intervention by the U.S. federal courts.[273] This suspicion was confirmed with the subsequent release of a U.S. Department of Justice memo.[274]

The memo detailed the lease of the Guantánamo Bay facility from Cuba in 1903.[275] The terms of that lease specified that while the Unites States would exercise jurisdiction and control over the base, Cuba would retain ultimate sovereignty over

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269. R.J. SHARPE, THE LAW OF HABEAS CORPUS 18 (1989); WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 52-53(1980).

270. Habeas Corpus Act 1679, 31 Car. 2, c. 2, http://british-history.ac.uk/report.asp?compid=47484.

271. *Id*. § 11.

272. *Id*. § 8.

273. Steve Vogel, *Afghan Prisoners Going to Gray Area: Military Unsure What Follows Transfer to U.S. Base in Cuba*, WASH. POST, Jan. 9, 2002, at A1.

274. *See* Memorandum from Patrick Philbin and John Yoo, Dep. Asst. Att'ys Gen., U.S. Dep't of Justice, to William Haynes II, Gen. Counsel, Dep't of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001) [hereinafter "Memo of Dec. 28, 2001"], http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf.

275. *Id*. at 3.

the territory.[276] The authors of the memo cited the U.S. Supreme Court's decision in *Johnson v. Eisentrager*[277] for the proposition that habeas corpus review was not available to persons beyond the territorial sovereignty of the United States and outside the statutory jurisdiction of any federal court.[278] The memo concluded that a U.S. district court would not be able to properly entertain a petition for habeas corpus from a detainee held at Guantánamo Bay.[279]

These examples demonstrate that territorial limits on the availability of habeas corpus might not just result in the inadvertent denial of access, but might be taken into consideration by states wishing to intentionally place detainees beyond the reach of courts. In this scenario, "rights free zones"[280] are physical places where the executive can escape the legal order that applies at home. It is in this context that the territorial reach of habeas corpus guarantees in human rights law takes on such importance.

5.3.2 Extraterritorial Application of Human Rights Law

The original language proposed for Article 2 of the International Covenant on Civil and Political Rights obligated states to ensure rights to those "within its jurisdiction."[281] A proposal to add an additional territorial element was offered by the United States, which expressed that it did not wish to assume an obligation to ensure the Covenant rights to citizens in occupied or leased territories.[282] Despite some

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276. *Id*.

277. 339 U.S. 763 (1950).

278. Memo of Dec. 28, 2001, *supra* note 274, at 2 (citing *Eisentrager* at 777-78).

279. *Id*. at 9. This position was ultimately rejected by the United States Supreme Court. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

280. This term, quoted by Joan Fitzpatrick in the text accompanying note 8, was used by Harold Koh to describe the assertion that the Guantánamo Bay Naval Base was beyond the jurisdiction of United States law when used as a refugee detention facility in the 1990s. Harold Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 140-41 (1994).

281. U.N. Secretary-General, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights, at 14, U.N. Doc. E/CN.4/365 (Mar. 22, 1950) (U.S. proposal).

282. *Id*.; Hum. Rts. Comm'n, 6th Sess., 193rd mtg. at 13, 18, U.N. Doc. E/CN.4/SR.193 (May 15, 1950).

resistance, the proposal was adopted in 1950 on a vote of 8 to 2, with 5 abstentions.[283] In its final form, Article 2(1) provides that the Covenant applies "to all individuals within [a state's] territory and subject to its jurisdiction."[284] The addition of this restrictive language has not prevented the Human Rights Committee from finding that Covenant obligations extend beyond a state's territorial boundaries. In 1981 the Committee decided two related cases in which the question of extraterritorial application of the Covenant was central. In *Lopez Burgos v. Uruguay*,[285] the applicant, a Uruguayan citizen, was abducted by Uruguayan forces from his residence in Argentina, which was not party to the Covenant at the time.[286] The Committee found that the Covenant applied to these actions even though they took place outside of Uruguayan territory.

The Committee reasoned that Article 2(1) "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."[287] It then relied on Article 5(1) of the Covenant, which provides that nothing in the Covenant may be interpreted as conveying the right to "engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized [in the Covenant]" to conclude that a state could not perpetrate violations of the Covenant on the territory of another state which were prohibited on its own territory.[288] *Celiberti v. Uruguay*[289] presented near-identical facts. In this case, the applicant was abducted by Uruguayan agents during a visit to Brazil from her home in Italy.[290] At the time, Brazil was not a

283. Hum. Rts. Comm'n, 6th Sess., 194th mtg. at 11, U.N. Doc. E/CN.4/SR.194 (May 16, 1950).

284. ICCPR art. 2(1).

285. No. 12/52 (July 29, 1981), *in* U.N. Doc. A/36/40 at 176 (1981).

286. *Id*, ¶ 10.2.

287. *Id*. ¶ 12.3.

288. *Id*.

289. No. 13/56 (July 29, 1981), *in* U.N. Doc. A/36/40 (1981).

290. *Id*. ¶ 2.2.

party to the Covenant. The Committee employed the same analysis as it had in *Lopez Burgos* and reached the same conclusion.[291]

In both cases, Committee member Christian Tomuschat issued identical concurring opinions. He asserted that Article 5(1) was only intended to prevent a state from arguing that a Covenant provision provided the basis for infringement of some other Covenant right.[292] According to Tomuschat, the conclusion of the Committee's majority decision was overbroad. He reasoned that Article 2(1) did limit extraterritorial application of the Covenant in specific circumstances, such as guaranteeing enjoyment of all Covenant rights to citizens living abroad. He did, however, concur with the results in both cases, reasoning that the Covenant could never be envisioned as granting states "unfettered discretionary power to carry out willful and deliberate attacks against the freedom and personal integrity against their citizens living abroad."[293]

In 2004, the Human Rights Committee attempted to further define the scope of Article 2(1) in its General Comment 31.[294] It stated the Covenant applies to "anyone within the power or effective control of that State Party," regardless of whether they were in the state's territory.[295] The Committee declared that Covenant rights must be available to everyone

> who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[296]

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291. *Id*. ¶ 10.3.

292. *Lopez Burgos*, No. 12/52 (individual opinion of Mr. Tomuschat); *Celiberti*, No. 13/56 (individual opinion of Mr. Tomuschat).

293. *Lopez Burgos*, No. 12/52 (individual opinion of Mr. Tomuschat); *Celiberti*, No. 13/56 (individual opinion of Mr. Tomuschat).

294. U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

295. *Id*. ¶ 10.

296. *Id.*

5. Challenges to Habeas Corpus

The Committee's broad interpretation of Article 2(1) has been met with criticism. According to a Dennis, the Committee "abandoned the literal reading [of Article 2(1)] altogether" by turning "territory *and* jurisdiction" into "territory *or* jurisdiction."[297] He notes that a proposal to substitute "or" for the "and" in the U.S. amendment was specifically rejected during the drafting of the article.[298] In his influential commentary on the Covenant, Manfred Nowak writes that this "grammatical (re)interpretation in the sense of a 'disjunctive conjunction'" failed to convince.[299] Instead, he suggests that Tomuschat's concurring opinion provides the correct interpretation of Article 2(1).[300]

Just months after the Committee adopted General Comment 31, the International Court of Justice considered the applicability of the Covenant to Israel's actions in the West Bank and Gaza in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[301] The Court observed that

> [w]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[302]

The Court then attempted to resolve the Human Rights Committee's interpretations to the territorial restriction added to Article 2 by the United States proposal.

> The *travaux preparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State

297. Dennis, *supra* note 19, at 464.

298. *Id*. at 475.

299. MANFRED NOWAK, CCPR COMMENTARY 43 (2005).

300. *Id*.

301. Advisory Opinion, 2004 I.C.J. 136 (July 9).

302. *Id*. ¶ 109.

> of origin, rights that do not fall within the competence of that State, but of that of the State of residence.[303]

Applying these principles to the facts of the situation before it, the Court noted Israel's lengthy presence in the Palestinian Territories and its exercise of effective jurisdiction[304] and concluded that the Covenant was "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[305] Dennis argued at the time that the Court's conclusion in the *Wall* case appeared to be based on "the unusual circumstances of Israel's prolonged occupation," and should not be read as a general endorsement of extraterritoriality during armed conflict.[306]

The Court reiterated this position, however, in its 2005 judgment in *DRC v. Uganda* dealing with the conduct of Ugandan forces in the territory of the Democratic Republic of Congo.[307] Here, the Court found that Uganda's human rights obligations applied extraterritorially even in those areas where Uganda's level of control fell short of occupation.[308] It also recited that "international human rights instruments" are applicable to acts done in the exercise of a state's jurisdiction,[309] which John Cerone notes is a subtle but significant difference from its *Wall* ruling which only referred to the Covenant's extraterritorial scope.[310] In neither the *Wall* nor the *DRC* case, though, did the Court define the term "exercise of its jurisdiction."

The Human Rights Committee referred to the Court's decisions as well as its own jurisprudence in its 2006 Concluding Observations to the periodic report submitted by the United States.[311] The Committee expressed concern about the

303. *Id*.

304. *Id*. ¶ 110.

305. *Id*. ¶ 111.

306. Michael Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 122 (2005).

307. Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19).

308. *Id*. ¶ 220. *See* John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in Extraterritorial Context*, 40 ISR. L. REV. 396 (2007).

309. *Id*. ¶ 216.

310. Cerone, *supra* note 308, at 396.

311. Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

"restrictive interpretation" taken by the state, and in particular "its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory."[312] The Committee recommended that the United States,

> review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular . . . acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory. . . .[313]

It urged the government to consider the interpretation of the Covenant provided by the Committee pursuant to its mandate.[314]

The jurisdictional article of the European Convention on Human Rights does not include a territorial reference similar to that found in the International Covenant on Civil and Political Rights. Article 1 of the European Convention provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[315] The European human rights bodies have frequently been called on to delineate the scope of a state's "jurisdiction" pursuant to this article.

In its 1975 decision in *Cyprus v. Turkey*,[316] the European Commission on Human Rights found that agents of the state bring individuals into the state's jurisdiction for purposes of Article 1 "to the extent that they exercise authority" over the individual through acts or omissions which affect the person.[317] In 1983 the Commission was asked in *Mrs. W. v. Ireland*[318] to consider whether the Republic of Ireland could be held accountable for an alleged violation of the Convention that occurred in Northern Ireland. It stated that the term jurisdiction "is not equivalent to

312. *Id.* ¶ 10.

313. *Id.*

314. *Id.*

315. European Convention, art. 1.

316. 2 Eur. Comm'n H.R. Dec. & Rep. 125(1975).

317. *Id.* at 136.

318. 13 Eur. Comm'n H.R. Dec. & Rep. 211(1983).

or limited to the national territory of a state."[319] The Commission went on to observe that

> [i]t emerges from the language, in particular of the French text, and the object of this article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory but also when it is exercise[d] abroad. . . .[320]

Following its reasoning in the *Cyprus* decision, the Commission reaffirmed that

> the authorized agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property.[321]

The Commission ultimately found that agents of the Republic of Ireland had not exercised authority over the victim of the alleged violation.[322]

In *Reinette v. France*[323] the applicant was summoned to the airport on the independent island of St. Vincent in the Caribbean where he was detained by immigration officials and handed over to French security forces. [324] The Commission considered the applicability of the European Convention to the actions of the French agents in St. Vincent. It found that "from the moment he was handed over the applicant was effectively subject to French authority and consequently to French jurisdiction, even though in this case that authority was exercised abroad."[325]

The European Court of Human Rights considered the applicability of the European Convention to Turkey's actions in Northern Cyprus in *Loizidou v.*

319. *Id* at 214

320. *Id*. at 214-15.

321. *Id*. at 215.

322. *Id*.

323. 63 Eur. Comm'n H.R. Dec. & Rep. 189 (1989).

324. *Id*. at 192.

325. *Id*. at 193.

Turkey.[326] Turkey denied applicability of the Convention in part on the grounds that the Turkish Republic of Northern Cyprus was an independent state.[327] Separate from any questions about the validity of the establishment of the Turkish Republic of Northern Cyprus,[328] the Court affirmed that jurisdiction is not limited to the national territory of a state, but can also exist when the state "exercises effective control of an area outside its national territory."[329] In its subsequent judgment in *Cyprus v. Turkey*,[330] the Court held that jurisdiction was not limited to the actions of Turkish military and officials "but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support."[331]

The Court's 2001 admissibility decision in *Bankovic v. Belgium*[332] marked a retreat from the trend toward extraterritorial application developed in its previous cases. The case concerned deaths resulting from the bombing a television station in Sarajevo during the conflict in the former Yugoslavia.[333] The strike was carried out by parties to the Convention as part of a campaign by the North Atlantic Treaty Organization (NATO),[334] and occurred outside the territory of Convention parties.

Analyzing the applicability of the Convention to these facts, the Court stated that Article 1 contained an "essentially territorial notion of jurisdiction" that would only extend extraterritorially in "exceptional circumstances."[335] Previously recognized exceptional circumstances included acts of state authorities which produced effects or

326. 1996-VI Eur. Ct. H.R.

327. *Id*. at 16-17 (¶ 51).

328. The Court noted that the U.N. Security Council had adopted a resolution calling the purported declaration of secession and establishment of a Northern Cypriot government "legally invalid." *Loizidou*, 1996-VI Eur. Ct. H.R. at 6 (¶19) (quoting S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983)).

329. *Id*. at 17 (¶ 52).

330. 2001-IV Eur. Ct. H.R.

331. *Id*. at 20-21 (¶ 77).

332. 2001-XII Eur. Ct. H.R. (admissibility decision).

333. *Id*. at 3-4 (¶¶ 6-11).

334. *Id*. at 3 (¶ 7).

335. *Id*. at 18 (¶ 67).

were performed outside their own territory,[336] effective control over territory as a result of military action or invitation of another state,[337] activities of diplomatic agents abroad,[338] and aboard craft and vessels registered to or flying the flag of a state.[339]

The Court then considered whether the victims of the NATO airstrike were covered by one of these exceptions. It rejected the primary argument that the bombing brought them under the effective control of any NATO member.[340] It further dismissed the suggestion that a proportional relationship should exist between the rights protected and the level of control.[341]

Emphasizing that the Convention was a regional treaty, the Court explained that it was intended to operate in the *espace juridique*, or legal space, of the contracting parties.[342] It stated

> The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[343]

The Court concluded that no jurisdictional link existed between the victims of the air strike and the respondent states.[344]

Milanović writes that "the Court has been much criticized for *Bankovic*, and rightly so."[345] According to Matthew Happold, the Court was correct to decline

336. *Id*. at 19 (¶ 69).

337. *Id.* at 19-20 (¶¶ 70-71).

338. *Bankovic*, 2001-XII Eur. Ct. H.R. at 20 (¶ 72).

339. *Id*.

340. *Id*. at 21-22 (¶75).

341. *Id*.

342. *Id*. at 23 (¶ 80).

343. *Id*.

344. *Bankovic*, 2001-XII Eur. Ct. H.R. at 24 (¶82).

345. Marko Milanovic, Al-Skeini *and* Al-Jedda *in Strasbourg*, 23 EUR. J. INT'L L. 121, 123 (2012).

jurisdiction in *Bankovic*, but did so using terms that were "dangerously wide."[346] He argues that the Court interpreted the word "jurisdiction" in a way that emphasized the legal relationship between parties when it is more properly a question of fact.[347] Milanović concurs in the assessment that the Court failed to distinguish the meanings of the word "jurisdiction," but points to other factors as the real reason for the outcome.

> *Bankovic* was the result of the Court's less than transparent weighing of competing policy considerations, and its ultimate desire to come up with a superficial, legalistic rationale that would justify making the extraterritorial application of the [Convention] exceptional. Deciding the case in late 2001, in the immediate wake of 9/11, the Court was understandably torn between considerations of universality and effectiveness.[348]

The Court did not want to open the floodgates to regulating every use of force by parties to the Convention.[349] "It could not, it would not find itself the ultimate arbiter of all European overseas adventures."[350]

As Milanović puts it, "as the years went by, the stringency of *Bankovic* started to look less and less appealing,"[351] and the Court's subsequent cases more closely tracked its earlier jurisprudence. In *Ilascu and Others v. Moldova and Russia*,[352] the Court stated that although it had emphasized the territorial principle in *Bankovic*, the concept of jurisdiction "is not necessarily restricted to the national territory of the High Contracting Parties" and that exceptional circumstances acts outside of a state's territory could give rise to jurisdiction.[353] It noted that state responsibility may be

346. Matthew Happold, Bankovic v. Belgium *and the Territorial Scope of the European Convention on Human Right*s, 3 HUM. RT.S L. REV. 77, 90 (2003).

347. Id. at 87.

348. Milanovic, *supra* note 345, at 123.

349. *Id*.

350. *Id*.

351. *Id*. at 124.

352. 2004-VII Eur. Ct. H.R.

353. *Id*. at 64 (¶ 314).

triggered even when agents act *ultra vires* or contrary to instructions, or in acquiescence in the actions of private individuals.[354]

The Court returned to the personal model of jurisdiction in *Issa and Others v. Turkey,*[355] a case in which Turkish troops were alleged to have killed several shepherds in northern Iraq. The Court noted that a state could be held accountable for violations of Convention rights of persons in the territory of another state but be under the former state's authority and control by virtue of its agents operating – whether lawfully or unlawfully - in the latter state.[356] Echoing the Human Rights Committee's *Lopes Burgos* decision, the Court reasoned that Article 1 "cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."[357] Jurisdiction was not found to exist in *Issa*, however, because of a lack of evidence that the Turkish military had effective overall control of the area of northern Iraq or had been operating in the area where the deaths occurred.[358]

In *Öcalan v. Turkey*,[359] the applicant was arrested by Turkish security agents aboard a Turkish-registered aircraft at the Nairobi International Airport in Kenya.[360] The issue of jurisdiction was not raised by the parties.[361] Turkey did not dispute the existence of jurisdiction and the Court accepted the applicability of Article 1 extraterritorially under the circumstances.[362]

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354. *Id*. at 65-66 (¶¶ 318-19).

355. App. No. 31821/96 (Nov. 16, 2004).

356. *Id*. ¶ 71.

357. *Id*.

358. *Id*. ¶¶ 75-81.

359. App. No. 46221/99 (Mar. 12, 2003).

360. *Id*. ¶ 91.

361. *Öcalan* had actually been deemed admissible in a separate admissibility decision by the European Court prior to the *Bankovic* admissibility decision and was relied on by the *Bankovic* applicants. Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. at 23 (¶ 81) (admissibility decision). The *Bankovic* Court dismissed this, however, because Turkey had not contested the issue of jurisdiction in the *Öcalan* admissibility proceedings. *Id*.

362. *Öcalan,* App. No. 46221/99, ¶91. A similar result occurred in the admissibility decision in *Pad v. Turkey*. There, seven Iranian men were killed by gunfire from a Turkish helicopter gunship. Turkey claimed that the men had illegally entered Turkey and were under Turkish jurisdiction, while the applicants argued that the Turkish actions occurred within Iran. The Court found the dispute

5. Challenges to Habeas Corpus

A series of related cases arose from a demonstration along the ceasefire line on the island of Cyprus. In *Isaak v. Turkey*[363] the European Court found that the victim of an attack in the neutral United Nations buffer zone was within Turkish jurisdiction because Turkish soldiers and officials took part in the attack and the victim was under their authority and control.[364] In *Andreou v. Turkey*[365] the applicant, who was located within the Republic of Cyprus, was within the jurisdiction of Turkey when she shot at close range by Turkish troops from within the Turkish Republic of Northern Cyprus.[366] The Court emphasized that unlike the applicants in *Bankovic*, the victim in *Andreou* was already within territory covered by the Convention, namely the Republic of Cyprus.[367] In *Solomou v. Turkey*,[368] the shooting of an individual by Turkish forces within the Turkish Republic of Northern Cyprus brought him within Turkish jurisdiction.[369]

Most recently, the actions of United Kingdom troops in Iraq have given rise to questions about the applicability of the European Convention. The jurisdictional scope of the European Convention was considered by the U.K. House of Lords in *Al-Skeini v. Secretary of State for Defense*.[370] The case involved six Iraqi civilians killed by British forces in Basra. The Law Lords, paying particular attention to the European Court Grand Chamber decision in *Bankovic*, concluded that under current European case law the Convention did not apply to five of the individuals who were shot in their homes or in the street because those areas of Basra was never within the "effective control" of the United Kingdom.[371] The sixth Iraqi civilian had been

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immaterial because Turkey had already acknowledged the men were within its jurisdiction. App. No. 60167/00, ¶¶ 51-55 (June 26, 2007) (admissibility decision).

363. App. No. 44587/98 (Sept. 28, 2006) (admissibility decision).

364. *Id*.

365. App. No. 45653/99 (June 3, 2008) (admissibility decision).

366. *Id*.

367. *Id*.

368. App. No. 36832/97, ¶¶ 49-51 (June 24, 2008) (admissibility decision).

369. *Id*. The Court relied on its earlier cases for the proposition that Turkey had "overall control" of Northern Cyprus. *Id*. ¶ 47.

370. [2007] UKHL 26.

371. *Id*. ¶ 83.

arrested by British troops and died in custody in a British prison. Four of the five Lords agreed that the Convention applied to the sixth individual.[372]

The European Court was asked to determine whether Article 1 extended to individuals imprisoned abroad by a state party to the European Convention in the admissibility decision in *Al-Saadoon and Mufdhi v. United Kingdom*.[373] The applicants in this case had been detained by British forces in Basra in southern Iraq before being transferred to Iraqi custody.[374] They claimed they had been within U.K. jurisdiction during this time.[375] The U.K. government denied that jurisdiction was triggered because Iraq was a sovereign state and the applicants could only be held by British forces at the request of Iraqi courts.[376]

The Court began its analysis with a recitation of relevant authority, including references to the House of Lords judgment in *Al Skeini* and the United States Supreme Court's opinion in *Rasul v. Bush,* which held that U.S. federal courts had jurisdiction to hear challenges to detentions at Guantánamo Bay since the United States exercised control over the base.[377] The Court reiterated the "essentially territorial notion of jurisdiction," and then identified the recognized exceptions to the territorial limitation.[378] First, state responsibility could, in principle, be engaged by acts by state authorities that were performed or produced effects outside of their own territory.[379] Next, jurisdiction may result when, as a consequence of lawful or unlawful military action, a state exercises effective control of an area outside its own territory.[380] Finally, extraterritorial jurisdiction could occur in cases involving activities of

372. *Id*. ¶¶ 84, 92, 99, 151.

373. App. No. 61498/08 (June 30, 2009) (admissibility decision).

374. *Id*. ¶¶ 23-29.

375. *Id*. ¶ 70.

376. *Id*. ¶ 79.

377. *Id.* ¶¶ 61-62 (citing Rasul v. Bush, 542 U.S. 466 (2004)).

378. *Id*. ¶ 85.

379. *Al-Saadoon,* App. No. 61498/08, ¶85 (citing Drozd & Janousek v. France & Spain, 240 Eur. Ct. H.R. (ser. A) (1992)).

380. *Id*.

diplomatic agents abroad or on board craft and vessels registered in or flying the flag of the state.[381]

Applying the law to the facts, the Court found that the detention facilities in which the applicants were detained had been established through the use of military force, and it was on that basis that the United Kingdom exercised control over the individuals held there.[382] Subsequently, this *de facto* control over the facilities was reflected in the law.[383] The Court held that given the United Kingdom's total and exclusive *de facto* control and subsequent *de jure* control over the facilities, the individuals detained there were within the United Kingdom's jurisdiction.[384] The Court noted that its conclusion was consistent with the position taken by the United Kingdom in *Al Skeini* before the British courts.[385]

In July 2011, the Grand Chamber of the European Court issued its judgment in *Al-Skeini & Others v. United Kingdom*.[386] In addition to the applicants whose cases had been heard before the U.K. House of Lords in 2007, the European Court's case included a new applicant: the father of an Iraqi who had died in British custody but not within a British-run place of detention.[387] The European Court was, essentially, faced with the question of whether the European Convention applied to the Iraqi civilians shot by British troops, to whom the Law Lords had found current European case law did not extend jurisdiction, and to the additional civilian killed in custody but outside a British facility.

The Court again acknowledged that the jurisdiction of the European Convention is primarily territorial, subject to exceptions. It was with regard to the exception for acts of state authorities outside of their own territory, though, that the Court offered significant clarification. Specifically, the Court reviewed the cases in which it had previously determined that jurisdiction existed on the basis of the use of

381. *Id.*

382. *Id.* at ¶87.

383. *Id.*

384. *Id.* ¶ 88.

385. *Al-Saadon,* App. No. 61498/08, ¶ 88.

386. App. No. 55721/07 (July 7, 2011).

387. *Id.* ¶¶ 55-62, 205.

force by a State's agents where an individual is brought under the agents' control. It rejected the notion that jurisdiction in these cases had solely been the result of the state's control over the buildings, aircraft, or ships where the individuals were held.[388] Instead, the Court unambiguously stated that the decisive factor in such cases was the exercise of "physical power and control over the person in question."[389] It continued by finding that "[i]t is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual."[390] Thus, it would be possible to divide and tailor Convention rights to a particular situation, a notion met with skepticism in *Bankovic*.[391]

The Court held that under the exceptional circumstances of British responsibility for security in the area, the United Kingdom, though its soldiers, exercised authority and control over the individuals killed.[392] Thus, jurisdiction existed as to the Iraqi civilians whose deaths were undisputedly caused by the acts of British soldiers.[393] Jurisdiction also extended to a sixth civilian who was killed during a firefight between British soldiers and unidentified gunmen. It was not clear whether the fatal bullet was fired by soldiers or the gunmen, however, the fact that the death took place during a security operation in which British soldiers carried out a patrol near her home and joined in the firefight was sufficient to convey jurisdiction.[394]

It is important to note that while the Court applied a personal model of jurisdiction, it did so based on the exceptional circumstances of the British responsibility for security in Basra. According to Milanović, had the U.K. not

388. *Id.* ¶ 136.

389. *Id.*

390. *Id.* ¶ 137.

391. *Id.* The idea that Convention rights can be "divided and tailored" suggests that while a person held in custody by British troops in Iraq may be subject to the Article 5(4) right to habeas corpus, which is relevant to the situation of his or her detention, the state might not be expected to guarantee the same individual's Article 12 right to marry.

392. *Al-Skeini*, App. No. 55721/07, ¶ 149.

393. *Id.* ¶¶ 149-150.

394. *Id.*

exercised these powers, this jurisdictional model would not have applied.[395] Thus, he concludes that while *Al-Skeini* marks a more expansive view of extraterritorial application, it has not overruled *Bankovic*.[396]

Like the International Covenant on Civil and Political Rights and the European Convention, the American Convention on Human Rights contains a jurisdictional provision. Article 1(1) of the American Convention obligates a state to respect the rights of all persons subject to its jurisdiction.[397] The interpretation of this article has been limited. Considering a complaint under the Convention in *Saldaño v. Argentina,*[398] the Inter-American Commission on Human Rights stated that jurisdiction under Article 1(1) is not "limited to or merely coextensive with national territory."[399] Like its international and regional counterparts, the Commission indicated that a state could be responsible for the "acts and omissions of its agents which produce effects or are undertaken outside that state's own territory."[400]

The Commission has had additional opportunities to examine the scope of the American Declaration of the Rights and Duties of Man,[401] which does not contain a jurisdictional article. In *Haitian Centre for Human Rights v. United States*,[402] the Commission found that United States obligations under the American Declaration were engaged by its interdiction of Haitian refugees in international waters.[403] The question of whether the refugees were within the jurisdiction of the United State was not specifically addressed.

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395. Milanovic, *supra* note 345, at 130.

396. *Id*. at 131.

397. American Convention, art. 1.

398. Inter-Am. Comm'n H.R., Report No. 38/99, OEA/Ser.L/V/II.95, doc. 7 rev. (1999).

399. *Id*. ¶ 17.

400. *Id*. The Commission ultimately found that the aggrieved party in Saldaño was not within the jurisdiction of Argentina. *Id*. ¶ 32.

401. O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

402. Case 10.675, Inter-Am. Comm'n H.R. ,Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev., at 550 (1997).

403. *See id*.

5. Challenges to Habeas Corpus

The issue of jurisdiction was taken up by the Commission in the case of *Alejandre v. Cuba*.[404] In this case, two small civilian aircraft were shot down by the Cuban Air Force over international waters.[405] The Commission stated that it was competent to consider a claim that an Organization of American States member state had violated protected rights even though the events take place outside of the state's territory.[406] It noted that American states were obligated to respect the rights of any person subject to their jurisdiction, and while

> this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad.[407]

The Commission stated that jurisdiction existed for an individual subject to the state's authority and control.[408] It held that when "agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues."[409] The Commission found that the Cuban pilots' actions had brought the civilians killed in international airspace under their authority.[410]

The Inter-American Commission issued its report in the case of *Coard v. United States*[411] on the same day as its *Alejandre* report. *Coard* involved claims of violations of the American Declaration committed by the United States during and following the invasion of Grenada.[412] Though the United States did not contest the extraterritorial

404. Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev., at 586 (1999).

405. *Id.* ¶ 15.

406. *Id.* ¶ 23.

407. *Id.*

408. *Id.*

409. *Id.* ¶ 25.

410. *Id.*

411. Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev., at 1283 (1999).

412. *Id.* ¶ 1.

applicability of the American Declaration to its actions,[413] the Commission nonetheless addressed the issue.

> While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – "without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[414]

It is worth noting that although Grenada was a party to the Organization of American States at the time of the incident,[415] this fact was not mentioned by the Commission and was not relevant to its analysis.

The "authority and control" standard was reiterated in *Ferrer-Mazorra v. United States*,[416] which involved the detention of Cuban immigrants to the United States. The United States took the position that, although the immigrants were being held within U.S. territory, as "excludable aliens" they had never entered the state's territory for purposes of domestic law.[417] The Commission found that this was no justification for failing to guarantee Declaration rights since the individuals had, as a

413. The United States did, however, contest the applicability of the American Declaration on other grounds. *See id*. ¶¶ 5, 9.

414. *Id*. ¶ 37.

415. Organization of American States, Charter of the Organization of American States: General Information of the Treaty, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm.

416. Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111, doc. 20 rev. (2001).

417. *Id*. ¶ 182.

factual matter, fallen within U.S. authority and control.[418] It held that the United States "became the guarantor of those rights when the petitioners came within the State's authority and control in 1980."[419]

The Commission confirmed this view in precautionary measures adopted in relation to Guantánamo Bay detainees. It reiterated that the key inquiry is whether a "person [falls] within the state's authority and control."[420] It further stated that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable rights."[421]

Interestingly, Goldman suggests that the Commission may find that the American Declaration only applies within the geographic boundaries of the Western Hemisphere.[422] He notes that the case law of the Commission has only extended extraterritorial jurisdiction within this space, and that it has never opened a case in response to petitions filed by individuals detained by United States forced in Iraq or Afghanistan.[423] This conclusion is not clear, however, from the cases of the Commission.

5.3.3 Availability of Habeas Corpus Extraterritorially

The foregoing examination of the extraterritorial application of human rights law reveals that the United Nations, European, and Inter-American systems have each taken a slightly different approach to the extraterritorial application of human rights based on their understanding of the relevant instrument and the nature of the facts that have been presented in contentious cases. The Inter-American Commission on Human Rights has taken a rather expansive view of jurisdiction in the absence of a jurisdictional article in the American Declaration. Despite the *inclusion* of a

418. *Id*.

419. *Id*. ¶ 183.

420. Decision on Request for Precautionary Measures, Mar. 12, 2002, *reprinted in* 41 I.L.M. 532, 534 n.7 (2002).

421. *Id*. at 533.

422. Goldman, *supra* note 131, at 111.

423. Id.

territorial element in Article 2 of the International Covenant on Civil and Political Rights, the Human Rights Committee has generally done the same. Conversely, despite the *lack* of a territorial element in the Article 1 of the European Convention, the European Court of Human Rights has emphasized a primarily territorial notion of jurisdiction subject to certain exceptions. The impact of these differences is fairly minimal, though, when considering the availability of the right to habeas corpus beyond a state's national territory as habeas corpus can be available extraterritorially on one of two grounds recognized by human rights institutions as conveying jurisdiction extraterritorially under each of the three instruments discussed earlier.

First and foremost, jurisdiction can exist based on the state's control over the individual being detained. In the alternative, jurisdiction can exist on the basis of the state's control over the place where the detainee is held. The first basis is a result of the state's control over the individual. The Human Rights Committee acknowledged this basis in General Comment 31, where it said that the Covenant applies to every person "within the power or effective control" of a state party regardless of location.[424] This is the case regardless of how power or control over the individual was obtained.[425] In its decisions in *Lopez-Burgos* and *Celeberti* the Human Rights Committee the Covenant applied extraterritorially to individuals detained by state actors.

The Inter-American Commission similarly finds that control over an individual brings them within the jurisdiction of a state. It held in *Alejandre* and *Coard* that states were obligated to respect the rights under the American Declaration of a person located outside of its territory but subject to its control, which would generally occur through the actions of the state's agents.[426] Although it was not relevant to the Commission's analysis, *Alejandre* is factually the stronger statement since the civilian pilots were over international waters and not within the territory of any state, whereas in *Coard* the applicants were within the territory of another member state. In *Ferrer-Mazorra* the Commission reiterated the control principle,

424. Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.1, ¶10 (May 26, 2004).

425. *Id.*

426. Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H.R. Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 23 (1999); Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev., ¶ 37 (1999).

and employed the phrase "authority and control."[427] In its precautionary measures related to Guantánamo Bay detainees, the Commission stated that the key to applicability of the American Declaration is whether the individual in question is within the state's authority and control.[428] The Commission's *Saldaño* decision suggests that it will apply the American Convention in the same manner.

The European Court has also recognized jurisdiction on the basis of a state's "authority and control" over an individual outside of the state's national territory. This exceptional jurisdiction arises as a result of the "acts of state authorities" exception to territorial jurisdiction recognized in *Bankovic*.[429] In *Issa*, the Court recognized that

> a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.[430]

In *Al-Skeini* the Court stated emphatically that jurisdiction arises from "the exercise of physical power and control" over the individual.[431] Milanović cautions, though, that this personal model of jurisdiction may only exist under exceptional circumstances.[432]

Each of the three human rights systems recognizes extraterritorial jurisdiction based on a state's authority and control over an individual through the actions of its agent. This begs the question of what actions rise to the level of establishing authority and control over the individual. The European Court found the beating of the victim in *Isaak* was sufficient to bring him under the control of state agents and, therefore, the Turkish state. The Inter-American Commission went much further in *Alejandre*, where it held that shooting down an airplane brought those aboard under the control

427. Ferrer-Mazorra v. United States, Case 9903, Inter-Am. Comm'n H.R. Report No. 51/01, ¶¶ 182-83 (2001).

428. Decision on Request for Precautionary Measures, Mar. 12, 2002, *reprinted in* 41 I.L.M. 532, 533-34 (2002).

429. Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. at 19 (¶ 69) (admissibility decision).

430. Issa v. Turkey, 41 Eur. Ct. H.R. 567 (¶ 71) (2004).

431. Al-Skeini & Others v. United Kingdom, App. No. 55721/07, ¶136 (July 7, 2011).

432. Milanovic, *supra* note 345, at 130.

of the Cuban Air Force pilot and, by extension, the government of Cuba. By contrast, the European Court found that the firing of a missile by a NATO aircraft did not establish "effective control" giving rise to jurisdiction in *Bankovic*.[433] It cannot be said with certainty where the line should be drawn between acts of a state or its agent that amount to "control" and those that do not.

Fortunately, this is not an issue in determining whether jurisdiction exists in the context of habeas corpus. The right to habeas corpus is guaranteed to individuals who are deprived of their liberty by arrest or detention. There is little dispute that a person who is deprived of his or her liberty by these means is under the control of the person responsible for his or her detention, as detention arguably represents the height of control over an individual. In fact, even the respondent states in *Bankovic* agreed that the detention of an individual by state agents on foreign soil represented the "classic exercise" of state authority giving rise to jurisdiction.[434] This was confirmed by the Court in *Al-Skeini*, where it found that the decisive factor was "physical power and control" over the person.[435]

If a person is detained, he or she is under the control of his or her custodian. Under the jurisprudence of each of the human rights system examined here, if that custodian is acting as the agent of a state, the detainee is subject to the jurisdiction of that state regardless of the location of his or her detention. In the context of the European Convention, Goldman writes that a state exercises jurisdiction when its agents "detain or exercise physical power and control over a person anywhere in the world."[436] Under each of these human rights instruments, the detainee has the right to seek a judicial determination of the legality of his or her detention under the relevant instrument.

An additional basis for habeas corpus jurisdiction under human rights law is grounded in the physical place of detention. If a state detains a person outside of its territory, it will likely occur at a location under the state's control such as a prison or

433. The Court's analysis of applicant's "effective control" argument does not distinguish between jurisdiction based on control over an individual or control over territory. *Bankovic*, 2001-XII Eur. Ct. H.R. at 21-22 (¶ 75).

434. The NATO members cited the factual situations in *Issa* and *Ocalan* as examples. *Bankovic*, 2001-XII Eur. Ct. H.R. at ¶ 37.

435. *Al-Skeini*, App. No. 55721/07, ¶ 136.

436. Goldman, *supra* note 131, at 109.

military facility. Human rights bodies have acknowledged the existence of jurisdiction based on control over territory. In the *Wall* advisory opinion, the International Court of Justice found the Covenant was applicable to acts of Israel in the exercise of its jurisdiction over the Palestinian Territories.[437] While it did not define what constituted the "exercise of jurisdiction," in the next paragraph the Court noted the unique fact that for 37 years the Territories had been subject to Israel's territorial jurisdiction as an occupying power.[438]

In *Bankovic*, the European Court stated that one of the exceptions to the primarily territorial notion of jurisdiction was effective control over territory as a result of military action on at the invitation of another state. This exception was the basis for the House of Lords decision in *Al Skeini* and for European Court's admissibility of the complaint in *Al-Saadoon*. There, the Court found that the United Kingdom had control over the detention facility in question. Based on this control over the facility, the Court held that the detainees there were within the jurisdiction of the United Kingdom for purposes of the European Convention. The case clearly established the application of the "effective control of an area" exception to a detention facility and, significantly, to an area in territory outside the European *espace jurisdique*.[439]

As with control over an individual, control over the place of detention brings detainees under the jurisdiction of the state. Together, these two bases of jurisdiction compel the conclusion that any person who is detained extraterritorially by a state party to one of these human rights instruments is within that state's jurisdiction. Extraterritorial detainees are, therefore, subject to the habeas corpus guarantees of the applicable human rights instruments.

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437. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9).

438. *Id*. ¶ 112 (discussing applicability of the International Covenant on Economic, Social, and Cultural Rights).

439. It should be noted that many prior applications of this exception, including *Loizidou*, *Cyprus v. Turkey*, and *Solomou*, involved Turkish control over the territory of northern Cyprus. The Cyprus cases present a somewhat unique situation because the entire territory of Cyprus had been subject to the Convention prior to Turkey's 1974 occupation of the north. Thus, the European Court sought to avoid a "regrettable vacuum" in human rights protection in northern Cyprus. *Bankovic*, 2011-XII Eur. Ct. H.R. at 23 (¶ 80). *Al-Saadoon* confirms that this exception can apply outside the present or former territory of Convention states.

5.3.4 Summary

The conclusion that habeas corpus is available to persons detained extraterritorially is well-grounded in international law. Jurisdiction is triggered by control over the individual by the state or its agent, and detention represents the height of control over an individual. Jurisdiction may additionally be conveyed by the state's territorial control over the physical place of detention.[440] These principles ensure that the purpose of habeas corpus cannot be thwarted by holding a detainee "beyond the seas."[441]

Under the jurisprudence of the European Court, jurisdiction exists regardless of whether the actions of the state agent are unlawful[442] or contrary to instructions.[443] Jurisdiction also exists over the actions of a private individual done with the acquiescence of the state[444] and over actions conducted by virtue of state support, even if performed by a distinct entity.[445] This case law is significant in that it prevents a state from utilizing third parties to circumvent the existence of jurisdiction. Despite the strength of existing law, however, some gaps related to the extraterritorial application of habeas corpus remain. These include:

- The view by some states that the International Covenant on Civil and Political Rights does not apply outside of a state's territory based on the plain text of Article 2(1),[446] and the perceived inconsistency between Article 2(1) of the Covenant and General Comment 31.

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440. This conclusion is also consistent with the history and purpose of the international human rights system. As a third-party intervener in the *Al-Skeini* case argued, this system was a direct product of the atrocities of World War II. As such, it is inconceivable that the framers of the postwar human rights system would have envisioned a situation in which the Nazi state "could be held accountable for Buchenwald, but not for Auschwitz." Written comments of interveners Bar Human Rights Committee, et al., Al-Skeini v. United Kingdom, App. No. 55721/07, Part I(3), at 1.

441. *See* Habeas Corpus Act 1679, 31 Car. 2, c. 2, § 11, http://british-history.ac.uk/report.asp?compid=47484.

442. Issa v. Turkey, 41 Eur. Ct. H.R. 567 (¶71) (2004).

443. Ilaşcu & Others v. Moldava & Russia, 2004-VII Eur. Ct. H.R. at 65-66 (¶¶ 318-19).

444. *Id*.

445. Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. at 20-21 (¶ 77).

446. *See, e.g.* Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006). However, this position was advanced by the government of the United States prior to the United States Supreme Court's landmark 2008 decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), in which it found that

- Where the jurisdictions of a state's trial courts are determined by territory (i.e., judicial districts), identifying which court will have jurisdiction over a person held outside of the state's municipal territory.

- Because habeas corpus is based on the premise of physically producing the detainee before the inquiring court, logistical issues may exist when detention occurs extraterritorially and the distance between detainee and courtroom is substantial.

To ensure effective habeas corpus protection, it is critical that states accept the proposition that jurisdiction can be established by either control over the individual or territorial control. Resolution of the remaining concerns will ensure that habeas corpus is readily available in extraterritorial situations.

5.4 Procedural Concerns

Even where the habeas corpus provisions of human rights law are clearly applicable, not subject to derogation, and not in tension with international humanitarian law, the international law of habeas corpus may still fail to provide an effective remedy due to a lack of procedural clarity. The right to habeas corpus is eviscerated if procedures are not in place or lack clarity. At best, this allows for procedures, or the lack thereof, to unintentionally work to the disadvantage of the detainee. At worst, it allows for governments to intentionally avoid meaningful habeas corpus inquiry through procedural gamesmanship. This danger is illustrated in Guantánamo Bay detention review procedures. After the United States Supreme Court ruled *Hamdi v. Rumsfeld*[447] that detainees were entitled to judicial review of their detention, the U.S. Department of Defense established Combat Status Review Tribunals (CSRTs).[448] The role of the CSRTs was to make an initial determination of

habeas corpus was available to extraterritorial detainees under domestic law. David Jenkins argues that United States Supreme Court case law is actually moving toward extension of jurisdiction to all persons in the government's actual custody. David Jenkins, *Habeas Corpus and Extraterritorial Jurisdiction after* Boumediene*: Towards a Doctrine of 'Effective Control' in the United States*, 9 HUM. RTS. L. REV. 306, 326 (2009).

447. 542 U.S. 507 (2004).

448. *See* Boumediene v. Bush, 553 U.S. 723, 734 (2008).

the detainee's status to satisfy the due process requirements identified in *Hamdi*.[449] While this did technically provide for review, the procedures rules employed resulted in little meaningful review, as illustrated by Mark Denbeaux et al.[450] For example, detainees were denied the right to counsel, the government relied on classified evidence that was not made available to the detainee, and the detainee was only allowed to call other detainees as witnesses. [451] In its 2008 opinion in *Boumediene v. Bush,*[452] the Supreme Court held that detainees were entitled to regular habeas corpus review because of the circumscribed nature of the CSRT proceedings.[453]

This section turns to examining the potential procedural shortcomings of habeas corpus in international law. It begins by considering the scope of the current procedural requirements in human rights law. It next identifies issues that have arisen in habeas corpus litigation in the United States civilian courts related to Guantánamo Bay detainees, and examine how the courts responded. Finally, this section identifies potential procedural gaps in habeas corpus protection under human rights law.

5.4.1 Parameters of Existing Procedural Rules

Human rights institutions have indicated that procedural flexibility is an important aspect of habeas corpus proceedings by distinguishing these procedures from the fair trial rights required in criminal cases. The International Covenant, European Convention, and American Convention each contain an article guaranteeing

449. *Id*.

450. *See generally* Mark Denbeaux et al., *No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo*, 41 SETON HALL L. REV. 1231 (2011).

451. *Id*.

452. 553 U.S. 723 (2008).

453. *See generally id*. In *Boumediene* the Court determined that detainees were entitled to habeas corpus review, and that a portion of the Military Commissions Act (MCA) designed to strip the habeas corpus jurisdiction of civilian courts was an unconstitutional suspension of the habeas corpus because the alternative review procedure established was not a sufficient substitute. The alternate review procedure allowed for limited review of CSRT proceedings by the District of Columbia Circuit Court in which the court was bound by the CSRTs findings of facts and could not hear new evidence. While the *Boumediene* Court did not rule on the adequacy of the CSRTs, it noted that the limited nature of review under the MCA was part of the justification for granting access to more robust civilian habeas corpus. In doing so, it is clear that the Court did not see the CSRT procedures as an adequate substitute for habeas corpus. *Id*.

the right to a fair trial.[454] The guarantees contained in these articles include the right to a public trial, and, in criminal cases, the following: a presumption of innocence, time and facilities to prepare one's defense, to be informed of charges against oneself, to defend oneself personally or through counsel, to call and examine witnesses, and to be provided an interpreter.[455] None of the human rights institutions interpreting these instruments has held that habeas corpus always requires all of the guarantees of the corresponding fair trial article. The European Court of Human Rights has expressly rejected the proposition that all fair trial rights contained in Article 6 of the European Convention are applicable in every habeas corpus proceeding.[456] The fair trial requirement of a public hearing, for example, is not applicable in the context of habeas corpus.[457]

The European Court has instead emphasized that habeas corpus proceedings should satisfy fair trial requirements "to the largest extent possible under the circumstances of an on-going investigation."[458] The procedural requirements for habeas corpus depend on the "particular nature of the circumstances in which such proceedings take place."[459] The Inter-American Commission on Human Rights has likewise suggested that habeas corpus proceedings need not comply with all of the fair trial guarantees of a criminal trial found in Article XXVI of the American Declaration. Instead, it has stated that proceedings should "at a minimum comply with rules of procedural fairness."[460]

The European Court has developed the most substantial jurisprudence related to habeas corpus procedures, but even this is somewhat limited. Habeas corpus

454. ICCPR art. 14; European Convention art. 6; American Convention art. 8.

455. *See* ICCPR art. 14; European Convention art. 6; American Convention art. 8.

456. Reinprecht v. Austria, 2005-XII Eur. Ct. H.R., at 9 (¶ 46) (2005); Neumeister v. Austria, 7 Eur. Ct. H.R. (ser. A) at 43 (¶ 23) (1968). *But see* A. & Others v. United Kingdom, 2009 Eur. Ct. H.R. at 81 (¶ 81) (fair trial rights in Article 6(1) required in habeas corpus proceedings based on potential length of detention and lack of other judicial oversight).

457. *Reinprecht*, 2005-XII Eur. Ct. H.R., at 9 (¶ 41).

458. Garcia Alva v. Germany, App. No. 23541/94, ¶ 39 (2001). *See also* Migoń v. Poland, App. No. 24244/94, ¶ 79 (2002); Chruściński v. Poland, App. No. 22755/04, ¶ 55 (2007). *See supra* § 4.1.2 (detailing the procedural requirements of Article 5(4) of the European Convention).

459. De Wilde, Ooms & Versyp v. Belgium, 12 Eur. Ct. H.R. (ser. A) at 41-42 (¶ 78) (1971).

460. Ferrer-Mazora v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111, doc.20 rev. ¶ 213 (2001).

proceedings must be adversarial.[461] The detainee must be permitted to participate and present his or her case to the court,[462] though this does not necessarily have to occur in person.[463] Habeas corpus proceedings must ensure "equality of arms" between the parties at all times.[464] This includes ensuring access to government-held documents needed to effectively challenge the lawfulness of detention[465] and an opportunity to respond to the government's submissions.[466] The detainee must be informed of the reason for his or her detention.[467]

The European Court has suggested that the while the right to call and examine witnesses is required by the circumstances of some habeas corpus proceedings, it is not an absolute right in all proceedings.[468] Similarly, while detainees might have a right to appear in person before the reviewing court in person in some circumstances,[469] this is not the case in all situations.[470] The Court has never held that the right to counsel is absolute in habeas corpus proceedings, although it has held that

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461. *A & Others*, 2009 Eur. Ct. H.R. at 76-77 (¶204); *Reinprecht*, 2005-XII Eur. Ct. H.R., at 9 (¶ 46); Toth v. Austria, 224 Eur. Ct. H.R. (ser. A) at 23 (¶ 84) (1991); Sanchez-Reisse v. Switzerland, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51) (1986); Weeks v. United Kingdom, 114 Eur. Ct. H.R. (ser. A) at 32 (¶ 66) (1987).

462. *Sanchez-Reisse*, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51).

463. Giorgi Nikolaishvili v. Georgia, App. No. 37048/04, ¶ (2009); Bochev v. Bulgaria, App. No. 73481/01, ¶ 69 (2008).

464. *A & Others*, 2009 Eur. Ct. H.R. at 76-77 (¶204); *Reinprecht*, 2005-XII Eur. Ct. H.R., at 9 (¶ 46). *See also* Kawka v. Poland, App. No. 25874/94, at ¶57 (2001); Niedbała v. Poland, App. No. 27915/95, at ¶ 66 (2000); Nikolova v. Bulgaria, 1999-II Eur. Ct. H.R., at 16 (¶ 59). The Court's position on this issue has evolved since it found in Neumeister v. Austria in 1968 that no justification existed for application of the principle of equality of arms to Article 5(4) proceedings. Neumeister v. Austria, 8 Eur. Ct. H.R. (ser. A) at 43-44 (¶ 24) (1968).

465. Łaszkiewicz v. Poland, App. No. 28481/03, at ¶ 77 (2008); Lamy v. Belgium, 151 Eur. Ct. H.R. (ser. A) at 16-17 (¶ 29) (1989); *Weeks*, 114 Eur. Ct. H.R. (ser. A) at 32 (¶ 66). Where access is restricted based on a compelling public interest, the court must craft procedures to counterbalance this limitation. *A & Others*, 2009 Eur. Ct. H.R. at 81 (¶218).

466. Lanz v. Austria, App. No. 24430/94, at ¶ 62 (2002).

467. Van der Leer v. the Netherlands, 170 Eur. Ct. H.R. (ser. A) 3, 13 (¶ 28) (1990); *Weeks*, 114 Eur. Ct. H.R. (ser. A) at 32 (¶ 66).

468. Singh v. United Kingdom, 1996-I Eur. Ct. H.R. 280, 300 (¶ 67-68).

469. *Reinprecht*, 2005-XII Eur. Ct. H.R., at 9 (¶ 46); *Singh*, 1996-I Eur. Ct. H.R. 280, 300 (¶ 67-68); Kampanis v. Greece, 318 Eur. Ct. H.R. at 45 (¶ 47) (1995); Kremzow v. Austria, 268 Eur. Ct. H.R. (ser. A) 27, 45 (¶ 67) (1993); Sanchez-Reisse v. Switzerland, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51) (1986).

470. *Sanchez-Reisse*, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51).

counsel was required under the circumstances of particular cases.[471] Habeas corpus proceedings do not need to be public,[472] and there is no guaranteed right to appeal from a habeas corpus decision.[473]

In the Inter-American system, the focus of habeas corpus jurisprudence has been on access to the remedy, with little attention to the procedural requirements once it is available. The Inter-American Court of Human Rights has not addressed the specific procedural requirements of habeas corpus under the American Convention. The Inter-American Commission has decided that under the American Declaration habeas corpus proceedings must comply with "rules of procedural fairness."[474] The Commission has specified that this includes an opportunity to present evidence, to know the claims of the opposing party and to meet those claims, and representation by counsel or some other representative.[475]

The Human Rights Committee has likewise had little opportunity to address the procedural requirements of habeas corpus. Its contested cases have touched on the right to counsel, suggesting that such a right may exist without expressly saying so.[476] Other procedural questions have not been presented to and decided on by the Committee.

In summary, the procedures required in habeas corpus proceedings have not been defined to a high degree of specificity in human rights law. Because human rights institutions only address those cases which have been raised and contested, these institutions' opportunities to do so are naturally limited. Until a state's habeas corpus laws, rules, or practices are challenged, the procedural requirements of habeas corpus under these human rights will likely not be further delineated by human rights institutions. And even when they are defined, procedural requirements will likely be

471. *Singh*, 1996-I Eur. Ct. H.R. at 300 (¶ 67-68); Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser A) at 24 (¶ 60) (1979). For a full discussion of the right to counsel in Article 5(4) proceedings, *see supra* § 4.1.2.

472. *Reinprecht*, 2005-XII Eur. Ct. H.R., at 8 (¶ 41).

473. Ječius v. Lithuania, 2000-IX Eur. Ct. H.R. 235, 260-61 (¶ 100); Toth v. Austria, 224 Eur. Ct. H.R. (ser. A) at 23 (¶ 84) (1991).

474. Ferrer-Mazora v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111, doc.20 rev. ¶ 213 (2001).

475. *Id*.

476. *See supra* § 3.2.

tied to the particulars of a given situation given the nature of habeas corpus as a malleable remedy.

5.4.2 Procedural Issues Arising in the "War on Terror"

To provide the maximum protection for individual liberty, habeas corpus has developed as a flexible remedy meant to provide the level of judicial review appropriate for the circumstances. Because is of this nature, it is difficult to anticipate the procedural requirements that will be appropriate in a given situation. No set of procedural rules could hope to be applicable to every conceivable situation while still retaining the flexibility so critical to habeas corpus review. It is, however, important to anticipate procedural issues that are likely to arise, as these may present challenges to effective habeas corpus protection.

Most prominent are the procedural issues that have arisen in the courts of the United States surrounding habeas corpus procedures for "enemy combatants" captured in the post-2001 "war on terror" and detained at the Guantánamo Bay Naval Base in Cuba. These procedural issues are particularly relevant because they are based in the circumstances of an emerging new model of detention: battlefield capture and indefinite detention outside of the criminal justice paradigm as part of counterterrorism efforts. These cases present unique issues in situations outside of the traditional detention context which is typically based on criminal proceedings, where fair trial rules are applicable. They also involve attempts by the government to test the limits of the minimum procedures necessary to satisfy habeas corpus requirements.

One procedural issue present in these cases has been determining which party bears the burden of proof in habeas corpus proceedings. It is typically understood that the government bears the burden of proving that a habeas corpus petitioner is lawfully detained. The detainee may present contrary evidence, but is not required to do so. In an early Guantánamo Bay case, however, the United States Supreme Court suggested that it might be constitutional to allow for a rebuttable presumption that the government has met its burden, effectively a "burden-shifting scheme" requiring the

detainee to show that his detention was unlawful.[477] In another case, the Supreme Court described habeas corpus as a means for the *detainee* to demonstrate the unlawfulness of his imprisonment.[478]

In practice, the district courts handling the detainee cases seem to have consistently accepted that the burden remains with the government to prove the legality of detention. This burden was somewhat tempered following a 2010 decision of the U.S. Court of Appeals for the District of Columbia which held that the implausibility of the detainee's testimony might be added to the government's evidence to tip the balance.[479] A 2011 report on Guantánamo litigation by Wittes, Chesney, and Larkin described this as a partial "operational" shift in the burden of proof, as the detainee now has the burden to offer a credible account of his activities.[480]

A related issue is the standard of proof required to show that a detainee is legally detained in habeas corpus cases. In opening courtroom doors to Guantánamo detainees, the Supreme Court suggested that an individual might be detained on the basis of a showing of "credible evidence" by the government,[481] a fairly low threshold. Litigants have subsequently argued for the application of wide range of standards. The government has advocated for a "credible evidence" standard,[482] while detainees have argued for a standard of "clear and convincing evidence" or even "evidence beyond a reasonable doubt."[483] The detainees argue that a higher

477. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) ("[T]he Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.").

478. Boumediene v. Bush, 553 U.S. 723, 779 (2008).

479. Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).

480. BENJAMIN WITTES, ROBERT CHESNEY & LARKIN REYNOLDS, BROOKINGS INSTITUTION, THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 21 (2011), http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx.

481. *See Hamdi*, 542 U.S. at 534.

482. *See, e.g.,* Government's Brief Regarding Procedural Framework Issues at 11, *In re* Guantánamo Bay Detainee Litig., 634 F. Supp. 2d 17 (D.D.C. July 25, 2008).

483. *See, e.g.,* Petitioners Joint Memorandum of Law Addressing Procedural Framework Issues at 9-14, *In re* Guantánamo Bay Detainee Litig., 634 F. Supp. 2d 17 (D.D.C. July 25, 2008). For a discussion of these standard of proof issues, *see* WITTES ET AL, *supra* note 480, at 14.

standard is warranted in a situation such as this, where they are detained indefinitely outside of criminal proceedings.

The district courts formed a consensus that the government must show the legality of detention by a "preponderance of the evidence."[484] The Court of Appeals for the District of Columbia, however, has hinted that while the district courts' "preponderance" standard is acceptable, it is not necessarily required by the constitution.[485] The Court pointed to past habeas corpus cases in which the government satisfied its burden by providing "some evidence," and pointed out that in the pre-trial criminal context detention is allowed on "probable cause."[486] Determining where the burden of proof lies and the applicable standard of proof are important in any habeas corpus case. They take on added importance in situations where the detention is not the result of judicial action such as criminal proceedings or involuntary hospitalization proceedings. In such situations, habeas corpus is the only judicial check on the detention of an individual by the executive.

The use of classified evidence has also been a point of contention in the Guantánamo habeas cases. Typically, a habeas corpus petitioner is entitled to view the evidence that will be used against him or her. In terrorism-related cases, the government has sought to rely on evidence which it does not wish to disclose to detainees. A 2011 Congressional Research Report suggested that in these situations "preventing disclosure to the defendant, as well as to the public, may be required."[487] While federal statutes exist regarding the use of classified information in criminal prosecutions,[488] these laws are not applicable to habeas corpus cases.

In 2008 the U.S. District Court for the District of Columbia entered an order related to the use of classified evidence in these cases.[489] The order provides a

484. *See, e.g.*, *In re* Guantánamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Nov. 6, 2008); Al-Qurashi v. Obama, 733 F. Supp. 2d 69, 79 (D.D.C. Aug. 3, 2010). See WITTES ET AL, *supra* note 480, at 14 n.53.

485. Al Bihani v. Obama, 590 F.3d 866, 878 n.4 (D.C. Cir. 2010).

486. *Al Adahi*, 613 F.3d at 1104.

487. MICHAEL GARCIA, JENNIFER ELSEA, R. CHUCK MASON & EDWARD LIU, CONG. RESEARCH SERV., R40139, CLOSING THE GUANTÁNAMO DETENTION CENTER: LEGAL ISSUES, 49 (2011).

488. Classified Information Procedures Act, P.L. 96-456, *codified at* 18 U.S.C. app. 3 § 1-16.

489. *See In re* Guantánamo Bay Detainee Litig., 577 F. Supp. 2d 143 (D.D.C. 2008).

mechanism by which attorneys for habeas corpus petitioners may view the government's classified evidence.[490] At the same time, it prohibited the attorney from discussing the confidential information with other parties, including the habeas petitioner.[491] The actual detainee is not entitled to view evidence designated confidential.

Another matter before the courts has been the government's use of coerced or involuntary statements by the detainee, many of which are alleged to have been secured through the use of torture or other mistreatment. The district courts have agreed that involuntary statements can be excluded from consideration by the court, regardless of whether they appear to be true or not. Aside from the extreme ends of the spectrum, however, there is little agreement on where the line should be drawn to determine whether a statement is voluntary in the habeas corpus context.[492]

Other procedural issues relate to the admissibility of evidence under the evidentiary rules of the U.S. federal courts. These rules include a general prohibition against the admissibility of hearsay evidence.[493] Given the nature of these habeas proceedings, the government often seeks to introduce the statements of other detainees or information contained in intelligence or military reports. In some situations, the identity of the declarant is provided, while in others the source of the testimony is unknown. Judges have generally declined to apply the Federal Rules of Evidence in a strict manner. Hearsay evidence has generally been admitted, with the court then assessing its reliability in the context of the other evidence presented.[494] Courts have, however, been more skeptical of testimony conveying the purported statements of other detainees.[495]

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490. *Id*, at 148-51.

491. *Id*. at 150.

492. WITTES ET AL, *supra* note 480, at 84.

493. Hearsay is "a term applied to that species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). Hearsay is generally prohibited in the Anglo-American legal system, subject to certain defined exceptions. *See, e.g.*, FED. R. EVID. 801 *et seq.* (U.S.).

494. *See* WITTES ET AL, *supra* note 480, at 71

495. *Id.* at 78.

5. Challenges to Habeas Corpus

The government has also sought presumptions on the admissibility of evidence in many of the Guantánamo Bay habeas corpus cases, which have fallen into two categories. First, the government has sought presumptions that its physical or documentary evidence is authentic, thus allowing for its admission without showing a chain of custody to the government's original acquisition of the evidence to prove that it is, in fact, what it is purported to be. The district courts have split on these requests.[496] The other evidentiary presumptions requested by the government have been presumptions of accuracy. Here, the government has asked that the court presume that its evidence, once admitted, is credible. Judges have generally denied such requests, preferring to weigh the credibility of the evidence themselves in the context of the evidence as a whole.[497]

5.4.3 Summary

Habeas corpus is meant to be a flexible remedy that provides for the vindication of an individual's right to liberty in a manner appropriate to a given situation. Therefore, the procedural requirements for habeas corpus proceedings may vary depending on the circumstances. The procedural requirements that have thus far been established in international law, however, are fairly limited. Because no set of procedures may be applicable to every conceivable situation, anticipating the procedural issues that are likely to arise is an important step in ensuring that habeas corpus remains an effective remedy. The Guantánamo Bay cases are particularly instructive in this regard. Procedural questions that arise include:

- Which party holds the burden of proof in habeas corpus proceedings?
- What is the appropriate standard of proof necessary to determine whether a detention is lawful?
- Is the burden of proof or standard of proof consistent, or might they change depending on the nature of the detention? For example, should the standard of proof be higher in a non-criminal counterterrorism context that may involve lengthy or indefinite detention than in a criminal pre-trial context where the defendant will receive a speedy trial with fair trial guarantees?

496. *Id*. at 50-51.

497. *Id*. at 52.

- How should classified information be used in habeas corpus proceedings, and to what extent is a detainee is entitled to view such evidence?

- Can a detainee's involuntary statements be used in habeas corpus proceedings? What standard should be used for determining the voluntariness of statements?

- Should hearsay or other less-reliable evidence be allowed in all or some situations in habeas corpus proceedings?

- Is it ever appropriate to presume the authenticity or reliability of evidence submitted by the government in habeas corpus proceedings?

Conclusion

This chapter examined challenges to the availability and effectiveness of habeas corpus. Exceptions to the normal legal order can arise during armed conflict, following derogation from human rights obligations, or when a state acts extraterritorially. This chapter has sought to understand how the right to habeas corpus is impacted in these situations and where questions remain about their effect. It has also attempted to identify unanswered procedural questions and to understand how they have been exploited in the past. But why is it important to understand these challenges to habeas corpus? The next chapter will attempt to answer this question.

6
THE IMPORTANCE OF EFFECTIVE INTERNATIONAL HABEAS CORPUS GUARANTEES

The previous chapter identified the areas where the greatest challenges exist in ensuring effective habeas corpus under international law. This chapter will identify the reasons why the international guarantees of effective habeas corpus are not only desirable, but are of great importance. It will argue that while habeas corpus is of great significance to individual detainees, its value extends much farther. Habeas corpus is, in fact, of critical importance to the maintenance of the rule of law.

To fully understand the significance of habeas corpus, one must recognize that a court conducting habeas corpus proceedings is concerned with two different subjects. First, and most apparent, the proceeding is concerned with the detainee. It serves as a means for the detainee to bring his or her case before the court and to seek a determination of the legality of his or her detention. In doing so, habeas corpus also serves as an important means of ensuring other rights of the detainee are being respected. For example, the potential for the appearance of a detainee before a court may lessen the likelihood that he or she will be subjected to torture.

Second, habeas corpus proceedings are concerned with the detainee's custodian. Historically, the custodian is the real object of a writ of habeas corpus, potentially being ordered by the court to produce the detainee and to demonstrate that the detention is legal. Habeas corpus is usually directed at a government officer acting on the authority of the executive. The proceeding thus serves as a check on the actions of the custodian and, by extension, the executive. As a result, habeas corpus plays an important role in maintaining the relationship between the executive branch and the law within the domestic legal framework.

6.1 The Role of Habeas Corpus in Protection of the Individual Detainee

Although habeas corpus originated as a vehicle for compelling a person's appearance before a court, it soon evolved into a mechanism by which an individual

could challenge the basis of his or her own detention.[1] Habeas corpus provides the detainee with a means to secure a judicial order that her or she be brought before a court so that a judge can inquire into the legality of his or her detention. If the court determines that the detention is unlawful, it is empowered to order the release of the detainee. Habeas corpus supports the substantive rights of an individual in two ways. First, it serves the direct function of protecting the right to personal liberty. Second, habeas corpus serves as an important means of guaranteeing other substantive rights. In both cases, the existence of international guarantees of habeas corpus are critical.

6.1.1 Protecting Personal Liberty

"The purpose of the writ of habeas corpus is to set a person free," writes Luis Kutner.[2] The most fundamental function of habeas corpus is also the most apparent. Habeas corpus protects personal liberty by serving as a check against unlawful or arbitrary imprisonment.[3] Through its simple procedure, it ensures that the deprivation of liberty only occurs in accordance with the law.

In 1765, William Blackstone wrote of the importance of personal liberty in English law.[4] He described personal liberty as the power to go wherever one's inclination might direct without imprisonment or restraint unless provided by the law.[5] Any confinement of the person, even within a private house or by detention in the street, amounted to imprisonment.[6] Blackstone considered unjust deprivation of liberty by the government a greater threat to individual rights than the infliction of physical violence or even death at the hands of the government. "[C]onfinement of a person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of

1. For a discussion of the historical development of habeas corpus, *see supra* § 1.1.

2. Luis Kutner, *World Habeas Corpus for International Man: A Credo for International Due Process of Law*, 36 U. DET. L.J. 235, 255 (1959).

3. G.A. Res. 34/178, U.N. Doc. A/RES/34/178 (Dec. 17, 1979).

4. 1 WILLIAM BLACKSTONE, COMMENTARIES *130.

5. *Id*.

6. *Id*. at *132.

arbitrary government."[7] The importance of protecting against arbitrary or illegal detention was therefore critical

Habeas corpus provided this critical means of protecting personal liberty. Blackstone explained that anyone deprived of his liberty shall "have a writ of habeas corpus, to bring his body before the court . . . who shall determine whether the cause of his commitment to be just."[8] As a result of the Habeas Corpus Act, "no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer."[9] Blackstone described habeas corpus as "another magna carta"[10] and the "stable bulwark of our liberties."[11]

Over a century later, Chief Justice Salmon P. Chase of the Unites State Supreme Court wrote, "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom."[12] It was the intent of the framers of the United States Constitution "that every citizen may be protected by judicial action from unlawful imprisonment."[13] Thus, Chase observed, courts had consistently tended to widen and enlarge their habeas corpus jurisdiction to protect personal liberty.[14]

In line with this history, the most direct concern of habeas corpus in international law is the protection of personal liberty by providing a means to challenge arbitrary or unlawful detention. Early in the drafting of the Universal Declaration of Human Rights[15] and International Covenant on Civil and Political Rights,[16] Charles Malik referred to habeas corpus as "a milestone in the history of

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7. *Id*. at *131.

8. *Id*.

9. *Id*.

10. 3 WILLIAM BLACKSTONE, COMMENTARIES *135.

11. 1 WILLIAM BLACKSTONE, COMMENTARIES *133.

12. *Ex parte* Yerger, 75 U.S. (8 Wall) 85, 95 (1868).

13. *Id*. at 101.

14. *Id*. at 102.

15. G A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter "UDHR" or "Universal Declaration"].

16. 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter "ICCPR" or "Covenant"].

human liberty."[17] The International Covenant, the European Convention for the Protection of Human Rights and Fundamental Freedoms,[18] the American Declaration of the Rights and Duties of Man,[19] and the American Convention on Human Rights[20] each contain a specific guarantee of the right to a judicial determination of the legality of a person's detention, distinct from other general remedies for violations of rights. In each of these instruments, this right appears as a subsection of the general article guaranteeing liberty of person.

Larry May notes that habeas corpus is often considered to be a procedural right which sets out a vehicle for the enforcement of other, substantive rights but conveys no individual protection on its own. [21] This is not an entirely accurate assessment, however, as in each of the major human rights instruments, habeas corpus is defined as the right of a person deprived of his or her liberty to take proceedings before a court to determine the lawfulness of the detention and to order his or her release if it is unlawful.[22] The substantive right to be free from unlawful detention is thus an integral part of these international habeas corpus guarantees, separate from other liberty of person provisions.

While habeas corpus serves other functions which will be detailed later, its primary concern is with personal liberty, as is evident in the history of habeas corpus and the text of the international guarantees. It exists, as Zechariah Chafee observed, as "a world-wide barrier against the knock on the door at 3 A.M."[23]

17. Comm'n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 8 (May 10, 1948).

18. 213 U.N.T.S. 222 (entered into force on Sept. 3, 1953) [hereinafter 'European Convention'].

19. O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter "American Declaration"].

20. 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter "American Convention"].

21. LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS 102 (2011). May writes, "[p]rocedural rights do not normally have value in themselves, but only as they somehow support substantive rights." *Id*.

22. *See* ICCPR art. 9(4); European Convention art. 5(4); American Convention art. 7(6).

23. Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B. U. L. REV. 143, 144 (1952).

6.1.2 Protecting Other Substantive Rights

While the most obvious function of habeas corpus is to protect personal liberty, the proceedings also serve as a means of protecting other fundamental human rights. As Blackstone noted, the prisoner's sufferings are "unknown or forgotten," as they occur beyond public scrutiny.[24] By providing a means for a detainee to initiate judicial oversight of his or her detention, habeas corpus allows the detainee to bring other violations into the light of day. The potential for the personal appearance of the detainee before the court only enhances the effectiveness of this remedy in the prevention of other abuse.

This relationship between habeas corpus and other substantive rights was notably addressed by the Inter-American Court of Human Rights in its landmark advisory opinion *Habeas Corpus in Emergency Situations*.[25] Although habeas corpus is not enumerated as a non-derogable right under the American Convention,[26] the Convention prohibits derogations from "the judicial guarantees essential for the protection of [non-derogable] rights."[27] The question presented to the Court in the *Habeas Corpus* case was whether habeas corpus, as guaranteed in the otherwise-derogable Article 7(6), was one of these "judicial guarantees," and, therefore, non-derogable. The inquiry would turn on whether habeas corpus protected any non-derogable rights.

The Court observed that, as a judicial mechanism to bring the detainee physically before the court to determine the lawfulness of his or her detention, habeas corpus does much more than simply providing a means of vindicating personal liberty.[28] It found that by providing judicial oversight, habeas corpus plays 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

24. 1 WILLIAM BLACKSTONE, COMMENTARIES *131.

25. Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8 (Jan. 30, 1987).

26. American Convention art. 27. *See supra* § 5.2.

27. *Id*.

28. *Habeas Corpus*, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 33, 35.

against torture or other cruel, inhumane, or degrading punishment or treatment."[29] The Court noted that in the preceding decades the peoples of the Americas had experienced disappearances, murder, and torture committed by or tolerated by governments.[30] It found that "[t]his experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended,"[31] and concluded that the right to habeas corpus was non-derogable because it was a judicial guarantee essential to protecting the non-derogable rights to life in Article 4 and to humane treatment in Article 5.[32]

General Comment 29, promulgated by the Human Rights Committee just days before the attacks of September 11, 2001, also emphasized the importance of procedural guarantees in protecting non-derogable rights.[33] It stated that "[i]n order to protect non-derogable rights," the right to habeas corpus "must not be diminished by a State party's decision to derogate from the Covenant."[34] The 2008 report of the Working Group on Arbitrary Detention also argued for the non-derogability of habeas corpus, emphasizing its role in preventing secret detention.[35]

Habeas corpus acts to protect these other substantive rights by providing a process by which every detainee can step out of the shadows of the prison into the public light. May asserts that if no process exists for the secret detainee to hold his or her custodians to public accountability for violations of substantive rights, the detainee is effectively without those rights, thus, "the deprivation of the right to

29. *Id*. ¶ 35.

30. *Id*. ¶ 36.

31. *Id*. ¶ 36.

32. The Court also considered whether habeas corpus remains available to vindicate the right to personal liberty, a right subject to derogation. The Court answered this question affirmatively, holding that even when a state derogated from the right to personal liberty, habeas corpus provided important judicial oversight to guarantee that the emergency measures were proportional and legal; in other words, that the derogation complied with the derogation regime of the Convention. *Id*. ¶¶ 37-40.

33. Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 15 (August 31, 2001).

34. Id. ¶ 16.

35. Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, ¶ 292(b), U.N. Doc. A/HRC/13/42 (Feb. 19, 2010).

habeas corpus could very well result in the effective deprivation of all other rights for the prisoner." [36]

Like the *Habeas Corpus* advisory opinion, May observes that habeas corpus has the potential to prevent several types of wrongdoing in addition to the role of preventing arbitrary or unlawful imprisonment. Habeas corpus proceedings serve a number of functions. First, they have the potential to expose extrajudicial executions.[37] By requiring that the detainee be brought before the court, habeas corpus prevents against detainees simply disappearing.[38] This does not guarantee a detainee will not be summarily executed, but does provide a means for any such wrongdoing to be brought to light.[39] Second, habeas corpus exposes torture, or at least the visible evidence thereof.[40] May recognizes that excuses can be made about the cause of injuries to a detainee, but suggests that such excuses can only cover up wrongdoing for a limited time, particularly in a society with a free press.[41] Finally, habeas corpus exposes other forms of abuse against the detainee. Even if visible signs of the abuse are not apparent, the detainee will have an opportunity to tell the court about the abuse.[42]

In all of these situations, the value of habeas corpus relates to the normative principle of 'visibleness.'[43] May describes this as the idea that rulers must make their actions transparent.[44] While the principle of 'visibleness' does not guarantee that detainees will not be wrongly or unfairly treated in violation of their rights, it ensures that such illegal action cannot be done completely in secret.[45] Habeas corpus provides a procedure by which the detainee remains visible. Echoing Blackstone, May writes

36. MAY, *supra* note 21, at 95.

37. *Id*. at 99.

38. *Id*. *See also* G.A. Res. 34/178, U.N. Doc. A/RES/34/178 (Dec. 17, 1979).

39. MAY, *supra* note 21, at 99.

40. G.A. Res. 34/178, U.N. Doc. A/RES/34/178 (Dec. 17, 1979)

41. MAY, *supra* note 21, at 99-100.

42. *Id*. at 100.

43. *Id*.

44. *Id*. at 101.

45. *Id*.

that "[t]he ruler or jailer who discovers that he or she can render a person invisible from public view may . . . use this power for wrongdoing, or for hiding wrongdoing, and such abuse of power is at least partially stopped by the anticipation of habeas corpus. . . ."[46] The prospect that a wrongdoing will be revealed deters against its occurrence in the first place.[47]

The propensity for secret detention and disappearances in the states of the Americas[48] provided the impetus for the Inter-American Court's bold *Habeas Corpus* advisory opinion. These abusive practices stood in clear opposition to May's principle of 'visibleness,' and created an environment conducive to violations of other substantive rights. The Inter-American Court recognized the strong connection between habeas corpus and the protection of other substantive rights in holding that habeas corpus is a non-derogable right.

6.3 Importance of International Law Guarantee

The Inter-American Court's action also underscores the importance of specifically guaranteeing habeas corpus in *international* law. The Court recognized that habeas corpus protects personal liberty and other important substantive international human rights, most notably the right to life and the right to be free from torture.[49] The fact that habeas corpus is guaranteed in international law is significant for three reasons.

First, international and regional habeas corpus guarantees provide a common remedy to vindicate these substantive rights regardless of domestic protection. Sixty-eight of 181 national constitutions expressly guarantee the right to habeas corpus.[50]

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46. *Id*. at 100.

47. MAY, *supra* note 21, at 102.

48. *See supra* § 4.2 for a discussion of disappearances in the Inter-American system.

49. Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 35 (Jan. 30, 1987).

50. Sixty-four contain a specific guarantee of habeas corpus, while four more prohibit the suspension of habeas corpus. *See See* ALB. CONST. art. 28(4); ANDORRA CONST. art. 9(3); ANGL. CONST. art. 38; ARG. CONST. art. 43; BELR. CONST. 25(2); BELIZE CONST. art. 5(2)(d); BOL. CONST. art. 18; BRAZ. CONST. art. 5(LXVII); BULG. CONST. art. 30(3); CAN. CHARTER RTS. & FREEDOMS art. 10(c); CAPE VERDE CONST. art. 34(1); CHILE CONST. art. 21; COLOM. CONST. art. 30; COSTA RICA CONST. art. 48; CROAT. CONST. art. 24(3); CYPRUS CONST. art. 11(7); DEN. CONSt. § 71(6); DOMINICA CONST. art. 16(1); DOM. REP. CONST. art.8(2); E. TIMOR CONST. art. 33; ECUADOR CONST. art. 93; EL SAL. CONST.

Another fifty provide for the general judicial redress for violations of rights.[51] While these domestic constitutional guarantees require a remedy for unlawful detention, they may not specify all of the procedural elements of international guarantees that make habeas corpus such an effective vehicle for protecting other substantive rights. For example, these broader domestic constitutional remedies may not provide for the possibility that the detainee be brought before the court in person or that the hearing occur with great speed.

Second, international and regional habeas corpus guarantees have the potential to provide important protection during armed conflict and extraterritorially, when domestic guarantees may not be applicable.[52] Similarly, the right to habeas corpus may be subject to suspension under many domestic systems, leaving a gap in

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art. 11; EQ. GUINEA CONST. art. 13(i); ERI. CONST. art. 17(5); ETH. CONST. art. 19; FIJI CONST. art. 27(1)(e); FIN. CONST. § 7; HOND. CONST. art. 182; ICE. CONST. art. 67; INDIA CONST. arts. 21 & 32(2); IR. CONST. art. 40(4)(2); JAPAN CONST. art. 34; KAZ. CONST. art. 16(2); S. KOREA CONST. art. 12(6); KYRG. CONST. art. 16(3); LIBER. CONST. art. 21(g); MALAY. CONST. art. 5(2); MARSH. IS. CONST. § 7; MICR. CONST. § 8; MOZAM. CONST. art. 102; NAURU CONST. art. 5(4); NETH. CONST. art. 15(2); N.Z. BILL RTS. art. 23(1)(c); OMAN CONST. art. 24; PAN. CONST. art. 23; PARA. CONST. art. 133; PAUPA N.G. CONST. art. 42(5); PERU CONST. art. 200; PHIL. CONST. art. 15; POL. CONST. art. 41(2); PORT. CONST. art. 31; SAMOA CONST. art. 6(2); SAO TOME & PRINCIPE CONST. art. 38; SEY. CONST. art. 18(8); SING. CONST. art. 9(2); S. AFR. CONST. art. 35(2)(d); SPAIN CONST. art. 17(4); SWED. CONST. art. 9; SWITZ. CONST. art. 31; TOGO CONST. art. 15; TONGA CONST. art. 9; TRIN. & TOBAGO CONST. art. 5(2)(c)(vi); TURK. CONST. art. 19; UGANDA CONST. art. 23(9); UKR. CONST. art. 29; U.S. CONST. art. I, § 9, cl. 2; URU. CONST. art. 17; VENEZ. CONST. art. 27.

51. *See* ANT. & BARB. CONST. art. 5, 18; ARM. CONST. arts. 16, 18; AZER. CONST. arts. 28, 60; BAH. CONST. arts. 19, 28; BANGL. CONST. arts. 32, 44; BARB. CONST. arts. 13, 24; BOTS. CONST. arts. 5, 18; BURUNDI CONST. arts. 16, 41; EST. CONST. arts. 15, 20; GAM. CONST. arts. 19, 37; GEOR. CONST. art. 18, 42; GHANA CONST. arts. 14, 33; GREN. CONST arts. 3, 16; GUAT. CONST. arts. 4, 29; GUINEA-BISSAU CONST. arts. 30, 33; HAITI CONST. arts. 24, 27; HUNG. CONST. arts. 55, 57; ITALY CONST. arts.13, 24; JAM. CONST. arts. 14, 17; KENYA CONST. arts. 72, 84; KIRIBATI CONST. arts. 5, 17; LESOTHO CONST. arts. 1, 22; LITH. CONST. arts. 20, 30; MACED. CONST. arts. 12, 50; MALAWI CONST. arts. 15, 18; MALDIVES CONST. art. 15(1)(b) & (2); MALTA CONST. arts. 34, 46; MAURITIUS CONST. arts. 5, 17; MOLD. CONST. arts. 20, 25; MONG. CONST. arts. 16(13) & (14); NAMIB. CONST. arts. 5, 7; NICAR. CONST. arts. 33, 45; NIG. CONST. arts. 35, 46; ROM. CONST. arts. 21, 23; ST. KITTS & NEVIS CONST. arts. 5, 18; ST. LUCIA CONST. arts. 3, 16; ST. VINCENT CONST. arts. 3, 16; SERB. & MONT. CHARTER HUM. & MINORITY RTS. & CIVIL LIB. arts. 9, 14; SIERRA LEONE CONST. arts. 17, 28; SLOVK. REP. CONST. arts. 17, 46; SLOVENIA CONST. arts. 19, 23; SOLOM. IS. CONST. arts. 5, 18; SURIN. CONST. arts. 10, 16; SWAZ. CONST. arts. 5, 17; TURKM. CONST. arts. 21, 40; TUVALU CONST. arts. 17, 38; U.A.E. CONST. arts. 26, 41; VANUATU CONST. arts. 5(1)(b), 6(1); ZAMBIA CONST. arts. 13, 28; ZIMB. CONST. arts. 13, 24.

52. Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists*, 12 J. CONFLICT & SEC. L. 223, 236-38 (2007). *See supra* §§ 5.1 & 5.2 (identifying questions about the applicability of habeas corpus in these situations); *see infra* §§ 7.3.1 & 7.3.3 (asserting the applicability of habeas corpus in these situations).

protection of fundamental substantive rights. Assuming they are non-derogable, international habeas corpus guarantees therefore take on even greater significance.[53]

Finally, William Schabas reminds us of the important fact that the modern human rights system was heavily influenced by World War II and the atrocities committed by nations against their own people.[54] This experience prompted the collective realization that the rights of all human beings should be the subject of international protection, and not solely a matter of domestic concern. Again, in such situations international and regional habeas corpus guarantees play a critical role in the protection of fundamental human rights, particularly in those states where citizens have access to international and regional institutions.

6.2 Habeas Corpus and the Rule of Law

The role of habeas corpus in protecting the right to personal liberty and other substantive rights is significant. Beyond the obvious importance to the individual, habeas corpus serves another critical role with an impact well beyond the individual detainee. As a unique and powerful check on executive action, habeas corpus promotes the international rule of law and plays a key role in protecting against the erosion of these principles during emergencies. Because of this, governments frequently seek to deny the applicability of habeas corpus. For these reasons, the existence of effective habeas corpus is critical.

6.2.1 Understanding the Rule of Law and the Role of Habeas Corpus

The concept of the "rule of law" has long been lauded as an important characteristic of government. The phrase was popularized in the late 19th Century in a book on English constitutional law written by A.V. Dicey.[55] Tom Bingham shows that the concept of the rule of law clearly predates Dicey's work, with some scholars

53. *See* de Londras, *supra* note 52, at 255. *See supra* § 5.2 (discussing the derogability of habeas corpus); *see infra* § 7.3.2 (asserting the non-derogability of habeas corpus).

54. William Schabas, Inaugural Lecture at Leiden University: The Three Charters: Making International Law in the Post-War Crucible, at 10-11 (Jan. 25, 2013), http://www.mediafire.com/view/?p7zisqsup89ay0h.

55. *See* A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1924).

tracing it back as far as Aristotle.[56] Brian Tamanaha observes that nearly everyone supports the rule of law,[57] and that it is viewed as a key to economic development and of individual freedom.[58] Political leaders from "a variety of systems, some of which have rejected democracy and individual rights, some of which are avowedly Islamic, some of which reject capitalism, and many of which oppose liberalism and are expressly anti-Western" all express their support for the rule of law.[59] Thomas Carothers reflects, "whether it's Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law. . . ."[60]

Tamanaha calls this ostensibly 'unanimous' support for the rule of law "a feat unparalleled in history."[61]

> No other single political idea has ever achieved global endorsement. Never mind, for the moment, an understandable skepticism with respect to the sincerity of some of these avowed commitments to the rule of law. The fact remains that government officials worldwide advocate the rule of law and, equally significantly, that none make a point of defiantly rejecting the rule of law.[62]

Respect for the rule of law is uniformly accepted as a measure of government legitimacy.[63]

Despite its status as an agreed global ideal,the rule of law. is an "exceedingly elusive notion," rarely defined by the politicians, journalists, dissidents, or citizens who use the phrase.[64] Tamanaha observes that the rule of law occupies the "peculiar state of being the preeminent legitimating political idea in the world today, without

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56. TOM BINGHAM, THE RULE OF LAW 3 (2010).

57. BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004).

58. *Id*. at 2.

59. *Id*. A cross-section of those extolling the rule of law includes Presidents George W. Bush of the United States, Vladimir Putin of Russia, Robert Mugabe of Zimbabwe, and Mohammed Khatami of Iran. *Id*.

60. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998).

61. TAMANAHA, *supra* note 57, at 3.

62. *Id*.

63. *Id*.

64. *Id*.

agreement upon precisely what it means,"[65] and he notes that some view the rule of law as a formal concept focused solely on the process by which law is adopted and applied.[66] Others consider individual rights to be a part of the rule of law.[67] Still others believe democracy, or even favorable social and economic conditions, are encompassed in the rule of law.[68]

Many attempts have been made to define the basic features of the rule of law. Bingham finds the core principles to be "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts,"[69] while Carothers defines the rule of law as a system in which laws are public knowledge, are sufficiently clear, and are equally applied.[70] U.N. Secretary General Kofi Annan defined the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[71]

Whatever the definition, it is clear that the principle of equal application of the law is of central significance to the rule of law.[72] Tamanaha defines the equality requirement as meaning that the law applies equally to all without taking into account any characteristics of the individual.[73] This principle of legal equality is itself

65. *Id*. at 4.

66. *Id*. at 91.

67. TAMANAHA, *supra* note 57, at 91.

68. *Id*.

69. BINGHAM, *supra* note 56, at 8.

70. Carothers, *supra* note 60, at 96.

71. Report of the Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶ 6, U.N. Doc S/2004/616 (Aug. 23, 2004). This is the definition used in the rule of law initiatives of the United Nations. *See* UNITED NATIONS AND THE RULE OF LAW, http://www.un.org/en/ruleoflaw/.

72. Report of the Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶ 6, U.N. Doc S/2004/616 (Aug. 23, 2004).

73. TAMANAHA, *supra* note 57, at 94.

enshrined in international law.[74] It is likewise clear that this legal equality is particularly focused on the fact that the government and its agents are subject to the law in the same way as others. This point is truly the core of the rule of law. Tamanaha argues that "[t]he broadest understanding of the rule of law, a thread that has run for over 2,000 years, often frayed thin, but never completely severed, is that the sovereign, and the state and its officials, are limited by the law."[75] The United States Supreme Court quoted Harry Jones for the proposition that the rule of law ensures that "all members of society, government officials as well as private persons, are equally responsible to the law. . . ."[76]

Because the rule of law dictates that even the government must operate within the bounds of the established law, including applicable international law, the principle of the rule of law is recognized as crucial to the protection of human rights. The preamble of the Universal Declaration of Human Rights states that, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[77] The Declaration proclaims that human rights are critical to the maintenance of justice and peace, and that the rule of law is critical to the maintenance of human rights.[78] Mary Ann Glendon argues that the Declaration sets forth several of the elements of the rule of law as individual rights.[79]

Carothers writes that the rule of law makes individual rights possible.[80] The Inter-American Court wrote that "the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its

74. ICCPR, art. 26.

75. TAMANAHA, *supra* note 57, at 114.

76. Seminole Tribe v. Florida, 517 U.S. 44, 136 n. 32 (1996) (quoting Harry Jones, *The Common Law in the United States: English Themes and American Variations, in* POLITICAL SEPARATION AND LEGAL CONTINUITY 128-29 (Harry Jones ed. 1976)).

77. UDHR, preamble ¶ 3.

78. *Id*., preamble para. 1.

79. Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT'L HUM. RTS. 1, 5 (2004).

80. Carothers, *supra* note 60, at 96.

meanings."[81] These individual rights are, in turn, at the core of democracy.[82] The Inter-American Court emphasized that individual rights cannot be disassociated from the "effective exercise of representative democracy."[83] The United Nations General Assembly has affirmed the links between human rights, the rule of law, and democracy.[84] Carothers writes that a "government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law."[85] Thus, he describes the relationship between the rule of law and democracy as "profound."[86]

The right to habeas corpus is intimately related to the establishment and maintenance of the rule of law. As discussed earlier, habeas corpus proceedings are concerned with two subjects: the detainee and his or her custodian. Justice Thomas Cooley of the Michigan Supreme Court highlighted in 1867 the fact that a writ of habeas corpus is "directed to, and served upon, not the person confined, but his jailor."[87] It is the relationship of habeas corpus to the custodian that is of particular significance to the rule of law.

Tamanaha emphasizes that one of the hallmarks of the rule of law is that everyone, including the government, is bound by the law.[88] Habeas corpus originated not as a means of protecting individual rights, but as procedure for the English judiciary to command the appearance of a person before the court.[89] As habeas corpus evolved, it became a process to examine the basis of an individual's detention by requiring the appearance of his or her custodian to provide the legal basis for a person's detention.[90] The writ was theoretically issued by courts to enforce the king's

81. Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 26 (Jan. 30, 1987).

82. Carothers, *supra* note 60, at 96-97.

83. *Habeas Corpus*, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 20.

84. G.A. Res. 67/1, U.N. Doc. A/RES/67/1 (Nov. 30, 2012).

85. Carothers, *supra* note 60, at 97.

86. *Id*. at 96.

87. *In re* Jackson, 15 Mich. 417, 439 (1867).

88. TAMANAHA, *supra* note 57, at 114.

89. *See supra* § 1.1.1 (examining the origins of habeas corpus in English law).

90. *Id*.

prerogative to know why one of his subjects was imprisoned. However, by the fifteenth century, English courts were inquiring into detentions ordered by the king's Privy Council to ensure that they conformed to positive law.[91] By the 1600s, habeas corpus was "deemed less an instrument of the King's power and more a restraint upon it."[92]

Thus, habeas corpus marked a watershed moment in English law by ensuring that the executive's actions conformed to the rule of law, even if the law was established by the executive. The role of habeas corpus in regulating the executive only grew in importance as the function of making law slowly shifted from the executive to a separate legislative branch. It provided a unique and direct mechanism to ensure that the executive did not exceed the established limits of its power by requiring the executive, or its agent, to provide the legal basis for its actions.

Bingham identified habeas corpus as one of the key milestones in the development of the rule of law.[93] He wrote that habeas corpus is "widely recognized as the most effective remedy against executive lawlessness that the world has ever seen."[94] Blackstone recognized that habeas corpus prevented arbitrary government action,[95] ensuring that the government conformed to the law.

At least three features of habeas corpus contribute to its effectiveness in maintaining the rule of law. First, habeas corpus ensures that the actions of state agents conform to the positive law. Those agents, typically acting on behalf of the executive, must be prepared to show that the detention of every individual has a basis in the law, regardless of whether that law was promulgated by executive or legislative authority.

Second, habeas corpus promotes the rule of law by providing a procedure to ensure that the positive law that provides the legal basis for detention conforms to fundamental individual rights. These fundamental rights may be established by

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91. *See supra* § 1.1.2 (discussing the extension of habeas corpus to executive actions).

92. Boumediene v. Bush, 553 U.S. 723, 741 (2008).

93. BINGHAM, *supra* note 56, at 13. The common law development of habeas corpus, the 1628 Petition of Right, and the Habeas Corpus Act of 1679 are three of twelve historical milestones he identifies in the development of the rule of law.

94. *Id*. at 14.

95. 1 WILLIAM BLACKSTONE, COMMENTARIES *131.

written constitutions, constitutional case law, or international and regional human rights guarantees. This function guarantees that fixing what Kutner calls "the location of the line between lawful and unlawful imprisonment"[96] is not completely within the discretion of the organ of government responsible for promulgating the law, but is instead limited by fundamental rights.[97]

Third, habeas corpus proceedings are judicial proceedings. This necessarily requires the existence of at least some minimal separation of powers between courts and the detaining authority for the first function described above, and between the courts and the lawmaking authority for the second. For example, the framers of the United States Constitution viewed habeas corpus as essential to the separation of powers between the legislative, executive, and judicial branches of government enshrined in that document.[98] The writ provided the judiciary with a means of maintaining "the delicate balance of governance that is itself the surest safeguard of liberty."[99] This view was reiterated by the United States Supreme Court in its landmark 2008 opinion in *Boumediene v. Bush*, which granted access to habeas corpus relief to Guantánamo Bay detainees. The Court wrote that "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."[100]

While the Court was referring to the separation of powers between three equal branches of government common in liberal democracies, this last quote rings true even in situations where executive and legislative powers are consolidated. For example, following the 1964 military coup in Brazil, that country's legislature was rendered impotent and the military-appointed president was given expanded power.[101]

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96. Kutner, *supra* note 2, at 251. Kutner correctly observes that this line is drawn by other parts of the law, and can be drawn broadly. However, since the time of Kutner's observation, international human rights law increasingly places limits on where this line is fixed, and habeas corpus courts can ensure the line conforms to these fundamental rights.

97. For a discussion of the limits of habeas corpus in the absence of fundamental rights, *see* Luis Kutner, *A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights*, 28 TULANE L. REV. 417, 432-33 (1954).

98. Boumediene v. Bush, 553 U.S. 723, 743 (2008).

99. *Id*. at 745 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)).

100. *Id*. at 765.

101. Martin Feinrider, *Judicial Review and the Protection of Human Rights under Military Governments in Brazil and Argentina*, 5 SUFFOLK TRANSNAT'L L. REV 171, 177-78 (1981).

The Brazilian courts, however, maintained a degree of independence and, by ruling on habeas corpus petitions, provided some check on the actions of the military government.[102]

The three functions that habeas corpus serves in maintaining the rule of law are all clearly present in international habeas corpus guarantees. The habeas corpus guarantees in the Universal Declaration, the International Covenant, the European Convention, and the American Convention all specifically place the judiciary in the position of regulating the exercise of authority by the state actors who detain and the state actors who make law, and provide a direct and effective procedure for doing so. In the International Covenant and European Convention, habeas corpus is the only procedure in which a court is specifically put in this role of regulating other organs of the state; [103] in the American Convention it shares this role with the related, but more general, remedy of *amparo*.[104] When it is non-derogable habeas corpus considerably enhances its importance in regulating the actions of the state. It is for this reason that habeas corpus is of unique significance to protection of the rule of law in the international system. This significance is enhanced by the potential of habeas corpus to guard against one particular threat to the rule of law, individual rights, and democracy: the *state of exception*.

6.2.2 The State of Exception

The term *state of exception* is used here to describe the phenomenon in which a state operates under a domestic legal framework designed to address grave emergencies. According to David Clark and Gerald McCoy, these emergencies may include: the use of, or threat to use, force to undermine public security; wars; riots; famines; earthquakes; floods; epidemics; the collapse of civil government; internal

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102. *See* Brian Farrell, *Habeas Corpus in Times of Emergency: A Historical and Comparative View*, PACE INT'L L. REV. ONLINE COMPANION 74, 84-86 (2010).

103. The International Covenant and European Convention each contain a separate article providing for an "effective remedy" for violation of rights, but neither of these articles specifies that this be a judicial remedy or that it occur in a speedy manner. ICCPR, art. 2(a) & (b); European Convention, art. 14. The International Covenant contemplates that this remedy could be provided by administrative, legislative, or "other competent" authority in addition to courts. ICCPR, art. 2(b).

104. In addition to habeas corpus, the American Convention provides for "simple and prompt recourse" to a court for violations of rights. American Convention, art. 25.

threats to the government, including terrorism; and strikes.[105] Like the human rights derogation regime, these exceptional domestic legal frameworks include provisions allowing for the suspension of certain laws normally in effect. However, the deviation from the normal order is often greater under the domestic frameworks and, unlike the derogation regimes, they also often grant additional powers to public officials. Kim Lane Scheppele summarizes the state of exception as "the situation in which a state is confronted by a mortal threat and responds by doing things that would never be justifiable in normal times."[106] In order to understand the nature and impact of the state of exception, it is helpful to examine how emergencies were historically accommodated by domestic legal systems and how this changed with the advent of constitutional democracies.

Like the derogation provisions of human rights instruments, the domestic state of exception finds its roots in the principle of the state of necessity, which holds that the law loses its capacity to bind when adherence to the law is impossible or impractical. In the words of Thomas Aquinas, "necessity is not subject to the law."[107] The state of necessity was invoked during emergencies in which the sovereign did not have an opportunity to formally amend or suspend the law.[108] The state of necessity was triggered by actual events outside of the legal order, and it then acted upon the legal order by removing the force of the law.

The late eighteenth century saw the establishment of written constitutions guaranteeing fundamental rights and establishing separate branches of government with distinct functions. The separation of legislative functions meant that the executive was no longer in the position to unilaterally promulgate or change law. Therefore, the framers of these constitutions attempted to accommodate emergency situations by providing a process for the suspension of the law within the constitutional order. Necessity, in effect, became constitutionalized.

As a result, emergency situations became contemplated by and governed by the constitutional order. Instead of being triggered by the necessity of events, the

105. DAVID CLARK & GERALD MCCOY, THE MOST FUNDAMENTAL LEGAL RIGHT 84 (2000).

106. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1004 (2004).

107. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II (1st pt.), 3d no., Q. 96, art. 6, 74-75 (Fathers of English Dominican Province, trans., 1915).

108. *Id.*

temporary suspension of the law was now triggered following a determination by a state official, typically the executive. This is well illustrated by the French constitution of 1799, which provided,

> In the case of armed revolt or disturbances that would threaten the security of the State, the law can, in the places and for the time that it determines, suspend the rule of the constitution. In such cases, this suspension can be provisionally declared by a decree of the government if the legislative body is in recess, provided that this body be convened as soon as possible by an article of the same decree.[109]

The suspension of the law was no longer triggered by necessity itself, but instead by the proclamation of necessity.

Only a short time after the adoption of the 1799 constitution, French law began to accept that the executive was not strictly bound by the factual existence of the emergency. The *state of siege*, in which all civil government functions pass to military authorities, was provided for by the French Constituent Assembly in 1791 in situations where a city was directly threatened by enemy forces.[110] Giorgio Agamben shows that by 1811, French law began to recognize the possibility that the emperor could declare a state of siege regardless of whether a city was actually under attack or directly threatened.[111] Consequently, a state of siege could be declared outside of wartime, regardless of the existence of an actual, military siege.[112] The law began to recognize a *fictitious* or *political* state of siege. Similar legal frameworks developed in other states and systems.[113]

The term *state of exception* describes the state of siege and equivalent frameworks such as emergency decrees, emergency powers, and martial law that developed in other domestic legal systems to address threats to the state.[114] These frameworks generally provide governments with two tools to employ during times of

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109. CONST. OF THE YEAR VIII, art. 92 (Fr. 1799).

110. GIORGIO AGAMBEN, STATE OF EXCEPTION 4-5 (Kevin Attell trans., 2005).

111. *Id.*

112. *Id.*

113. Scheppele, *supra* note 106, at 1005-08.

114. *Id.* at 1004.

declared crisis.[115] First, they allow government officials to suspend or limit certain laws, which may include the suspension or limitation of fundamental constitutional rights, similar to the derogation provisions in human rights law. Second, and going beyond derogation regimes, these domestic frameworks typically provide for the legal consolidation of government powers in the hands of the executive or military officials. Legislative functions might be carried out by administrative rule or emergency decree, and judicial functions might be performed by military tribunals or administrative officials. Essentially, distinctions between branches of government are abolished and plenary powers are consolidated in the hands of the executive,[116] much like sovereigns in the days before constitutional separation of powers.

In conjunction, these tools provide the executive with formidable powers. The rationale for providing these powers is to allow the executive to address a threat or emergency for a defined period of time. Scheppele writes that they allow the state to "violate its own principles to save itself."[117] This type of framework has the potential to be an essential tool if used as intended on a temporary basis. At the same time, the potential for abuse is substantial as an executive could exploit an actual threat to the state by suspending laws or exercising powers beyond those strictly tailored to address the situation. This is compounded by the fact that in most cases the state of exception is triggered by a proclamation of the existence of the threat – a political act.[118] As with the French *fictitious state of siege*, the existence of an actual threat is not necessarily a precursor to the proclamation of a state of exception. Thus, the potential exists that a state of exception might be proclaimed or maintained as a pretext for the executive to employ these extraordinary powers. The significance of this potential is reflected in Carl Schmitt's 1922 definition of the sovereign as "he who decides on the exception."[119] The political sovereign is the one with the power to act outside of judicial normality.[120]

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115. AGAMBEN, *supra* note 110, at 5; Scheppele, *supra* note 106, at 1005.

116. *Id*. at 5, 7.

117. Scheppele, *supra* note 106, at 1004.

118. Clark and McCoy write that "judgments about these matters involve issues of policy." CLARK & MCCOY, *supra* note 105, at 85.

119. *See* CARL SCHMITT, POLITICAL THEOLOGY 5 (George Schwab trans., 2005).

120. Scheppele, *supra* note 106, at 1009.

6. Importance of Habeas Corpus

Agamben writes that the state of exception exists in a "no-man's land between public law and political fact."[121] The initiation of a state of exception is a political decision that, under the legal framework of a state, allows for the executive to suspend laws and exercise extraordinary powers. As Scheppele points out, this means the sovereign can never be fully bound by the law.[122] Essentially, the result is the "suspension of the juridical order itself."[123] This allows a state to claim that it is applying the law in the absence of any normative aspect.[124]

The potential for abuse is not simply theoretical, but is quite real. Agamben observes that Nazi jurists openly acknowledged that the National Socialist State was established through a "willed state of exception."[125] This voluntary state of exception continued throughout the twelve year existence of the Third Reich.[126]

As Agamben notes, the state of exception is the creation of the democratic tradition, not the absolutist.[127] It is significant that Hitler was legally installed as chancellor and that his regime operated in the space provided by the state of exception that existed alongside the Weimar Constitution, which remained intact.[128] Both Hitler and Mussolini employed the state of exception to establish their totalitarian regimes in constitutional democracies under the color of law. The state of exception occupies the critical space at the "threshold of indeterminacy between democracy and absolutism."[129]

Agamben warns that since World War II, "the voluntary creation of a permanent state of emergency has become one of the essential practices of

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121. AGAMBEN, *supra* note 110, at 1.

122. Scheppele, *supra* note 106, at 1011-12.

123. AGAMBEN, *supra* note 110, at 4.

124. *Id*. at 87.

125. *Id*. at 3.

126. *Id*. at 2.

127. *Id*. at 5.

128. AGAMBEN, *supra* note 110, at 48. This, despite the fact that the Weimar Constitution "tried harder than most constitutions to ensure that constitutional failure in a time of emergency did not occur." Scheppele, *supra* note 106, at 1007.

129. AGAMBEN, *supra* note 110, at 3.

contemporary states, including so-called democratic ones."[130] Joan Fitzpatrick cautioned that the post-2001 'war on terror' resulted in a "permanent emergency."[131] The state of exception has become the "dominant paradigm" of contemporary politics.[132] The maintenance of the voluntary and extended state of exception presents dangers to the individual. Agamben refers to the state of exception as "the original structure in which law encompasses living beings by means of its own suspension."[133] He points to detainees at Guantánamo Bay, who were the "object of pure de facto rule . . . entirely removed from the law and from judicial oversight."[134]

At the height of the state of exception, legal norms continue to exist in theory but have no relation to human life. Agamben writes that:

> . . . the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by government violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law.[135]

Ominously, he warns that "when the state of exception . . . becomes the rule, then the juridico-political system transforms itself into a killing machine."[136]

This disconnect between law and life was apparent in the early years of the Guantánamo Bay detention facility, where the United States government attempted to craft a "rights-free zone"[137] excepted from human rights law, humanitarian law, and

130. *Id*. at 2.

131. Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 251 (2003).

132. AGAMBEN, *supra* note 110, at 2.

133. *Id*. at 3.

134. *Id*. at 3-4.

135. *Id.* at 87.

136. *Id.* at 86.

137. The term was used by Harold Koh to describe the earlier assertion that the Guantánamo Bay Naval Base was beyond the jurisdiction of United States law when used as a refugee detention facility in the 1990s. Harold Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 140-41 (1994).

domestic constitutional law.[138] One of the government's arguments was that detentions at Guantánamo Bay were undertaken pursuant to the President's exceptional powers as Commander in Chief.[139] In his dissent arguing against judicial oversight of detainees in *Hamdan v. Rumsfeld*,[140] Justice Clarence Thomas wrote that these powers "confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit."[141]

In addition to the danger it presents to the individual, the state of exception threatens democracy itself. In 1934, Herbert Tingsten wrote that while the temporary use of plenary powers was theoretically compatible with democratic constitutions, "a systematic and regular use of the institution necessarily leads to the 'liquidation' of democracy."[142] The state of exception has been effectively used as a means for legally installed leaders to transition from democratic rule to authoritarian rule within the constitutional orders of their states. Scheppele notes that through "absolutely constitutional mechanisms, the unconstitutional state of Nazi Germany was born."[143]

In its *Habeas Corpus* opinion,[144] the Inter-American Court wrote that the suspension of guarantees may be necessary in emergencies "to preserve the highest values of a democratic society."[145] It recognized, however, that abuses would result from the application of emergency measures not objectively justified by the

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138. Scheppele, *supra* note 106, at1062. *See supra* Intro.

139. Memorandum from Patrick Philbin and John Yoo, Dep. Asst. Att'ys Gen., U.S. Dep't of Justice, to William Haynes II, Gen. Counsel, Dep't of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, at 8 (Dec. 28, 2001) [hereinafter "Memo of Dec. 28, 2001"], http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf. Scheppele observed with concern the Bush administration's "increasing effort to avoid regular judicial procedures at all by trying to bring the war on terrorism entirely within the executive branch and minimizing the influence of both Congress and the courts." Scheppele, *supra* note 106, at 1051.

140. 548 U.S. 557 (2006).

141. *Id*. at 679 (Thomas, J., dissenting). *See also* HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 67-69 (1990).

142. HERBERT TINGSTEN, LES PLEINS POUVOIRS. L'EXPANSION DES POUVOIRS GOUVERNMENTAUX PENDANT ET APRÈS LA GRANDE GUERRE 333 (1934), *quoted in* AGAMBEN, *supra* note 110, at 7.

143. Scheppele, *supra* note 106, at 1013.

144. Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8 (Jan. 30, 1987).

145. *Id*. ¶ 20. This echoes Clinton Rossiter's statement that "No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy." CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 314 (1948).

circumstances, and that these abuses presented a threat to the effective exercise of representative democracy.[146] The Court wrote that the suspension of guarantees lacks legitimacy when done so for the purpose of undermining the democratic system.[147] This statement acknowledges, of course, that exceptional measures have often been employed for this purpose.

The underlying difficulty was identified in 1941 by Carl Friedrich – no institutional safeguards exist to ensure that emergency powers are only used for the goal of preserving democratic constitutions.[148] As a result, democratic systems are at risk of being transformed into totalitarian schemes under the right conditions.[149] As Agamben neatly puts it, "the emergency measures [that are justified] in the name of defending the democratic constitution are the same ones that lead to its ruin."[150]

The provisional abolition of the separation of powers and the temporary suspension of laws are the central features of the state of exception. The state of exception at its fullest deployment is marked by plenary executive powers and the effective suspension of the domestic juridical order. It is at this stage – when individuals become subject to de facto rule while states still claim to be applying the rule of law – that the state of exception has the greatest potential to foment totalitarianism and violence.

These exceptional measures of the state of exception necessarily come into tension with a wide range of individual rights. However, it is the right to habeas corpus that stands most simply and squarely in the path of the state of exception and the associated risks to the individual and to democracy. This is because, as noted earlier, the primary subject of a habeas corpus proceeding is not the detainee, but the detainee's custodial – usually the executive.[151] As Bingham illustrates, the development of habeas corpus marked a watershed in the establishment of the separation of governmental powers and submission of the sovereign to the rule of

146. 1987 Inter-Am Ct. H.R. (ser. A) No. 8 at ¶ 20.

147. *Id*.

148. CARL FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 246 (1941).

149. *Id*.

150. AGAMBEN, *supra* note 110, at 8.

151. *In re* Jackson, 15 Mich. 417, 439 (1867).

law.[152] Habeas corpus review by domestic courts remains essential to the maintenance of these principles by providing an independent judicial check on executive and legislative action and ensuring that state action conforms to pre-established normative law. As long as habeas corpus remains available, the juridical order remains intact – even if minimally – and the state of exception cannot reach its fullest deployment.

The unique connection between the state of exception and habeas corpus is apparent in the United States Constitution.[153] A conflict exists in the American constitutional system between the president and Congress regarding supreme authority during emergency situations.[154] This conflict appears in two locations within the Constitution: the delineation of war powers and the so-called Suspension Clause.[155] The latter provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,"[156] without specifying who holds the power to suspend.[157] According to Agamben, the power to suspend the right to habeas corpus is the herald of the one "who decides on the exception"[158] in the American system – the true sovereign. The suspension of habeas corpus creates conditions conducive to the most serious dangers of the state of exception. It tends to mark a final step in the march toward consolidation of plenary powers in the executive and the evaporation of normative law. The risk that the state of exception presents to the individual and to democratic rule reaches its zenith.

Examples of this risk are plentiful. The United States Supreme Court addressed the United States government's attempt to exclude detainees at Guantánamo Bay Naval Base from habeas corpus review through a jurisdiction-

152. BINGHAM, *supra* note 56, at 13.

153. Scheppele, *supra* note 106, at 1006.

154. AGAMBEN, *supra* note 110, at 19.

155. *Id*.

156. U.S. CONST., art. I, sec. 9.

157. For a discussion of this question, *see* David Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59/70-72 (2006); Shepple, *supra* note 106, at 1006.

158. AGAMBEN, *supra* note 110, at 20.

stripping statute in *Boumediene v. Bush*.[159] The Court determined that the legislation in question amounted to an unconstitutional suspension of the right to habeas corpus.[160] In doing so, it ominously warned that if the government's argument regarding jurisdiction was successful, "it would be possible for the political branches to govern without legal constraint."[161] Of course, the possibility still exists for habeas corpus to be formally suspended in the United States in a manner consistent with its domestic law and constitution.

This connection between the state of emergency and habeas corpus can also be seen in period known as The Emergency in India, which was characterized by the suspension of rights and the establishment of rule by executive decree. H.M. Seervai writes that the suspension of habeas corpus marked the nadir of "the darkest hour of India's history after Independence."[162] The Indian Supreme Court held in *A.D.M. Jabalpur v. Shukla*[163] that habeas corpus was not available after the government had used emergency powers to suspend the right to liberty. The lone dissenting justice, Hans Raj Khanna, warned that the effect of the Court's ruling would be that executive officers "would not be governed by any law, they would not be answerable to any court and they would be wielding more or less despotic powers."[164] He pointed out that in a formal sense even the mass murders of the Nazi regime were carried out pursuant to law, but argued that a system where a law had been passed abolishing all laws could not honestly be considered to operate under the rule of law.[165]

Justice Khanna emphasized the connection between habeas corpus, the rule of law, and democracy:

> The power of the courts to issue a writ of habeas corpus is regarded as one of the most important characteristics of democratic states under the

159. 553 U.S. 723 (2008).

160. *See id.*

161. *Id.* at 765.

162. H.M. SEERVAI, THE EMERGENCY, FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE: A CRITICISM 3 (1978).

163. A.I.R. 1976 S.C. 1207.

164. *Id.* ¶ 176 (Khanna, J., dissenting).

165. *Id.* ¶ 183 (Khanna, J., dissenting).

> rule of law. The significance of the writ for the moral health of the society has been acknowledged by all jurists.[166]
>
> . . . .
>
> The cases before us raise questions of the utmost importance and gravity, questions which impinge not only upon the scope of the different constitutional provisions, but have the impact also upon the basic values affecting life, liberty and the rule of law. More is at stake in these cases than the liberty of a few individuals or the correct construction of the wording of an order. What is at stake is the rule of law.[167]

Justice Khanna's dissent provides an extraordinary illustration of the space occupied by habeas corpus *vis-à-vis* the state of exception. Habeas corpus has the potential to prevent the worst abuses of the state of exception. So long as habeas corpus review remains available, the state of exception cannot reach its fullest form and the risk to the individual and to democracy are held at bay. The problem, of course, is that most domestic systems do allow for the suspension of the right to habeas corpus, even if suspension is a last resort reserved for the most critical of situations, as in the United States Constitution.

It is this very fact that, though, makes the right to habeas corpus in international law so crucial and so unparalleled.[168] As discussed in the last chapter, international law contains non-derogable (or arguably non-derogable) habeas corpus guarantees,[169] obligating states to provide access to this remedy via domestic courts even during emergencies. According to de Londras, international legal standards suggest that "the basic requirement of an opportunity to launch a meaningful challenge to one's detention cannot be denied to detainees, regardless of the emergency situation."[170]

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166. *Id*. ¶ 208 (Khanna, J., dissenting).

167. *Id*. ¶ 211 (Khanna, J., dissenting). Following The Emergency, the 44th Amendment to the Indian Constitution made it impossible to suspend habeas corpus. Constitution (Forty Fourth Amendment) Bill of 1978, § 40(a).

168. *See* Scheppele, *supra* note 106, at 1076-77 (discussing the increasing role of international human rights law in regulating exceptions).

169. *See supra* § 5.2 (identifying question about derogation from habeas corpus provisions in international law).

170. de Londras, *supra* note 52, at 253

6. Importance of Habeas Corpus

To the extent that it is non-derogable, habeas corpus occupies a unique place in international law. Under the International Covenant and General Comment 29, the only other domestic judicial protection from which derogation is not permitted is the fair trial right that "[o]nly a court of law may try and convict a person for a criminal offense."[171] This requirement provides fairly limited protection, in that it is only applicable to persons charged with a crime. A state can avoid this element of judicial scrutiny by simply not holding criminal trials.

Under the American Convention and the case law of the Inter-American Court, only habeas corpus and the related remedy of *amparo* are absolutely non-derogable. In its advisory opinion on *Judicial Guarantees in States of Emergency*,[172] the Inter-American Court recognized that additional judicial guarantees could be non-derogable, but this would "depend in each case upon an analysis of the juridical order and practice of each State Party, which rights are involved, and the facts which give rise to the question."[173] The result is "more clear" with respect to habeas corpus, which the Court wrote is "indispensable for the protection of the human rights that are not subject to derogation."[174] Reiterating its earlier *Habeas Corpus* advisory opinion, the Court concluded that while other judicial guarantees could be non-derogable in certain circumstances, there was no question that habeas corpus is always non-derogable.[175]

As the one non-derogable guarantee of domestic judicial oversight, the habeas corpus guarantees in international law ensures the maintenance of at least some separation of powers and the preservation of some level of normative law within domestic systems. The domestic juridical order cannot not placed upon a shelf for the duration of the emergency. Habeas corpus proceedings before domestic courts, as guaranteed by international law, can in fact serve as the institutional safeguard Friedrich was looking for in 1941.[176]

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171. Human Rights Committee, General Comment 29, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001).

172. Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987).

173. *Id*. ¶ 40.

174. *Id*. ¶ 30.

175. *Id*. ¶¶ 31-33, 41.

176. *See supra*, text accompanying note 148.

6. Importance of Habeas Corpus

Habeas corpus proceedings allow an independent national court to ensure that any suspension of rights complies with the domestic legislation authorizing the emergency and the derogation provisions of applicable human rights instruments.[177] It provides a check against suspensions that are disproportionate or that exceed the temporal or geographic limits of the emergency.[178] A habeas corpus court could go so far as to determine the actual existence of the circumstances used to justify the use of exceptional powers, potentially limiting the "willed state of exception."[179] While such a judicial challenge may not be respected by an authoritarian leader, it could be significant in rebuffing a democratic leader's claim that exceptional powers are being exercised under the rule of law. This could, at least, more sharply define the otherwise "indeterminate" threshold between democracy and absolutism.[180]

6.2.3 Habeas Corpus as a Reflection of Policy Choices

Arbitrary detention is a tool of control. At the most simple level, habeas corpus is challenged by states because it limits their use of detention, what Blackstone referred to as the "dangerous engine of arbitrary government."[181] By regulating detention, habeas corpus regulates executive and legislative branches and imposes "legal constraint"[182] on their actions, the fundamental feature of the rule of law.[183] In many cases, this alone explains state challenges to habeas corpus.

But many times habeas corpus comes under attack by governments that would reject any claim that they are seeking to act in an arbitrary or authoritarian manner. For example, during The Emergency in India, the government successfully argued

177. *Habeas Corpus*, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 40.

178. *Id.* ¶ 39.

179. This is, of course, dependant on an independent judiciary willing to assert its authority. Following the Indian Supreme Court's *Shukla* opinion, a contemporary editorial observed that "the submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Court's decision appears close to utter surrender." *Fading Hope in India*, N.Y. TIMES, Apr. 30, 1976, at 21.

180. *See* AGAMBEN, supra note 110, at 3.

181. 1 WILLIAM BLACKSTONE, COMMENTARIES *131.

182. Boumediene v. Bush, 553 U.S. 723, 765 (2008).

183. *See supra* text accompanying notes 72-76.

that habeas corpus was unavailable following the suspension of the right to liberty.[184] Following the terrorist attacks of September 11, 2001, the United States argued that habeas corpus did not extend to detainees at Guantánamo Bay.[185] Both of these states were democracies and their governments professed adherence to the rule of law.

As Agamben points out, in its fullest deployment the state of exception allows a democratic state to claim to operate within the rule of law but in the absence of legal norms.[186] The ability of the executive to couch its actions within the language of "law" is significant. Martti Koskenniemi argues that "[p]roblems in the 'war on terror,' for example, do not emerge from the absence of 'law' or 'rights,'"[187] but from the manner in which they are interpreted. He observes that "'human rights,' like any legal vocabulary, is intrinsically open-ended" and the detention of one individual can be described in terms of another's human right to security.[188] Koskenniemi describes the resulting quandary: "If freedom is a right and security is a right, then activism for human rights is mere shouting."[189] The executive can use 'rights' language to justify repressive measures while operating in a legal framework completely unhinged from normative fundamental rights.

Habeas corpus places limitations on the ability of the executive in a democratic state to wield plenary powers and suspend laws under emergency legislation while claiming to operate pursuant to the rule of law. This function of habeas corpus in policing the executive explains why it is frequently challenged, even in liberal democracies. The absence of habeas corpus makes it possible for the executive to act in an unfettered manner.

Understanding this resistance to habeas corpus also highlights the significance of a non-derogable habeas corpus guarantee in international law. A non-derogable international guarantee of habeas corpus review by national courts is much more than

184. *See supra* text accompanying notes 162-167.

185. *See supra* text accompanying notes 137-141, 159-161.

186. AGAMBEN, *supra* note 110, at 87.

187. Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L LAW 7, 17 (2009).

188. *Id*. at 10.

189. Martti Koskenniemi, *Occupied Zone – 'A Zone of Reasonableness?'*, 41 ISRAEL L. REV. 13, 29 (2008).

a means of individual protection. It is also a policy choice at the international level aimed at promoting the rule of law and regulating the state of exception in domestic law.[190]

Conclusion

The significance of the right to habeas corpus is multidimensional. Habeas corpus is the primary vehicle to secure the liberty of an unlawfully detained person. It also protects against violations of other non-derogable rights, exposing such abuses as extrajudicial killings, torture, and disappearances. Habeas corpus is intricately connected to the rule of law, and is central to its preservation during emergency situations. Habeas corpus takes on an added importance in all of these roles because of its status as an international guarantee.

It is critical, then, that habeas corpus is available and effective. Unfortunately, the challenges identified in Chapter 5 have the potential to limit this effectiveness. How can habeas corpus best be strengthened to overcome these challenges? This question is the subject of Chapter 7.

190. This is a policy choice that was recently reaffirmed by the United Nations General Assembly. G.A. Res. 67/1, U.N. Doc. A/RES/67/1 (Nov. 30, 2012).

7

STRENGTHENING HABEAS CORPUS IN INTERNATIONAL LAW

As outlined in Chapters 2 through 4, the right to habeas corpus is guaranteed in the Universal Declaration of Human Rights,[1] the International Covenant on Civil and Political Rights,[2] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[3] American Declaration of the Rights and Duties of Man,[4] and the American Convention on Human Rights.[5] Despite the existence of these guarantees, vulnerabilities exist in the protection currently afforded under international law. Chapter 5 identified challenges to effectiveness of the current habeas corpus guarantees, both in terms of the legal norms and states' application of these norms. These include questions about the interplay of human rights law and international humanitarian law,[6] the derogability of habeas corpus,[7] the application of human rights norms extraterritorially,[8] and the procedural requirements of habeas corpus.[9]

As Chapter 6 illustrates, international habeas corpus guarantees provide critical protection of individual liberty and other substantive rights, such as the prohibition against torture.[10] More importantly, habeas corpus plays a central role in the ensuring respect for the rule of law by political branches of government and have

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1. U.N. G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71, Dec. 10, 1948 [hereinafter "UDHR" or "Universal Declaration"].

2. 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR" or "Covenant"].

3. 213 U.N.T.S. 222 (entered into force on September 3, 1953) [hereinafter "European Convention"].

4. O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter "American Declaration"].

5. 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter "American Convention"].

6. *See supra* § 5.1.

7. *See supra* § 5.2.

8. *See supra* §5.3.

9. *See supra* § 5.4.

10. *See supra* § 6.1.

the potential to regulate states of emergency.[11] In order to fulfill these vital roles, habeas corpus must be available and effective and the potential gaps identified in Chapter 5 must be closed. This chapter examines how this should best occur for habeas corpus to perform its unique role in the international legal order. The arguments presented are consistent with the history and purpose of habeas corpus, and are essential for the protection of the individual and the maintenance of the rule of law.

7.1 The Location for Advancement

It is necessary to consider the structural aspect of how the right to habeas corpus might be strengthened in the international system. The current structure consists of guarantees in international instruments that individuals will have access to habeas corpus within their domestic systems. This section will discuss three possible ways to strengthen habeas corpus: 1) a clearer understanding and more effective application of current habeas corpus guarantees; 2) the execution of a new treaty to better define the right to habeas corpus; and 3) a new role for international institutions in providing habeas corpus review and granting relief.

7.1.1 Existing Provisions

The Universal Declaration, International Covenant, the European Convention, the American Declaration, and the American Convention all guarantee the right to habeas corpus. Unfortunately, the challenges outlined in Chapter 5 – application during armed conflict, the possibility for derogation, extraterritorial application, and procedural limitations – impact both the access to and effectiveness of the right. These challenges to the effectiveness of habeas corpus exist in part because of state arguments against the applicability of human rights generally or the judicial oversight provided by habeas corpus specifically.[12]

With a clearer understanding of the purpose and importance of habeas corpus, international institutions can interpret habeas corpus guarantees in a manner that

11. *See supra* § 6.2.
12. *See supra* § 6.2.3 for a discussion of state hostility toward habeas corpus.

provides more effective protection, and domestic institutions may be less able or willing to circumvent the judicial oversight it provides. A more principled and faithful application of existing habeas corpus provisions would represent a major step toward the goals of protecting individual liberty and the rule of law.[13] A number of declarations, decisions, and interpretations impact the right to habeas corpus, ranging from the European Court's cases on extraterritorial application of human right to the Copenhagen Principles on detention review in non-international armed conflict to the general comments of the Human Rights Committee. However, these occur in a variety of locations and are often related to broader questions of human rights application. Clarification of the parameters of the right to habeas corpus in human rights law, its applicability during emergencies, and its interplay with other bodies of law such as international humanitarian law is a necessary step in this direction and is one of the primary goals of this thesis.

Related to this goal of clarifying existing international instruments is the identification of other international imperatives bolstering the right to habeas corpus. One of the sources of international law identified by the Statute of the International Court of Justice is "general principles of law recognized by civilized nations."[14] Mary Ellen O'Connell describes these as principles found commonly in legal systems and principles inherent to those systems and linked to their structure and operation.[15] According to James Brierly, general principles represent "an authoritative recognition of a dynamic element on international law, and of the creative function of the courts which may administer it."[16]

Christina Voight argues that general principles of international law derive from their acceptance in a high number of national legal systems and acceptance in international law.[17] As previously detailed, habeas corpus is already accepted in

13. *See supra* § 6 for a discussion of these goals.

14. Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 33 U.N.T.S.993.

15. Mary Ellen O'Connell, *Jus Cogens: International Law's Higher Ethical Norms, in* THE ROLE OF ETHICS IN INTERNATIONAL LAW 83 (Donald Childress ed. 2012).

16. JAMES BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 63 (1963).

17. Christina Voight, *The Role of General Principles in International Law and Their Relationship to Treaty Law*, 31 RETFÆRD: NORDIC J.L. JUST. 3, 8-9 (2008).

international law.[18] M. Cherif Bassiouni asserts that an empirical approach can be employed to determine the acceptance of a particular right in national systems.[19] Employing this approach, a survey of national constitutions demonstrates a wide acceptance of the right to habeas corpus at the national level.[20]

These constitutional guarantees of habeas corpus fall into three general categories. First, a constitution may contain an affirmatively stated right specific to detentions. A detained person, or someone acting on his or her behalf, is expressly guaranteed the opportunity to request that a court to review the lawfulness of a person's detention. In some cases, this is done through a specific guarantee of "habeas corpus." Second, a constitution may prohibit the suspension of habeas corpus. No right is affirmatively granted. However, this prohibition and inclusion of the term "habeas corpus" clearly imply the right exists. Finally, a combination of two constitutional articles can provide a guarantee generally equivalent to habeas corpus, similar to the implicit guarantee in the Universal Declaration.[21] Typically, one article contains a guarantee of personal liberty or a prohibition on detention except as provided by law. A separate article then provides that anyone who alleges rights guaranteed by the constitution have been violated may apply to a court for redress – the general remedy often known as *amparo*.

A survey of 181 written national constitutions reveals that 118 provide for a remedy in the nature of habeas corpus. Of these, sixty-four constitutions contain an affirmative right specific to detention.[22] Four constitutions prohibit the suspension of

18. International Covenant, art. 9(4); European Convention, art. 5(4); American Convention, art. 7(6).

19. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993).

20. Constitutions surveyed were English-language texts or translations available in CONSTITUTIONS OF COUNTRIES OF THE WORLD (Max Planck Inst. ed.).

21. *See supra* § 2.3.

22. *See* ALB. CONST. art. 28(4); ANDORRA CONST. art. 9(3); ANGL. CONST. art. 38; ARG. CONST. art. 43; BELR. CONST. 25(2); BELIZE CONST. art. 5(2)(d); BOL. CONST. art. 18; BRAZ. CONST. art. 5(LXVII); BULG. CONST. art. 30(3); CAN. CHARTER RTS. & FREEDOMS art. 10(c); CAPE VERDE CONST. art. 34(1); CHILE CONST. art. 21; COLOM. CONST. art. 30; COSTA RICA CONST. art. 48; CROAT. CONST. art. 24(3); CYPRUS CONST. art. 11(7); DEN. CONSt. § 71(6); DOMINICA CONST. art. 16(1); DOM. REP. CONST. art.8(2); E. TIMOR CONST. art. 33; ECUADOR CONST. art. 93; EL SAL. CONST. art. 11; EQ. GUINEA CONST. art. 13(i); ERI. CONST. art. 17(5); ETH. CONST. art. 19; FIJI CONST. art. 27(1)(e); FIN. CONST. § 7; HOND. CONST. art. 182; ICE. CONST. art. 67; INDIA CONST. arts. 21 & 32(2); IR. CONST. art. 40(4)(2); JAPAN CONST. art. 34; KAZ. CONST. art. 16(2); S. KOREA CONST. art. 12(6); KYRG. CONST. art. 16(3); LIBER. CONST. art. 21(g); MALAY. CONST. art. 5(2); MARSH. IS. CONST. § 7; MOZAM.

habeas corpus.[23] Fifty constitutions, a large number of which are Commonwealth nations, provide both a guarantee of liberty and judicial redress for violation of that right.[24]

The number of countries that protect habeas corpus legally is certainly higher, as the above numbers only include express constitutional protection. There is little doubt that as a practical matter, habeas corpus is not a meaningful remedy for persons in many of the counties that guarantee it constitutionally, but do not make the remedy practical and effective. Even so, the enshrinement of habeas corpus in a majority of written constitutions supports the proposition that the right constitutes a general principle of international law.

The status of habeas corpus is corroborated by judgments of international criminal tribunals. In an appeals decision in *Barayagwiza v. Prosecutor*,[25] the International Criminal Tribunal for Rwanda described the "notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts" as being well-established in the Tribunal's Statute and Rules.[26] It identified habeas corpus as a "fundamental right."[27] The International

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CONST. art. 102; NAURU CONST. art. 5(4); NETH. CONST. art. 15(2); N.Z. BILL RTS. art. 23(1)(c); OMAN CONST. art. 24; PAN. CONST. art. 23; PARA. CONST. art. 133; PAUPA N.G. CONST. art. 42(5); PERU CONST. art. 200; POL. CONST. art. 41(2); PORT. CONST. art. 31; SAMOA CONST. art. 6(2); SAO TOME & PRINCIPE CONST. art. 38; SEY. CONST. art. 18(8); SING. CONST. art. 9(2); S. AFR. CONST. art. 35(2)(d); SPAIN CONST. art. 17(4); SWED. CONST. art. 9; SWITZ. CONST. art. 31; TOGO CONST. art. 15; TONGA CONST. art. 9; TURK. CONST. art. 19; UGANDA CONST. art. 23(9); UKR. CONST. art. 29; URU. CONST. art. 17; VENEZ. CONST. art. 27.

23. *See* MICR. CONST. § 8; PHIL. CONST. art. 15; TRIN. & TOBAGO CONST. art. 5(2)(c)(vi); U.S. CONST. art. I, § 9, cl. 2.

24. *See* ANT. & BARB. CONST. art. 5, 18; ARM. CONST. arts. 16, 18; AZER. CONST. arts. 28, 60; BAH. CONST. arts. 19, 28; BANGL. CONST. arts. 32, 44; BARB. CONST. arts. 13, 24; BOTS. CONST. arts. 5, 18; BURUNDI CONST. arts. 16, 41; EST. CONST. arts. 15, 20; GAM. CONST. arts. 19, 37; GEOR. CONST. art. 18, 42; GHANA CONST. arts. 14, 33; GREN. CONST arts. 3, 16; GUAT. CONST. arts. 4, 29; GUINEA-BISSAU CONST. arts. 30, 33; HAITI CONST. arts. 24, 27; HUNG. CONST. arts. 55, 57; ITALY CONST. arts.13, 24; JAM. CONST. arts. 14, 17; KENYA CONST. arts. 72, 84; KIRIBATI CONST. arts. 5, 17; LESOTHO CONST. arts. 1, 22; LITH. CONST. arts. 20, 30; MACED. CONST. arts. 12, 50; MALAWI CONST. arts. 15, 18; MALDIVES CONST. art. 15(1)(b) & (2); MALTA CONST. arts. 34, 46; MAURITIUS CONST. arts. 5, 17; MOLD. CONST. arts. 20, 25; MONG. CONST. arts. 16(13) & (14); NAMIB. CONST. arts. 5, 7; NICAR. CONST. arts. 33, 45; NIG. CONST. arts. 35, 46; ROM. CONST. arts. 21, 23; ST. KITTS & NEVIS CONST. arts. 5, 18; ST. LUCIA CONST. arts. 3, 16; ST. VINCENT CONST. arts. 3, 16; SERB. & MONT. CHARTER HUM. & MINORITY RTS. & CIVIL LIB. arts. 9, 14; SIERRA LEONE CONST. arts. 17, 28; SLOVK. REP. CONST. arts. 17, 46; SLOVENIA CONST. arts. 19, 23; SOLOM. IS. CONST. arts. 5, 18; SURIN. CONST. arts. 10, 16; SWAZ. CONST. arts. 5, 17; TURKM. CONST. arts. 21, 40; TUVALU CONST. arts. 17, 38; U.A.E. CONST. arts. 26, 41; VANUATU CONST. arts. 5(1)(b), 6(1); ZAMBIA CONST. arts. 13, 28; ZIMB. CONST. arts. 13, 24.

25. Case No. ICTR-99-54, Decision (Nov. 3, 1999).

Criminal Tribunal for the former Yugoslavia reached a similar conclusion in *Prosecutor v. Simic*.[28]

According to Voight, the identification of habeas corpus as a general principle of international law is meaningful and serves several roles. The generality of these principles allows them to fulfill the function of filling gaps left open by treaty.[29] They also serve as a source of argument for judges where other sources fail, both guiding and constraining judicial discretion.[30] General principles allow the law to be construed in a dynamic fashion[31] – particularly relevant given the attempts to circumvent habeas corpus in recent years.[32] In practical terms, the identification of habeas corpus as a general principle of international law might be of relevance in internal constitutional deliberations by national courts, as suggested by Diane Amann.[33] As Fiona de Londras notes, it would also serve as a basis to assert that habeas corpus is required as an indispensable judicial guarantee applicable to situations of non-international armed conflict pursuant to Common Article 3 of the four Geneva Conventions.[34]

Going even further, it has been argued that habeas corpus rises to the level of *jus cogens.* According to the Vienna Convention on the Law of Treaties, this term

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26. *Id*. ¶ 88.

27. *Id*.

28. Case No. IT-95-9, Separate Opinion of Judge Robinson (Oct. 18, 2000). Neither the Statute nor the Rules of the International Criminal Court contain a distinct right to habeas corpus. William Schabas writes that this right will, therefore, need to be ensured through judicial action. William Schabas, *The Right to a Fair Trial, in* 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 271 (Flavia Lattanzi & William Schabas eds. 2003).

29. Voight, *supra* note 17, at 9-10.

30. *Id*. at 10-11.

31. *Id*. at 11.

32. *See supra* §§ 5 & 6.2.3 (describing the challenges to habeas corpus).

33. *See, e.g.,* Diane Amann, *"Raise the Flag and Let it Talk": On the Use of External Norms in Constitutional Decision-Making*, 2 INT'L J. CONST. L. 597 (2004) (describing the United States Supreme Court's increasing reliance on external norms in certain circumstances).

34. Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorirsts*, 12 J. CONFLICT & SEC. L. 223, 234 (2007). It must be noted, however, that these "judicial guarantees which are recognized as indispensable by civilized peoples" are mentioned in the context of the "passing of sentences and the carrying out of executions," and may, therefore, only be applicable to criminal proceedings and not all detentions. *See, e.g.,* Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

describes "a peremptory norm of general international law" with which a treaty cannot conflict and from which no derogation is permitted.[35] In addition, the Human Rights Committee has stated that provisions of the International Covenant which represent peremptory norms may not be subject to reservation.[36] While *jus cogens* norms are superior to all other norms, Ulf Linderfalk notes that questions exist about the definition of this term,[37] and O'Connell observes that there is dispute as to the method for identifying which norms rise to this level.[38] O'Connell observes that presently "it appear that judges and scholars simply consult their own consciences when identifying *jus cogens* norms," an approach she notes has generally been successful to date.[39]

In a 2008 the U.N. Working Group on Arbitrary Detention suggested that habeas corpus should have the status of *jus cogens*.[40] It wrote that in its view, habeas corpus guarantees "represent peremptory norms of (customary) international law so that they are also binding on States which are not parties to the Covenant."[41] Larry May makes the same argument in his 2011 book.[42] He posits that the ultimate source of *jus cogens* is morality,[43] and that the avoidance of serious unfairness is as important as the avoidance of serious substantive harm with which *jus cogens* norms are usually concerned.[44] He argues that for an international rule of law to exist,

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35. United Nations Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

36. Human Rights Committee, General Comment 24, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

37. Ulf Linderfalk, *The Effect of* Jus Cogens *Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 18 EUR. J. INT'L L. 853, 854 (2007).

38. O'Connell, *supra* note 15, at 79-80.

39. *Id*. at 79. A study group of the International Law Commission recommended it is best for the full content of the rule of jus cogens to be determined by state practice and the jurisprudence of international institutions. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682, at 190 (2006).

40. Report of the Working Group on Arbitrary Detention, ¶67, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008).

41. *Id*.

42. LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS 120 (2011).

43. *Id*. at 121.

44. *Id*. at 126.

"certain core rights will have to be protected against abuse wherever in the world that abuse occurs," and points to habeas corpus as the most crucial example.[45]

There are difficulties with calls for the recognition of habeas corpus as *jus cogens*. First, May's argument is based on a particularly Anglo-American understanding of habeas corpus, based on the Magna Carta. He writes that the habeas corpus at a minimum requires a publicly declared charge against the prisoner and that imprisonment must be for a brief and definite period.[46] May states that the closest equivalent to minimalist habeas corpus in the European Convention is Article 4(2), which provides that a person who is arrested must be promptly informed of the reasons for the arrest and the nature of the charges.[47] He argues that a more reasonable model would involve a judicial determination that a *prima facie* basis existed for continued incarceration.[48] This judicial supervision is, of course, already present in the habeas corpus guarantees international human rights law, and is essential to habeas corpus serving the important interests detailed in Chapter 6. What May refers to as minimalist habeas corpus differs in important ways from the definition used in this thesis to describe the right enshrined in international human rights law.[49]

It is also problematic that May offers the decisions of international criminal tribunals as support for habeas corpus as *jus cogens*. He writes that habeas corpus was recognized by the International Criminal Tribunal for Rwanda "as a fundamental, or *jus cogens*, right."[50] While the Appeals Chamber of the Tribunal did state that habeas corpus is a "fundamental right,"[51] it is not obvious that it equated a "fundamental right" with *jus cogens* status.

Finally, the argument that any norm should be considered a *jus cogens* norm must be met with skepticism. O'Connell cautions that invoking *jus cogens* "too often

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45. *Id*. at 130.

46. *Id*. at 225.

47. *Id*. at 132.

48. MAY, *supra* note 42, at 105.

49. *See supra* Intro.

50. MAY, *supra* note 42, at 79.

51. *Barayagwiza v. Prosecutor*, Case No. ICTR-99-54, Decision, ¶ 88 (Nov. 3, 1999).

or in unpersuasive ways may lead to disrespect for the category."[52] May acknowledges this danger, stating that *jus cogens* norms need to be specified in a way that prevents an endless proliferation of new norms.[53] On the other hand, William Schabas warns that the value of the designation may itself be limited by the fact that "there have been very few serious attempts to identify which human rights norms fall into the privileged category of *jus cogens*."[54]

In any event, the tangible value of *jus cogens* status is uncertain. Marko Milanović writes that "[t]here is probably no concept that has attracted so much scholarly attention, yet so little practical application, as *jus cogens*. And by little, I mean zero."[55] According to Milanović, there has never been a case "where *jus cogens* was unambiguously the basis for a court ruling that a conflicting rule of international law was null and void."[56]

Even considering these challenges, May's assertion that "habeas corpus should be at the top of the candidate list for *jus cogens* status"[57] is worth exploring, particularly because of the non-derogable nature of rules of *jus cogens*. International law jurists and scholars should contemplate this possibility in light of the critical role that habeas corpus plays in protecting individual liberty and, more importantly, in maintaining the rule of law.[58] Marrti Koskenneimi's U.N. report entitled Fragmentation of International Law confirms that the recognition of habeas corpus as *jus cogens* would render any treaty conflicting with the requirement invalid.[59] This

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52. O'Connell, *supra* note 15, at 81.

53. MAY, *supra* note 42, at 125.

54. William Schabas, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, CAN. Y.B. INT'L L. 39, 49 (1994).

55. Marko Milanović, *Norm Conflicts, International Humanitarian Law, and Human Rights Law, in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 103 (Orna Ben-Naftali ed. 2011).

56. *Id*.

57. *Id*. at 126.

58. *See supra* § 6.

59. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682, at 185 (Apr. 13, 2006). Milanović points out that this means that if a provision of a Geneva Convention conflicted with a rule of *jus cogens*, the treaty – and not just the conflicting provision – would be rendered void. Milanović, *supra* note 55, at 102.

could be relevant, for example, in ensuring that the right to habeas corpus is respected in a bilateral treaty related to a jointly operated detention facility or the transfer of detainees.[60] At a minimum, this debate will highlight the non-derogable nature of habeas corpus and perhaps inspire the European Court to take action confirming its non-derogability within that system.[61]

7.1.2 New Treaty

Another possibility for strengthening habeas corpus is the adoption of a new international treaty. A new treaty could clarify the application of habeas corpus in the situations identified in Chapter 5.[62] It could, for example, resolve questions about the availability of habeas corpus extraterritorially or procedural questions such as the right to counsel.

Some argue that the best way to close perceived gaps in existing human rights is by negotiating new treaties. Michael Dennis writes that the extension of human rights law to situations of armed conflict, for example, ignores what was already agreed by the international community.[63] Instead, he asserts that gaps should be closed through the amendment of treaties or the negotiation of new treaties, and that this approach has the potential to generate increased compliance.[64] To do otherwise, Dennis argues, would create confusion and increase the gap between legal theory and state practice.[65]

A proposal for a new treaty which would have impacted the right to habeas corpus, among other rights, was already discussed in the United Nations in the early 1990. In 1990, a preparatory report by Stanislav Chernichenko and William Treat,

60. While not a treaty, this type of situation was the subject of a 2012 agreement between the United States and Afghanistan related to the transfer of detention facilities. *See* Memorandum of Understanding between The Islamic Republic of Afghanistan and the United States of America On Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan (Mar. 9, 2012), http://mfa.gov.af/en/news/7671.

61. *See supra* § 5.2.2 (discussing the derogability of habeas corpus).

62. *See supra* § 5 (identifying the potential limitations of existing habeas corpus provisions).

63. Michael Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISR. L. REV. 453, 501 (2007).

64. *Id*.

65. *Id*. at 502.

Rapporteurs of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, raised the possibility of taking action to make aspects of the right to a fair trial non-derogable.[66] The Rapporteurs' 1993 progress report recommended the development of a third optional protocol to the International Covenant on Civil and Political Rights aimed at guaranteeing the right to a fair trial and remedy in all circumstances.[67] Appended to the report was a draft third optional protocol, the primary focus of which was to add Articles 9(3), 9(4) and 14 to the list of non-derogable provisions enumerated in Article 4 of the Covenant.[68] These articles guarantee the right to appear before a judge following a criminal arrest, the right to habeas corpus, and fair trial rights, respectively.[69]

In their 1994 final report, the Rapporteurs recommended the Sub-Commission adopt a revised draft of the third optional protocol.[70] They further recommended the drafting of a declaration on the right to habeas corpus, *amparo*, and other remedies.[71] The proposal for a third optional protocol was forwarded to the Human Rights Committee, which considered the recommendation in April 1994.[72] It noted that the availability of habeas corpus during emergencies had often been discussed, and that states generally understood that the right should not be limited during emergencies.[73] The Committee warned that the third optional protocol might actually work contrary to its intended goal of strengthening habeas corpus. It expressed its view that

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66. Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1994/24, ¶ 3 (June 3, 1994).

67. The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening, Fourth Report Prepared by Mr. Stanislav Chernichenko and Mr. William Treat, U.N. Doc. E/CN.4/Sub.2/1993/24, ¶ 102 (June 29, 1993).

68. Third Optional Protocol to the Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/Sub.2/1993/24, Annex , at 25-27 (June 29, 1993).

69. *See* ICCPR arts. 9(3), 9(4), & 14.

70. Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1994/24, ¶¶ 165-66 (June 3, 1994).

71. *Id.* ¶ 165.

72. Official Records of the General Assembly, Forty-ninth Session, Supp. No. 40, Vol. I, U.N. Doc. A/49/40, Annex XI, at 119 (Sept. 21, 1994).

73. *Id.*

> there is a considerable risk that the proposed draft third optional protocol might implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.[74]

In other words, this might give states the impression that by not ratifying a new optional protocol they can "opt out" of non-derogable habeas corpus protection, even if the state is already bound by a non-derogable habeas corpus provision.[75] Alfred De Zayas observes that no member of the Committee spoke in support of the proposal,[76] and the Committee declared that the optional protocol was an "inadvisable" course of action.[77] The third optional protocol was not pursued further.

This experience exposes an important concern about negotiating a new treaty to confirm the scope of habeas corpus protection. Even if challenges exist in ensuring state compliance with current habeas corpus provisions, if the parameters of that protection can be firmly established based on current law, an attempt to confirm those parameters in the form of a new treaty may actually be a step backward. This concern was well stated by the International Committee of the Red Cross in relation to the question of confirming the non-derogability of habeas corpus.

> [T]here may be a certain danger in doing this by way of an optional protocol because this may give the impression that the non-derogability of fundamental judicial guarantees is optional. States which do not ratify may well then derogate from these standards arguing that the protocol does not bind them.[78]

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74. *Id*.

75. The Inter-American Court determined that the right to habeas corpus contained in the American Convention is non-derogable in *Habeas Corpus in Emergency Situations*, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (Ser. A) No. 8 (Jan. 30, 1987). The Human Rights Committee followed suit by determining that habeas corpus is non-derogable under the International Covenant. *See* Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001). For a full discussion of these decisions on the non-derogability of habeas corpus, *see supra* § 5.2.

76. *See* Alfred de Zayas, *The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, *in* THE RIGHT TO A FAIR TRIAL 676 (David Weissbrodt & R. Wolfrum eds. 1998).

77 . Official Records of the General Assembly, Forty-ninth Session, Supp. No. 40, Vol. I, U.N. Doc. A/49/40, Annex XI, at 119 (Sept. 21, 1994). The Committee also felt that it would not be feasible to expect that all of the fair trial rights in Article 14 could remain in effect during an emergency. *Id*.

Instead, the International Committee of the Red Cross suggested that it would be useful "to study whether there may be some other way to make it clear that certain essential guarantees are *already* non-derogable. . . ."[79] The Human Rights Committee took a step in this direction with the issuance of General Comment 29 in 2001, specifying the non-derogability of Article 9(4) of the International Covenant on Civil and Political Rights.[80] Given these experiences, it may be that the comprehensive clarification or restatement of existing law will have a more positive impact than an attempt to renegotiate the parameters of habeas corpus protection in international law.

7.1.3 International Institutions

International law specifies that states will provide access to habeas corpus in their domestic court systems. The current role of international legal institutions has been to police state compliance in providing a domestic remedy that conforms to international norms. These international institutions are generally not directly accessible for an individual seeking habeas corpus relief, with the limited exception of international criminal law institutions. The International Criminal Tribunal for Rwanda, for example, confirmed its inherent authority to conduct habeas corpus review, but only for individuals within its limited jurisdiction.[81]

Several scholarly proposals have been made to empower international legal institutions to conduct habeas corpus proceedings, as well as concrete legal action. The most notable advocate of habeas corpus at the international level was the United States lawyer Luis Kutner. Following the 1948 political arrest of Jozsef Cardinal Mindszenty by the Hungarian government, Kutner explored the possibility of legal actions to obtain the Cardinal's release.[82] Kutner concluded that an action for habeas

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78. Report of the Secretary-General Prepared Pursuant to Sub-Commission Resolution 1993/26, U.N. Doc. E/CN.4/Sub.2/1994/26, at 14 (June 13, 1994).

79. *Id*. (emphasis added).

80. Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001). The identification of right not enumerated in Article 4 of the Covenant has, however, been characterized as "controversial." Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 HUM. RTS. L. REV. 81, 91 (2002). *See supra* § 5.2

81. *Barayagwiza v. Prosecutor* , Case No. ICTR-99-54, Decision, ¶ 88 (Nov. 3, 1999).

82. LUIS KUTNER, WORLD HABEAS CORPUS 100 (1962).

corpus could be brought within the United Nations.[83] After consulting with Catholic leaders in the United States, he prepared a widely-distributed memorandum in support of this idea and traveled to Europe in 1950 to meet with church leaders.[84] While Kutner found "great interest among those most highly concerned," his meeting revealed a reluctance to pursue to the option without complete assurance that it would succeed.[85] In the end, his plan was shelved.[86]

In April 1951, William Oatis, a U.S. citizen and an Associated Press reporter, was arrested in Czechoslovakia.[87] Oatis was held incommunicado and subjected to harsh treatment before his summary conviction.[88] Kutner again raised the idea of a habeas corpus action in the United Nations, and in May 1952 addressed a petition for a United National Writ of Habeas Corpus to the Economic and Social Council via Eleanor Roosevelt, a member of the American delegation.[89] The petition suggested that the Economic and Social council or General Assembly had inherent power to act under the U.N. Charter, and also raised the possibility of referral to the International Court of Justice.[90] Eight days after the petition was filed, the U.N. Commission on Human Rights advised that it would allow the filing of the petition, and served copies on Czechoslovakia as respondent.[91]

Kutner reported the United States government neither embraced nor distanced itself from the petition, though others have concluded the State department was resistant to his involvement.[92] Vicki Jackson concludes that Oatis's wife did not

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83. *Id*.

84. *Id*. at 100-01.

85. *Id*. at 101.

86. *Id*.

87. *Id*. at 103.

88. KUTNER, *supra* note 82, at 104.

89. *Id*. at 105

90. Vicki Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 311 (2006).

91. KUTNER, *supra* note 82, at 105.

92. Jackson, *supra* note 90, at 314.

embrace the efforts, either.[93] The petition sat before the Commission for a year.[94] In May 1953, the Dominican Republic introduced a proposed resolution in the General Assembly which indicated it was intervening on behalf of Oatis, and asked that the petition be referred to the International Court of Justice and prosecuted by members of the Human Rights Commission.[95] The United States asked that consideration of the resolution be temporarily delayed for thirty days;[96] before that time expired, Oatis was freed.[97]

Kutner was convinced that the potential proceedings before the United Nations had contributed to Oatis's release, but he was also frustrated by the speed such an action would take. He wrote that the Oatis case demonstrated that it would take at least five years for a habeas corpus proceeding to be decided before existing United Nations organs, and that additional time might be required for enforcement.[98] Kutner became convinced that a new mechanism was needed to hear habeas corpus petitions within the United Nations framework.

From the early 1950s through the 1970s, Kutner published and spoke prolifically in favor of the establishment of what he called World Habeas Corpus.[99] Having determined that existing institutions, namely the United Nations General

93. Id. at 310.

94. KUTNER, *supra* note 82, at 106.

95. Resolution Proposed by the Dominican Republic, *in* Kutner, *supra* note 82, Annex XII at 263-64.

96. KUTNER, *supra* note 82, at 106.

97. *Id*.

98. *Id*. at 107-08.

99. *See, e.g*., THE HUMAN RIGHT TO INDIVIDUAL FREEDOM: A SYMPOSIUM ON WORLD HABEAS CORPUS (Luis Kutner ed. 1970); Luis Kutner, *World Habeas Corpus: Ombudsman for Mankind*, 24 U. MIAMI L. REV. 352 (1970) [hereinafter Kutner, *Ombudsman*]; Luis Kutner, *World Habeas Corpus, Human Rights and World Community*, 17 DEPAUL L. REV. 3 (1967) [hereinafter Kutner, *World Community*]; Luis Kutner, "*International" Due Process for Prisoners of War: The Need for a Special Tribunal of World Habeas Corpus*, 21 U. MIAMI L. REV. 721 (1967); Luis Kutner, *World Habeas Corpus: Ligament for Political Diversity*, 43 U. DET. L.J. 79 (1965); Luis Kutner, *World Habeas Corpus: The Legal Ultimate for the Unity of Mankind*, 40 NOTRE DAME L. 570 (1964) [hereinafter Kutner, *Unity of Mankind*]; Luis Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525 (1964); KUTNER, *supra* note 82; Luis Kutner, *World Habeas Corpus: A Legal Absolute for Survival*, 39 U. DET. L.J. 279 (1962) [hereinafter Kutner, *Legal Absolute*]; Luis Kutner & Beverly Carl, *An International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order*, 22 U. PITT. L. REV. 469 (1961); Luis Kutner, *World Habeas Corpus for International Man: A Credo for International Due Process of Law*, 36 U. DET. L.J. 235 (1959); Luis Kutner, *Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights*, 28 TUL. L. REV. 417 (1954).

Assembly and International Court of Justice, could not provide speedy and effective habeas corpus relief, Kutner felt that of a new international court was necessary.[100] He drafted and disseminated a proposed Treaty-Statute of the International Court of Habeas Corpus.[101]

Kutner's plan established nine regional habeas corpus circuits, to make the courts as accessible as possible,[102] and a court of review.[103] Each party to the United Nations would select two judges to serve on the courts.[104] Each circuit would be staffed with an Attorney-General and administrators.[105] Kutner proposed legal standards similar to those in the Anglo-American tradition, with the court issuing a "show cause" order upon the respondent nation if three or more judges in a circuit were convinced of the legal sufficiency of the petition.[106] Access to the court required an exhaustion of available remedies or a showing that no remedy existed, although a court could take original jurisdiction in extraordinary cases.[107]

Kutner recognized that his international proposal would face technical challenges, including the lack of enforcement mechanisms, but pointed out that all international institutions relied on voluntary cooperation.[108] In response to the concern that standards and sources of law would be inadequate, he argued that international custom, general principles of law, state constitutional practices, and the Universal Declaration of Human Rights were adequate.[109] Kutner also conceded that states might attempt to evade the courts' judgments, but countered that courts everywhere relied on the moral force of their decisions. He emphasized that in

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100. KUTNER, *supra* note 82 at 99.

101. *See id.*, Appendix XIII at 266-74 [hereinafter "Treaty-Statute"]; *see also* Kutner, *Legal Absolute*, *supra* note 99, at 331-40.

102. KUTNER, *supra* note 82, at 115. Kutner's original plan established seven circuits. Treaty-Statute, art. III(2).

103. Treaty –Statute, art. XVI.

104. KUTNER, *supra* note 82, at 114.

105. *Id*. at 116.

106. *Id*.

107. *Id*.

108. *Id*. at 132.

109. *Id*.

domestic systems it is the political branches, and not the courts, that hold "the purse and the sword."[110]

Kutner was also conscious of the political obstacles that his plan faced. Acknowledging that the "spectre of 'supranatural government'" would be used against the proposal, he argued that the international rule of law could be developed without a supranational government.[111] This international legal, as opposed to international political approach, would create less intrusion on sovereignty.[112] Because of this, he reasoned, an international court would be more effective than a supranational government as an instrument of international reform.[113] The proposal was significant, and grounded in Kutner's views on natural law and the dignity of the individual. He wrote of his efforts,

> The philosophy that pervades World Habeas Corpus is that there can be a world summary remedy, prosecuted by world attorney generals, that will stand against any winds of tyranny that blow, as a haven of refuge for those who might otherwise suffer because they are helplessly weak, outnumbered, or because they are nonconforming victims of prejudice or public excitement. No higher duty, no more solemn responsibility rest upon this international court than that of translating into living law and maintaining an impervious shield of "due process of law" deliberately planned and inscribed for the benefit of every human being on the face of the globe – whatever his race, creed, color, or persuasion.[114]

Kutner saw the proposal as a vehicle to promote the rule of law internationally[115] and, therefore, as a means to promote peace and security.[116]

The proposal received the support and endorsement of some significant figures. Former British Prime Minister Sir Winston Churchill called World Habeas

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110. KUTNER, *supra* note 82, at 133.

111. *Id*. at 128-29.

112. *Id*. at 130.

113. *Id*.

114. Kutner, *World Community*, *supra* note 99, at 8.

115. KUTNER, *supra* note 82, at 119.

116. *Id*. at 10, 35.

Corpus "the difference between civilization and tyranny."[117] Justice Kotara Tanaka of the International Court of Justice offered his sponsorship to the World Habeas Corpus movement.[118] The introduction to Kutner's monograph, which argued for a new international mechanism, was written by Professor Quincy Wright, a former president of the American Society of International Law and former consultant to the Nuremberg trials and UNESCO,[119] with a forward by renowned Harvard Law School Dean Roscoe Pound.[120] Kutner was also able to find support in the United States Congress. On April 23, 1958, Representative John Beamer from William Oatis's home state of Indiana submitted a proposed resolution in the United States House of Representatives that called for U.S. cooperation in the World Habeas Corpus effort.[121] Others, such as U.S. Supreme Court Justice William Brennen and former Justice and U.N. Ambassador Arthur Goldberg also praised Kutner's effort.[122] Jackson observes that it is significant that the proposal attracted so much public support at a time when resistance to international human rights was increasing in the United States,[123] although she speculates that may have been in part due to the proposal's value as an ideological tool in the Cold War.[124]

In the end, however, Kutner's vision was not realized. His proposal met with opposition from the United States Department of State as being impractical and an infringement on state sovereignty.[125] Kutner continued to test habeas corpus actions under the existing United Nations institutions,[126] and continued to publish in support of the Treaty-Statute.

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117. Kutner, *Unity of Mankind*, *supra* note 99, at 570.

118. Kutner, *Legal Absolute*, *supra* note 99, at 279.

119. KUTNER, *supra* note 82, at i.

120. *Id*. at viii.

121. H.R. Con. Res. 318, 85th Cong. (1958), *reprinted in* KUTNER, *supra* note 82, Appendix I at 201.

122. Jackson, *supra* note 90, at 327-28.

123. *Id*. at 305-06.

124 . *Id*. at 341.

125. *State Dep't Report on H.R. Con. Res. 318 Before the H. Comm. on Foreign Affairs*, 85th Cong (1958), *reprinted in* Kutner, *supra* note 82, at 154. *See also* Jackson, *supra* note 90, at 323.

126. Kutner, *Ombudsman*, *supra* note 99, at 354.

7. Strengthening Habeas Corpus

More recently, May suggests – in very general terms – the creation of a world court of equity to ensure respect for due process at the international level.[127] He describes this court as a 'court of appeals' from regional human rights courts and, potentially, from domestic courts, a court of first impressions in certain instances, and a 'gap-filler' where legal black holes exist.[128] May envisions that the court would hear appeals from detainees challenging the legality of their detention who have not received satisfaction in domestic or regional courts.[129] He considers his idea more restrictive than past proposals (such as Kutner's) because of his less expansive view of habeas corpus.[130] May suggests that in the alternative, the emerging model of global administrative law or an enhanced version of the Human Rights Council might fill this role.[131]

May's suggestion confirms that gaps exist in human rights protection generally and habeas corpus protection specifically, and rekindles the idea that institutional changes might be a part of the solution. His suggestion of a world court of equity is a theoretical one, though, and does not dwell on the practical questions of how it might be realized. While May's suggestions are in contrast to Kutner's detailed Treaty-Statute and highly developed arguments in favor of World Habeas corpus, it nonetheless serves as a useful starting point for further discussion about new institutions.

7.1.4 Assessment of Options

The negotiation of a new treaty – whether it confirms the law of habeas corpus, like the Sub-Commission proposed third optional protocol, or creates a new international court, like Kutner's Treaty-Statute – is a complex and challenging goal. History has shown that such proposals are likely to encounter resistance.

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127. MAY, *supra* note 42, at 205-07.

128. *Id*. at 206-07.

129. *Id*. at 207.

130. *Id*. at 208.

131. *Id*. at 210-215.

In the case of a treaty confirming the law, part of the resistance came from United Nations and international organizations concerned that the approach would imply that states have the option to derogate under existing law if they do not become a party to the new treaty.[132] At the same time (as discussed in Chapter 6), there are reasons why states seek to avoid the oversight of habeas corpus, particularly in the situations where it is most needed.[133] As pointed out in Egypt's comment on the draft third optional protocol, "the number of states able to accede will be small, and its scope and effect will therefore be diminished."[134]

Against this reality, this option does not seem like a desirable course of action at present. A new United Nations treaty specifying, for example, that habeas corpus is non-derogable, applies extraterritorially, and is available during armed conflict would simply restate what the weight of authority suggests is already required under the International Covenant.[135] At the same time, there would be a significant risk that non-parties would feel justified in arguing that they are not bound by what are largely considered to be already existent norms.[136] While the international law of habeas corpus may need some clarification, this can be accomplished through other means. As the International Committee of the Red Cross suggested, there are other ways to make clear the scope of this fundamental right.[137]

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132. For a discussion of these concerns, *see supra* § 7.1.2.

133. *See supra* § 6.2.3 (examining state hostility to habeas corpus).

134. Report of the Secretary-General Prepared Pursuant to Sub-Commission Resolution 1993/26, U.N. Doc. E/CN.4/Sub.2/1994/26, at 6 (June 13, 1994).

135. For example, the Human Rights Committee has determined that the International Covenant remains applicable during armed conflict, that no derogation is permitted from habeas corpus, and that the Covenant applies extraterritorially to an individual over whom the state exercises "effective control." *See* Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (May 26, 2004) (regarding armed conflict); Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (regarding armed conflict and derogation); Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (regarding extraterritorial application). The International Court of Justice has also held that the Covenant is applicable during times of armed conflict and is applicable to acts of a state outside its own territory. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ¶ 111, 2004 I.C.J. 135 (July 9) (regarding extraterritorial application). Of course, some states and scholars dispute these determinations. For a discussion of these issues and the conflicting views, *see supra* § 5.1 (regarding armed conflict); § 5.2 (regarding derogation); and § 5.3 (regarding extraterritorial application).

136. *See supra* § 7.1.2.

137. *See supra* text accompanying note 79.

In the case of a new court, resistance would likely be from states arguing that it represents an infringement on their sovereignty, as Kutner encountered with the United States in 1958.[138] This would potentially shift the location for the habeas corpus proceedings guaranteed in international human rights law from the domestic courtroom to an international body. While this would make a proposal for a new court a difficult goal, this approach comes with fewer risks than the third optional protocol. A treaty for a new international habeas corpus mechanism creates something new, and is not merely a clarification of existing law. Such a treaty could still contain a restatement of habeas corpus law in the context of the specific legal norms and procedures to be applied by its specific court. This would present much less risk of regression in the current state of the law for non-parties.

Jackson notes the absence of Kutner's proposal from debates about habeas corpus in the last decade.[139] It is possible that in the contemporary context, some states might voluntarily accept the jurisdiction of a new international habeas corpus court. The experience of the International Criminal Court, established by treaty in 1998, provides one example for this possibility.[140] Both Kutner and May point out that an international habeas corpus court could exist independent of a supranational executive branch or political system.[141] Kutner argues that a judicial, as opposed to political, approach is the best way to advance the rule of law internationally,[142] as it presents less of an infringement on sovereignty; little more than extradition treaties.[143] While the creation of a new court might possibly be criticized as contributing to the fragmentation of international law, scholars such as Koskenniemi and Paivi Lenio do not see the proliferation of international institutions as particularly problematic.[144] In

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138. *State Dep't Report on H.R. Con. Res. 318 Before the H. Comm. on Foreign Affairs*, 85th Cong (1958), *reprinted in* Kutner, *supra* note 82, at 154.

139. Jackson, *supra* note 90, at 305.

140. As of January 2013, the number of states party to the Rome Statute of the International Criminal Court stood at 121. The States Parties to the Rome Statute, http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx.

141. *See* KUTNER, *supra* note 82, at 128; MAY, *supra* note 42, at 212.

142. KUTNER, *supra* note 82, at 119.

143. *Id*. at 130.

fact, the creation of one new institution empowered to pull together the already-fragmented legal components related to habeas corpus – human rights law, international humanitarian law, general principles of law, international criminal law – might be desirable.

The possibility of a new court should be considered as a means of strengthening habeas corpus. Habeas corpus jurisdiction might also be considered for express inclusion in any future courts, including the proposed World Court of Human Rights envisioned by Manfred Nowak and Julia Kozma.[145] Given the odds and the long timeframe, however, it cannot be the only approach considered. An option that does not involve the negotiation of a new treaty is more realistic and immediate.

The most effective short-term means to strengthen the right to habeas corpus internationally is to better define the scope and application of existing provisions. This approach maintains the role of domestic courts to provide habeas corpus review in the first instance. International institutions maintain the function of review where they currently have jurisdiction. At both levels, courts would be guided by the same clarified legal norms and procedures.

Of particular concern are the challenges identified in Chapter 5.[146] How can existing norms ensure an effective remedy consistent with its fundamental nature and purpose? Asserting well-reasoned answers to lingering questions represents a major step toward ensuring that the international habeas corpus provisions serve the critical roles detailed in Chapter 6 as an effective guarantee of individual liberty and the rule of law.[147]

While working on their proposal for a third optional protocol, the Special Rapporteurs on the Right to a Fair Trial recommended that the Sub-Committee also consider drafting a separate declaration on habeas corpus and similar rights to "amplify and further define [their] international meaning."[148] While scholarship such

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144. *See* Martii Koskenniemi & Paivi Lenio, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 575 (2002).

145. *See* MANFRED NOWAK & JULIA KOZMA, A WORLD COURT OF HUMAN RIGHTS (2009), http://www.udhr60.ch/report/hrCourt-Nowak0609.pdf.

146. *See supra* § 5 (identifying the major challenges to international habeas corpus guarantees).

147. *See supra* § 6 (examining the role of habeas corpus in protecting the individual detainee, maintaining the rule of law, and promoting democracy).

as this study plays an important role in defining the international meaning and scope of habeas corpus, a United Nations declaration focused exclusively on habeas corpus offers the most authoritative definition and should be pursued.

Finally, further thought might be given to the potential for existing international legal institutions to entertain habeas corpus petitions at the first instance in exceptional circumstances. It is worth remembering that in the Oatis case, Luis Kutner's petition for a United Nations Writ of Habeas Corpus was accepted by the Human Rights Commission and served on Czechoslovakia.[149] Jackson calls Kutner's argument that the General Assembly could refer the case to the International Court of Justice for an advisory opinion "well-founded."[150] Despite the very different nature of the courts, it is not inconceivable that a human rights court could assert its inherent authority to grant habeas corpus relief as the International Criminal Tribunal for Rwanda did in *Barayagwiza v. Prosecutor*.[151] The European and Inter-American systems, for example, already possess the authority to adopt interim or provisional measures.[152] Both systems require exhaustion of domestic remedies,[153] though this may be satisfied by the absence of effective domestic procedures.[154] It is, perhaps, not a complete stretch to think that under the right circumstances a court might issue an order that the petitioner be produced before a judge of the court. While this goes beyond the usual role of a human rights court, it is also a natural progression.[155]

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148. Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1994/24, ¶ 165 (June 3, 1994).

149. *See supra* text accompanying notes 94-97.

150. Jackson, *supra* note 90, at 311-12.

151. Case No. ICTR-99-54, Decision, ¶ 88 (Nov. 3, 1999).

152. Eur. Ct. R. 39; Am. Conv. art. 63(2).

153. *See* Eur. Conv. art. 35; Am. Conv. art. 46(a).

154. *See, e.g.*, American Convention, art. 46(2); Batayev & Others v. Russia, App. Nos. 11354/05 & 32952/06, ¶ 162 (June 17, 2010); Open Door & Dublin Well Women v. Ireland, 246-A Eur. Ct. H.R. (ser. A) at 16-17 (¶¶ 47-52) (1992).

155. *See, e.g.*, NOWAK, *supra* note 145, at 23-24.

7.2 Fundamental Considerations: An Adaptable Remedy Available to Every Person

The need for meaningful habeas corpus protection in international law is apparent.[156] Fascism was a major catalyst for transferring the protection of fundamental right from the exclusive jurisdiction of the state to the field of international law.[157] The Oatis case demonstrated that the habeas corpus has the potential not just to protect the citizens of a state against its own government, but also to protect a state's citizens abroad from the actions of a foreign government.[158]

To be truly meaningful, the right to habeas corpus at the international level must be available to everyone, regardless of location or status. For habeas corpus to effectively protect individual liberty and maintain the rule of law, no person can exist in a "rights free zone"[159] beyond its reach. At the same time, in order for habeas corpus to be available in a workable manner, it must remain a flexible remedy that can be adapted to particular situations.[160] As the United States Supreme Court wrote in 1969, "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected."[161] This section elaborates on these two fundamental considerations which should guide our understanding of and application of habeas corpus guarantees.

To serve the critical role of safeguarding individual liberty and physical integrity and maintaining the rule of law,[162] the most important feature of habeas corpus is that it is accessible to every person under all circumstances. No human

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156. *See supra* § 6 (discussing the justification for robust habeas corpus).

157. KUTNER, *supra* note 82, at 60-61.

158. *See supra* text accompanying notes 87-97 (describing Louis Kutner's efforts to seek habeas corpus relief for Oatis through the United Nations).

159. *See* Harold Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 140-41 (1994).

160. *See supra* § 5.4.1 (discussing flexibility as a guiding principle in determining appropriate habeas corpus procedures).

161. Harris v. Nelson, 394 U.S. 286, 291 (1969).

162. For a discussion of the justification for strong habeas corpus guarantees, *see supra* § 5.

being deprived of his or her liberty should be denied the right to access a court via the habeas corpus process. This must be an absolute no matter where, why, or by whom the individual is detained. This is consistent with the object of human rights law, which de Londras writes, "is to further the philosophy of equality of respect for all regardless of nationality, location, [or] race."[163] This philosophy can be traced to the core document of the modern human rights regime. The Universal Declaration of Human Rights is grounded in the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[164] A central premise of the Declaration is that it applies to all persons without distinction.[165] As Schabas emphasizes, its broad principles are not limited by jurisdictional or derogation provisions, but apply to everyone, everywhere.[166]

One of the unique qualities of habeas corpus is "its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes. . . ."[167] To be clear, this access does not necessarily mean that each individual will be entitled to a full judicial hearing; rather, he or she should be allowed to petition a competent court to at least make the claim that he or she is unlawfully detained, and to have the lawfulness of the detention be reviewed by the court.[168] The court can, of course, determine whether the claim can be ruled on in a summary fashion or whether it justifies further consideration.[169]

What is important is that every person is able to reach the court to ask for its help. The United States government denied that detainees at Guantánamo Bay were

163. de Londras, *supra* note 34, at 237.

164. UDHR, preamble.

165. UDHR, art. 2.

166. William Schabas, Inaugural Lecture at Leiden University: The Three Charters: Making International Law in the Post-War Crucible, at 10-12 (Jan. 25, 2013), http://www.mediafire.com/view/?p7zisqsup89ay0h.

167. *Harris*, 394 U.S. at 291.

168. Smirnova v. Russia, No. 712/1996, ¶ 10.1, U.N. Doc. CCPR/C/81/D/712/1996 (Aug. 18, 2004).

169. Habeas corpus proceedings are typically initiated by the petition of the detainee or a third party which is then reviewed for legal sufficiency by a court. If it appears from the face of this petition that the individual is not entitled to relief the court may summarily deny the petition without a hearing or personal appearance by the petitioner. Procedural requirements are discussed *infra* at § 7.3.4.

entitled to habeas corpus review.[170] Yet these detainees were, eventually, able to access the civilian courts of the United States through petitions for a writ of habeas corpus.[171] Habeas corpus was the tool that allowed this purported legal black hole to be brought within the scope of the rule of law.[172]

The critical role that habeas corpus plays in protecting individual rights, maintaining the rule of law, and regulating states of exception[173] is contingent on every person having access to an effective habeas corpus remedy. The unlawful combatant, the prisoner of war, the hospitalized patient, the alleged terrorist, the convicted murderer – each must be able to seek habeas corpus review from a competent court regardless of where, how, or why they are detained. Some of these petitions will be resolved in a summary manner, but it is critical that in each case the detainee has the opportunity to put his or her claim before the court.

At the same time, states must be afforded some latitude in meeting the obligation to afford all persons access to habeas corpus under all circumstances for two primary reasons. First, habeas corpus proceedings may take different forms in different legal systems.[174] While some procedural commonality must exist, there should be room for variations based on legal tradition, court structure, and other factors particular to a state. Second, the nature of proceedings should conform to circumstances.[175] The logistics of providing review for some a large number of

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170. The Guantánamo Bay facility was intentionally chosen on the theory that its location would bar detainees from accessing United States courts. For a discussion of the political rationale for this choice and the legal arguments made in favor of it, *see supra* Intro.; § 5.3.1

171. *See* Boumediene v. Bush, 533 U.S. 723 (2008) (holding that legislative attempts to bar detainees from habeas corpus review amounted to an unconstitutional suspension of the right). For a discussion of the *Boumediene* case, *see supra* § 6.2.2.

172. The *Boumediene* court referred to habeas corpus as an "indispensible mechanism" in preventing the legislature and executive from governing without legal constraint. 553 U.S. at 765. *See also, e.g.,* David Jenkins, *Habeas Corpus and Extraterritorial Jurisdiction after Boumediene: Towards a Doctrine of 'Effective Control' in the United States*, 9 HUM. RTS. L. REV. 306 (2009); Daniel Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1.

173. For an explanation of the role in protecting individual liberty and personal integrity and maintaining the rule of law, *see supra* § 6.

174. During the drafting of Article 9(4) of the International Covenant it was emphasized that countries must be allowed to adapt habeas corpus proceedings "within the framework of their own systems." U.N. Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights, U.N. Doc. A/2929 at 35 (July 1, 1955).

175. The United States Supreme Court, for example, has indicated that proceedings may be tailored to the exigencies of the circumstances during ongoing military conflict, so long as they retain core elements. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

irregular combatants detained overseas, for example, will likely be more involved than those involved in review of a domestic criminal defendant. The tailoring of proceedings to unique circumstances may be warranted, so long as certain minimum standards are met.[176]

These needs are readily accommodated by habeas corpus which is, at its core, flexible.[177] In the landmark Guantánamo Bay case of *Boumediene v. Bush*,[178] the United States Supreme Court observed that habeas corpus was "above all, an adaptable remedy. Its precise application and scope changed depending on the circumstances."[179] Therefore, Robert Chesney correctly argues that states should be allowed to adapt habeas corpus in particularly challenging circumstances.[180] He asserts, in the context of the American 'war on terror,' that a lack of adaptability to the circumstances would present the twin risks of disrupting military operations and spurring greater reliance on shadowy practices such as "extraordinary rendition."[181] During exceptional situations, the question of whether habeas corpus proceedings are speedy may be viewed differently.[182] The formality of court procedures might be relaxed. Categorical decisions may be warranted. For example, it might not be unreasonable for a court to make a blanket determination that the detention of an irregular combatant detained overseas is legal under the applicable law, and that this determination is applicable to each of the other similarly situated detainees who makes the same allegation of illegal detention. It is critical, however, that each detainee retain access to a court to demonstrate that he or she is not actually in the

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176. *See supra* § 5.4.

177. George Longsdorf, *Habeas Corpus – A Protean Writ and Remedy*, 10 OHIO ST. L. J. 301, 316 (1949).

178. 553 U.S. 723 (2008).

179. *Id*. at 780.

180. Robert Chesney, *Judicial Review, Combatant Status Determinations, and the Possible Consequences of* Boumediene, 48 HARV.INT'L L.J. ONLINE 62, 67-68 (2007).

181. *Id*.

182. International institutions already judge speediness in light of the circumstances. *See, e.g.*, Ines Torres v. Finland, No. 291/1988, ¶ 7.3, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 5, 1990); Sanchez-Reisse v. Switzerland, 107 Eur. Ct. H.R. (ser. A) at 20 (¶ 55) (1986). For discussion of interpretation of the speediness requirement by international institutions, *see supra* § 3.2.2 (International Covenant); § 4.1.2 (European Convention); § 4.2.4 (American Convention).

same category as the first detainee, or to protest the violation of other substantive rights.

The appropriateness of particular measures will vary from case to case. Koskenniemi writes that "[i]n a complex environment . . . law becomes deformalized; bright-line rules do not work. We need to take into account the specific circumstances of the situation so as to obtain the objectives of the law in that case."[183] It is important that any variation from established procedures be guided, then, by the objectives of the right to habeas corpus. No matter what, every person must retain access to the remedy and it must be administered in such a way as to ensure individual liberty, protect other substantive rights, and subject state action to meaningful judicial supervision so as to promote the rule of law and regulate exceptions.[184]

7.3 Asserting the Proper Scope and Application of Habeas Corpus

As discussed in Chapter 5, states have challenged the scope and application of habeas corpus in the many of the situations where it is most vital. The areas where the greatest vulnerabilities appear involve the availability of habeas corpus during armed conflict,[185] the derogability of habeas corpus,[186] the extraterritorial application of habeas corpus,[187] and the procedural requirements for habeas corpus.[188] Establishing the proper scope and application of habeas corpus under international law is essential to providing a meaningful and effective remedy that can serve the

183. Martti Koskenniemi, *Occupied Zone – "A Zone of Reasonableness"?,* 41 ISR. L. REV. 13, 21 (2008).

184. For a discussion of the role of habeas corpus in achieving these objectives, *see supra* § 6. The Combatant Status Review Tribunals operated by the United States at Guantánamo Bay presents an example of alternative proceedings that failed to meet these objectives. For an account of the shortcomings of these proceedings, *see* Mark Denbeaux et al., *No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo*, 41 SETON HALL L. REV. 1231 (2011).

185. *See supra* § 5.1.

186. *See supra* § 5.2.

187. *See supra* § 5.3.

188. *See supra* § 5.4.

important purposes of protecting the individual[189] and maintaining the rule of law.[190] Guided by those purposes and the fundamental considerations discussed in the preceding section – availability to everyone and flexibility – and employing the legal analysis of these four challenges presented in Chapter 5, the following positions can be asserted regarding the appropriate scope and application of habeas corpus.

7.3.1 Armed Conflict

The existence of armed conflict cannot be an excuse to eschew the critical protections offered by habeas corpus. As the United States Supreme Court wrote in *Hamdi v. Rumsfeld*,[191] "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."[192]

As revealed by the analysis of controlling legal principles in Section 5.1, detention review remains available during international and non-international armed conflict under either human rights law or, in defined circumstances, international humanitarian law.[193] Consistent with the fundamental consideration that every person must have access to habeas corpus, the two legal frameworks have the capacity to provide seamless regulation of detention at all times. For persons who fall into one of the three categories specified under the Geneva Convention Relative to the Treatment of Prisoners of War[194] and Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[195] detention is regulated at a minimum by the review provisions of those treaties. Persons who fall outside of the scope of these categories are subject to the habeas corpus provisions of applicable human rights law. Everyone is entitled to review; the provisions of the two Geneva Conventions simply create

189. *See supra* § 6.1.

190. *See supra* § 6.2.

191. 542 U.S. 507 (2004).

192. *Id*. at 535.

193. *See supra* §§ 5.1.

194. 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter "Third Geneva Convention"].

195. 75 U.N.T.S. 287 (entered into force Oct. 21,1950) [hereinafter "Fourth Geneva Convention"].

detention review schemes that are specifically adapted to the context of international armed conflict or occupation.

Adaptability is a fundamental consideration in ensuring the right habeas corpus. The three specific schemes contained in the Third and Fourth Geneva Conventions have been, in a sense, pre-adapted by treaty for application in unique, defined circumstances of armed conflict or occupation. Articles 43 and 78 of the Fourth Geneva Convention govern detention reviews for foreign nationals in enemy territory and persons in occupied territories, respectively.[196] In both cases, detainees can initiate review conducted by a court or administrative board with guarantees of independence and impartiality.[197] Periodic review is required if detention continues.[198] However, as explained in Section 5.1.3, these review procedures are a baseline, and the ICRC principles drafted by Jelena Pejic urge that the highest level of procedural guarantees allowed under the circumstances be employed.[199] Review by a court and the right to counsel are thus preferred.[200]

Article 5 of the Third Geneva Convention contains the other scheme applicable during international armed conflict, and specifying that if any doubt exists regarding a person's status as a prisoner of war, that person shall be afforded the protection of the convention until his or her status is determined by a competent tribunal.[201] While this scheme provides for limited review on the question of status and no review once prisoner of war status is confirmed, this is not problematic for two reasons. First, a prisoner of war's detention for the duration of hostilities is based on just two factors – the existence of hostilities, and status as a prisoner of war[202] – and, once determined, prisoner of war status presumably will not change. Second, the

196. Fourth Geneva Convention, arts. 43, 78. For a more detailed discussion of these provisions, *see supra* § 5.1.2.

197. Fourth Geneva Convention, arts. 43, 78.

198. Fourth Geneva Convention, arts. 43, 78.

199. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 386-89 (2005).

200. *Id*.

201. Third Geneva Convention art. 5. For a more detailed discussion of this provision, *see supra* § 5.1.2.

202. *See supra* § 5.1.3.

prisoner of war scheme is supplemented by monitoring mechanisms that serve the habeas corpus purpose of preventing violations of other substantive rights.[203]

These special Geneva Convention schemes provide the baseline of detention review in the limited circumstances where they are applicable. The baseline protections afforded by these schemes may prove inadequate to safeguard the rights of detainees, in which case habeas corpus might supersede international humanitarian law.[204] Individuals subject to these the international humanitarian law frameworks should still have access to habeas corpus for very limited purposes, such as arguing that the Geneva Convention framework is no longer in effect due to the end of hostilities, or that the required review is absent. This access is critical to ensure that the primary detention regulation schemes are operating in a manner ultimately consistent with the rule of law, and to prevent international humanitarian law from being used in an abusive manner to establish a state of exception beyond judicial regulation.[205]

Outside of these three Geneva Convention detention review schemes applicable in specified circumstances during international armed combat, challenges to the lawfulness of detention during armed conflict are governed by habeas corpus under human rights law.[206] This necessarily includes access for combatants not granted prisoner of war status following an Article 5 hearing.[207] As with all habeas corpus review, procedures might be adapted to fit the particular circumstances. For example, access to habeas corpus could be provided in a more flexible manner where a large number of individuals are detained on foreign territory during active hostilities.

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203. For a description of these other substantive rights, *see supra* § 6.1.2

204. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights ¶ 146, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (Oct. 22, 2002).

205. For example, this serves as a check against a "willed state of exception" referred to in GIORGIO AGAMBEN, STATE OF EXCEPTION 3 (Kevin Attell trans. 2005). *See supra* § 6.2.2.

206. Robert Goldman, *Extraterritorial Application of the Human Rights to Live and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict, in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 121 (Robert Kolb & Gloria Gaggioli eds. 2013).

207. Marco Sassòli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts, in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 73 (Orna Ben-Naftali ed. 2011).

7. Strengthening Habeas Corpus

As discussed in Section 5.1.4, one potential gap exists during non-international armed conflict since non-state actors may not be bound by conventional human rights law or may lack the ability to ensure review by a "court."[208] Marco Sassòli and Laura Olson offer a workable solution. They suggest that during non-international armed conflict, the detention review provisions of the Fourth Geneva Convention apply as a baseline to all parties, with parallel application of any applicable human rights obligations.[209] It is important to keep in mind that the guarantees of the Universal Declaration would also serve to fill this gap.[210] This is a functional approach, guided by the purposes and fundamental considerations of habeas corpus. Monica Hakimi writes that when the debate is over which legal domain governs, those who disagree talk past on another.[211] With respect to detention review, once it is accepted that review should be universally available regardless of the domain, the conversation can turn to how to provide the necessary review in an efficient and flexible manner.

7.3.2 Non-Derogability

The permissibility of derogation from the habeas corpus guarantees of human rights law was examined in depth in Section 5.2 above. The wealth of authorities holding that habeas corpus must be non-derogable is based, in part, upon the important role that habeas corpus plays in preventing violations of other non-derogable human rights.[212] The ability of habeas corpus to prevent torture or extrajudicial executions is eviscerated if it can be suspended during emergencies. Perhaps more important is the role of habeas corpus in maintaining the rule of law. As the only non-derogable judicial guarantee under international law, habeas corpus can ensure some separation of powers and the preservation of normative law during

208. *See supra* § 5.1.4.

209. Marco Sassòli & Laura Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 625-26 (2008).

210. *See* Schabas, *supra* note 166, at 10-12.

211. Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1367 (2012).

212. *See supra* § 6.1.2.

emergencies.[213] It has the greatest potential to regulate and limit the state of exception.[214]

The Inter-American Court held that habeas corpus is non-derogable in its landmark 1987 advisory opinion.[215] The Human Right Committee adopted General Comment 29 in 2001,[216] and the non-derogability of habeas corpus was included in the 2005 updated Principles to Combat Impunity.[217] While the European Court of Human Rights has not expressly held that Article 9(4) of the European Convention is non-derogable, in *Brannigan and McBride v. United Kingdom*[218] it did find habeas corpus to be an important safeguard against arbitrary behavior and incommunicado detention, providing assurance that derogation from other detention provisions are required by the exigencies of the situation.[219] The lack of availability of habeas corpus later played a factor in the Court's determination in *Aksoy v. Turkey*[220] that the Turkey's derogation from Article 5 exceeded the exigencies of an emergency situation it faced.[221] In addition, a state party to the European Convention may not derogate from its obligations under the Convention if the derogation is "inconsistent with its other obligations under international law."[222] A range of commentators conclude that Article 5(4) of the European Convention should now be considered non-derogable.[223]

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213. *See supra* § 6.2.1 (discussing the rule of law).

214. *See supra* § 6.2.2 (discussing states of exception).

215. Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8 (Jan. 30, 1987).

216. Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

217. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Principle 36, at 18, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

218. 258 Eur. Ct. H.R. (ser. A) (1993).

219. *Id*. at 49-50 (¶ 43).

220. 1996-VI Eur. Ct. H.R.

221. *Id*. at 22 (¶¶ 82-84).

222. European Convention art. 15(1).

223. MARK JANIS, RICHARD KAY, ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 401 (2nd ed. 2000); Elizabeth Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U. J. INT'L L. & POL'Y 653, 685-87 (1994); de Londras, *supra* note 34, at 253; Sassòli, *supra* note 207, at 91.

7. Strengthening Habeas Corpus

As discussed earlier, the U.N. Working Group on Arbitrary Detention argues that habeas corpus now represents *jus cogens*, the highest order of international law norms, and from which no derogation is permitted, a view supported by May.[224] While this position is not yet widely accepted, his call is indicative of the increasing recognition of the essential nature of habeas corpus protection, and offers further support to the conclusion that habeas corpus is non-derogable.

7.3.3 Extraterritorial Application

As detailed in Section 5.3, the element of control of the individual is the key factor in determining whether that individual is within a state's jurisdiction and, consequently, whether the state's human rights obligations extend extraterritorially.[225] Where control over the individual exists, international institutions have found that jurisdiction exists, and the state must ensure relevant human rights protections exist.[226] The detention of a human being represents the height of control over him or her. There is little doubt under current international law that a person detained by a state is within that state's control and, therefore, within its jurisdiction, even if the detainee is outside of the geographical territory of the state.[227] In addition, the Universal Declaration applies as a general matter regardless of formal notions of territory. It follows that the states must secure to the individual those human rights that are relevant to his or her situation.[228] The right to habeas corpus will always be relevant to the situation of a detainee, as will other rights, such as the prohibitions of torture or extrajudicial execution, which habeas corpus protects.

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224. *See supra* § 7.1.1.

225. For a full discussion of the extraterritorial application of human rights law generally and of habeas corpus provisions specifically, *see supra* § 5.3.

226. *See, e.g.*, Al-Skeini & Others v. United Kingdom, App. No. 55721/07, ¶ 137 (July 7, 2011). When a person is detained extraterritorially in a building, aircraft, or ship, the state's control over the physical area provides a secondary basis for jurisdiction. *See supra*, § 5.3.3.

227. *See, e.g.*, Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev. 1/Add.13 (May 26, 2004); *Al-Skeini*, App. No. 55721/07; Inter-Am Comm'n H.R., Decision on Request for Precautionary Measures, Mar. 12, 2002, 41 I.L.M. 532 (2002). For a full review of the legal authority supporting this proposition, *see supra* §§ 5.3.2 & 5.3.3.

228. *Al-Skeini*, App. No. 55721/07, ¶ 137.

The application of at least those rights relevant to detention to every detainee regardless of location provides seamless protection of the individual. This is consistent with the fundamental consideration that habeas corpus always be available to every person deprived of his or her liberty.[229] It prevents the existence of "rights free zones" where a state operates beyond the rule of law.

Critics have pointed out that a state often lacks the institutions to fulfill this obligation outside of its own territory.[230] Such logistical concerns should be taken into consideration,[231] but not a justification for the denial of rights. In such situations, the adaptability of habeas corpus is important. The manner in which review is conducted should be tailored to take into account the unique circumstances of the situation, while still providing an effective remedy that fulfills its objectives.[232]

7.3.4 Minimum Procedural Standards

While current international law is fairly clear as to the availability of habeas corpus during armed conflict, its extraterritorial application, and the derogability of habeas corpus, it offers less guidance on the procedural requirements for habeas corpus proceedings, particularly in challenging circumstances. Only the European Court of Human Rights has addressed such questions in any detail,[233] and many important questions remain unanswered.[234] This section will attempt to delineate the existing procedural standards for habeas corpus proceedings, and to make recommendations where clear standards do not currently exist.

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229. *See supra* § 7.2 (identifying fundamental considerations in habeas corpus protection).

230. Dennis, *supra* note 63, at 473 (citing CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 110 (2003)).

231. For a discussion of such considerations, *see* Boumediene v. Bush, 553 U.S. 723, 770 (2008).

232. The European Court of Human Rights has stressed the Convention must be "interpreted and applied so as to make its safeguards practical and effective." States have an obligation to take realistic and practicable steps to safeguard an individual's fundamental human rights. Al-Sadoon & Mufdhi v. United Kingdom, App. No. 61498/08, ¶ 162 (Apr. 10, 2010).

233. For a discussion of the main procedural requirements established by the European Court, *see supra* § 5.4.2. For a detailed discussion of the case law interpreting the habeas corpus provision in each of the major human rights instruments, *see supra* § 3.2 (International Covenant); § 4.1.2 (European Convention); § 4.2.4 (American Convention).

234. *See supra* § 5.4.4 (identifying unanswered procedural questions).

The minimum procedural standards for habeas corpus should be guided by the fundamental considerations that habeas corpus should be available to everyone, and that it is an adaptable remedy.[235] They should also promote its fundamental objectives – to protect individual liberty and other substantive rights, and to maintain the rule of law.[236] Because habeas corpus must be adaptable in very complex and challenging circumstances, identifying procedural minimums is more realistic than establishing strict rules of procedure applicable in every situation. The European Court of Human Rights, for example, has expressly rejected the claim that all of the fair trial requirements of the European Convention are applicable to habeas corpus proceedings in every situation.[237]

Some guidance on minimum requirements for habeas corpus proceedings can be distilled from existing human rights law. The Inter-American Commission has succinctly stated that habeas corpus must "at a minimum comply with rules of procedural fairness."[238] The Commission indicated that this means the opportunity to know and meet the other party's claims, the ability to present evidence on one's behalf, and the right to representation by counsel or some other representative.[239]

With the exception of the right to counsel, these comparable to the European Court's requirements that proceedings be adversarial and that "equality of arms" exist.[240] And while it is not clear that the Court would find counsel necessary in all in habeas corpus proceedings, it has held that counsel is required under the circumstances of particular cases.[241] It is reasonable to consider these elements

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235. *See supra* § 7.2.

236. For a discussion of these objectives, *see supra* § 6.

237. Reinprecht v. Austria, 2005-XII Eur. Ct. H.R. at 9 (¶ 46); Neumeister v. Austria, 7 Eur. Ct. H.R. (ser. A) at 43 (¶ 23) (1968). The Court has, instead emphasized that fair trial guarantees should be respected to the extent possible. Garcia Alva v. Germany, App. No. 23541/94, ¶ 39 (Feb. 13, 2001). *See also* Migoń v. Poland, App. No. 24244/94, ¶ 79 (June 25, 2002); Chruściński v. Poland, App. No. 22755/04, ¶ 55 (Nov. 6, 2007). In the context of a terrorism detention case where no other judicial control existed, the Court has found that Article 5(4) required substantially the same guarantees as a criminal proceeding. A. & Others v. United Kingdom, 2009 Eur. Ct. H.R. at 81 (¶ 217). *See supra* § 5.4.1.

238. Ferrer-Mazora v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111, doc.20 rev. ¶ 213 (2001).

239. *Id*.

240. *A. & Others*, 2009 Eur. Ct. H.R., ¶ 204.

identified by the both the Inter-American Commission and the European Court – notice of the reasons for detention, an opportunity to meet those claims and present one's case, and the right to representation – as the procedural baseline in existing law.

The major human rights treaties also state that habeas corpus review should be conducted by a "court."[242] The Fourth Geneva Convention detention review schemes allow for review by court or an "administrative board."[243] Jean Pictet clarifies, though, that an administrative board must possess the guarantees of independence and impartiality that are usually associated with a "court."[244]

Together, these provisions suggest that habeas corpus review must always be conducted by an independent and impartial decision-maker with the power to order the detainee's release. Given the important role that habeas corpus plays in maintaining the rule of law and regulating states of exception,[245] there is compelling reason to argue that review should normally be conducted by the regularly constituted civilian courts.[246] The Fourth Geneva Convention provisions recognize that in exceptional circumstances, such as international armed conflict, it might be acceptable for review to be conducted by an administrative board so long as they possess the crucial attributes of independence and impartiality.[247] This should be considered the exception to the rule, and Pejic's ICRC position paper indicates that "judicial

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241. *See, e.g.*, Winterwirp v. the Netherlands, 33 Eur. Ct. H.R. (ser. A) at 24 (¶ 60). For a discussion of the European Court's decisions related to the requirement of counsel in habeas corpus proceedings, *see supra* § 4.1.2

242. International Covenant, art. 9(4); European Convention, art. 5(4); American Convention, art. 7(6). For a discussion of the interpretation of a "court" by the relevant institutions, *see supra* § 3.2.2 (International Covenant); § 4.1.2 (European Convention); § 4.2.4 (American Convention).

243. Fourth Geneva Convention, art. 43. *See also* JEAN PICTET, COMMENTARY – IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 368-69 (Ronald Griffin & C.W. Dumbleton trans., 1958) (stating that the Article 43 requirement that review be conducted by a court or administrative body is also applicable to Article 78). For a full discussion of the Article 43 and Article 78 provisions, *see supra* § 5.1.2.

244. PICTET, *supra* note 243, at 260.

245. *See supra* § 6.2.

246. *See, e.g.*, Neumeister v. Austria, 8 Eur. Ct. H.R. (ser. A) at 19-20 (¶ 24) (1968) (the reviewing court "must possess a judicial character"). *See also* Boumediene v. Bush, 553 U.S. 723, 769 (2008) (commenting on the ability of civilian courts to function alongside the military).

247. PICTET, *supra* note 243, at 260. The Commentary observes that the use of the term "administrative board" means that review by a single administrative official is not permitted. *Id.*

supervision would be preferable to an administrative board and should be organized wherever possible."[248]

The personal appearance of the detainee, or at least the potential for appearance, is also critical. The production of the detainee before the court is one of the most powerful and central features of habeas corpus.[249] Appearance before the court is an important part of allowing the detainee to meet the state's claims and present his or her own. Much more importantly, it is the physical appearance of the detainee that makes habeas corpus the most effective procedure to prevent the other substantive human rights violations such as torture, mistreatment, forced disappearance, or extrajudicial execution.[250]

Habeas corpus proceedings are initiated by petition of the detainee or a person acting on the detainee's behalf.[251] An initial screening is usually conducted to ensure the petition is legal sufficient.[252] A petition is typically determined to be legally sufficient if, on its face, it makes a claim that the detainee is being unlawfully detained.[253] If the petition does not make a prima facie case that the detention is unlawful, the court may summarily dismiss the petition.[254]

In response to a legally sufficient petition, two procedural options are acceptable to achieve the purpose of providing meaningful judicial review of the legality of detention. First, the reviewing court could order that the detainee be produced before the court for a hearing and determination of the legality of detention.[255] Second, the reviewing court could order the custodian to provide legal justification for the detention in what is known as a "show cause" order.[256] This

248. Pejic, *supra* note 199, at 387.

249. *See* Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 33, 35 (Jan. 30, 1987).

250. *Id.* ¶ 35; MAY, *supra* note 42, at 99

251. Donald Wilkes, *Writ of Habeas Corpus*, *in* 2 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 645-57 (Herbert Kritzer ed. 2002).

252. *Id*.

253. *Id*.

254. *Id*.

255. Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 33 (Jan. 30, 1987).

provides an opportunity for the custodian to show the legality of the detention before having to produce the detainee.[257] In some situations, a case may be decided at this point without requiring a hearing or the production of the detainee.[258] For example, if the issue is purely a legal one – whether the statute in question establishes a legal basis for detention – it may be reasonable for the court to issue a decision without a personal appearance by the detainee.[259]

Yet these situations must be limited to those where only legal issues are in dispute and the detainee has raised no concerns about his or her well-being. The Inter-American Court has stated that for habeas corpus to serve its purpose, "it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him."[260] It is here, the Court writes, that habeas corpus performs the vital role of ensuring that a detainee's life and personal integrity are respected, preventing disappearance, and protecting against torture.[261]

One more procedural standard can be extracted from existing law. Habeas corpus proceedings must be "speedy" or "without delay,"[262] the precise definition of which will vary significantly depending on the situation and the nature of the petition presented by the detainee.[263] Where other judicial controls are present, such as during criminal pre-trial proceedings, the urgency may not be as great as in situations without such control.[264] Where the detainee's physical integrity is in question, time will be of

256. PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 46-49 (2012); Wilkes, *supra* note 256, at 645-46; Longsdorf, *supra* note 177, at 310-12.

257. *See* Wilkes, *supra* note 256, at 645-46.

258. *Id*.

259. *See, e.g.*, Sanchez-Reisse v. Switzerland, 107 Eur. Ct. H.R. (ser. A) at 19 (¶ 51) (1986).

260. Habeas Corpus in Emergency Situations, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 35 (Jan. 30, 1987).

261. *Id*.

262. International Covenant, art. 9(4); European Convention, art. 5(4); American Convention, art. 7(6).

263. For a discussion of the speediness requirement of each of the major instruments, *see supra* § 3.2 (International Covenant); § 4.1.2 (European Convention); § 4.2.4 (American Convention).

264. *See, e.g.*, Letellier v. France, 207 Eur. Ct. H.R. (ser. A) at 21-22 (¶¶ 54-57) (1991).

the essence. Ideally, habeas corpus proceedings should occur within a matter of days.[265]

In additional to the preceding procedural standards which emerge from the existing law of habeas corpus, additional procedural issues should be considered. Most notable are procedural questions that arose during the litigation over Guantánamo Bay detainees.[266] Learning from these cases can guide the development of the law to prevent future legal wrangling over the same issues. The first question is where the burden of proof should lie in habeas corpus cases. The traditional view is that the burden is on the custodian. This seems consistent with the habeas corpus provisions in human rights law, which simply refers to the detainee's ability to "take proceedings,"[267] whereby the court will decide on the lawfulness of the detention. There is no suggestion in the text of these provisions that the detainee has the burden to prove the unlawfulness of detention. Absent any textual indication that this burden lies with the detainee, the traditional understanding that the burden is on the custodian should be embraced.

The second question is the standard of proof needed to show that the detention is lawful. In the Guantánamo cases, the government urged a lower standard of "credible evidence,"[268] while detainees urged a high standard, such as "beyond a reasonable doubt."[269] The United States District Courts settled on the traditional middle ground, a "preponderance of the evidence" standard.[270] This standard

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265. The European Court has held that delays as short at 17 days can violate Article 5(4). Kadem v. Malta, App. No. 55263/00, ¶¶ 44-45 (Jan. 9, 2003). Manfred Nowak asserts that in the context of the International Covenant, the term "without delay" means within several weeks. MANFRED NOWAK, CCPR COMMENTARY 179 (1993).

266. For a discussion of these cases, *see supra* § 5.4.3.

267. International Covenant, art. 9(4); European Convention, art. 5(4). The American Convention habeas corpus guarantee states that the detainee is "entitled to recourse" and may "seek these remedies." American Convention, art. 7(6).

268. *See, e.g.,* Government's Brief Regarding Procedural Framework Issues at 11, *In re* Guantánamo Bay Detainee Litig., 634 F. Supp. 2d 17 (D.D.C. July 25, 2008).

269. *See, e.g.,* Petitioners Joint Memorandum of Law Addressing Procedural Framework Issues at 9-14, *In re* Guantánamo Bay Detainee Litig., 634 F. Supp. 2d 17 (D.D.C. July 25, 2008).

270. *See, e.g., In re* Guantanamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Nov. 6, 2008); Al-Qurashi v. Obama, 733 F. Supp. 2d 69, 79 (D.D.C. Aug. 3, 2010). For an excellent discussion of the case law related to the burden of proof in detainee cases, see BENJAMIN WITTES, ROBERT CHESNEY & LARKIN REYNOLDS, BROOKINGS INSTITUTION, THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING, 13-15 (2011), http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx.

essentially means that it is more probable than not that the person is legally detained. This has proven to be a workable standard, offering a detainee a degree of protection without overburdening the state.[271] It is appropriate for the flexible remedy of habeas corpus.

The third question is the use of classified or secret evidence. The notion that a detainee can be held based on evidence that he or she cannot see is contrary to the basic standard of procedural fairness discussed above.[272] Of course, while a detainee is generally entitled to know the evidence against him or her,[273] this may be offset by a strong countervailing public interest such as national security or the integrity of an ongoing investigation.[274] The European Court has held that in such situations, as much evidence should be disclosed to the detainee as is possible without compromising the countervailing interest.[275] Where full disclosure is not possible, this must be counterbalanced in a way that allows the detainee to still challenge the basis for detention.[276] The reviewing court will usually be best placed to determine the proper balance to protect both of these compelling interests.[277] Most national systems have some procedure for the use of classified evidence in criminal cases, and these can be adapted to the habeas corpus setting.[278] What is important is that the detainee has some opportunity to meet the state's claims.[279]

A fourth question that emerged in the Guantánamo Bay cases was whether involuntary statements should be admissible in habeas corpus proceedings. The United States courts have agreed involuntary statements can be deemed inadmissible,

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271. Some United States federal appellate courts have, however, suggested that a lower standard might be acceptable. *See* Al Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. July 13, 2010).

272. *See supra* text accompanying notes 238-241.

273. A. & Others v. United Kingdom, 2009 Eur. Ct. H.R. at 76-77 (¶ 204).

274. *Id.* ¶ 205.

275. *Id.* ¶ 218.

276. *Id.*

277. *Id.* ¶¶ 219-220.

278. *See, e.g.*, OXFORD PRO BONO PUBLICO, THE USE OF SECRET EVIDENCE IN JUDICIAL PROCEEDINGS: A COMPARATIVE STUDY (2011), http://denning.law.ox.ac.uk/news/events_files/Secret_Evidence_JCHR_27_October_2011_final.pdf.

279. Ferrer-Mazora v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111, doc.20 rev. ¶ 213 (2001);

regardless of whether they appear to be true.[280] Given the particular attention paid by international law to the treatment of detainees, it is wise to exclude statements that are the product of torture or mistreatment. The challenge for courts is in determining what amounts to an involuntary statement.[281]

A final question that arose was the admissibility of hearsay statements. While the prohibition against hearsay is an Anglo-American evidentiary rule that may not be relevant in other contexts, it is worth noting that the United States courts have routinely admitted hearsay evidence in Guantánamo Bay litigation and made clear that they need not be strictly bound by the formal Federal Rules Evidence. [282] This speaks to the flexibility of habeas corpus, and its status as a less formal, more equitable remedy. This is consistent with the findings of the European Court and Inter-American Commission that full fair trial rights need not always be observed in habeas corpus proceedings.[283]

The preceding procedural considerations provide a useful framework for the conduct of habeas corpus proceedings. It is critical, however, that compliance with formal procedural requirements never be allowed to compensate for a lack of actual, meaningful judicial oversight. As the European Court has stated, human rights law must be "interpreted and applied so as to make its safeguards practical and effective."[284] It follows, then, that the important objectives of habeas corpus are not furthered simply by its operation in the abstract.[285] As de Londras writes, states' fulfillment of their international habeas corpus obligations should only be assessed by "focusing on the real-life workings" of habeas corpus.[286]

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280. *See* WITTES ET AL, *supra* note 270, at 92-94.

281. For a discussion of the different approaches taken by the United States courts, *see id*. at 94-102.

282. *Id*. at 71.

283. Reinprecht v. Austria, 2005-XII Eur. Ct. H.R., at 9 (¶ 46); Neumeister v. Austria, 7 Eur. Ct. H.R. (ser. A) at 43 (¶ 23) (1968); Ferrer-Mazora v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser./L/V/II.111, doc.20 rev. ¶ 213 (2001).

284. Al-Sadoon & Mufdhi v. United Kingdom, App. No. 61498/08, ¶ 162 (Apr. 10, 2010).

285. de Londras, *supra* note 34, at 254

286. *Id*.

Conclusion

The goal of strengthening the right to habeas corpus can best be achieved in the short term by authoritatively establishing the scope and application of existing law. This should include discussion as to whether habeas corpus represents a general principle of international law or a rule of *jus cogens*. While the creation of a new treaty is possible, a risk exists that states might "opt out," resulting in less protection than currently exists. The establishment of a new court, such as that proposed by Kutner in the mid-20th Century presents less risk, but is ambitious and should be considered a longer term goal.

Two fundamental considerations, universal availability and flexibility, must guide the interpretation and application of habeas corpus. With these considerations as a starting point, it becomes apparent that existing law can serve as the foundation for a robust form of habeas corpus applicable even in exceptional circumstances. It also informs our understanding of the procedural guarantees necessary to ensure the remedy is effective.

CONCLUSION

This examination endeavored to fill a gap that exists in scholarly literature by determining the location, scope, application, and significance of the right to habeas corpus as guaranteed by international and regional human rights instruments. As noted in the Universal Declaration of Human Rights, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[1] Habeas corpus holds a unique position in the rights system as a cornerstone in the maintenance of the rule of law itself. The rule of law protects human rights, and habeas corpus protects the rule of law.

Habeas corpus originated as a tool of state power which, in the hands of judges, began to be used as a mechanism to regulate state action.[2] Eventually, it was even used to determine the legality of executive actions. By the 17th Century, it was "deemed less an instrument of the King's power and more a restraint upon it."[3] This history reveals both the malleability of the remedy in the hands of judges, and the significance of habeas corpus in establishing the rule of law, applicable even to the government. The English version of habeas corpus was shipped to the far corners of its empire, but similar remedies had also developed in other legal systems.[4] The concept of a remedy to determine the legality of a person's detention was broadly recognized, and by the end of World War II could be found in thirty-four national constitutions.[5]

Based on this broad acceptance of the importance of the right, an express guarantee of habeas corpus was included in early drafts of the Universal Declaration. This distinct provision was removed during the drafting process, but a broader

1. U.N. G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71, preamble, Dec. 10, 1948. [hereinafter "Universal Declaration"].

2. *See supra* § 1.1.

3. Boumediene v. Bush, 553 U.S. 723, 741 (2008).

4. *See supra* § 1.2.

5. Statement of Essential Human Rights comment to art. 8 (Americans United for World Org. ed. 1945).

amparo provision was reinstated in the General Assembly.[6] The removal of the express habeas corpus provision was not a rejection of the concept, but was driven by the view that the Declaration should be concerned with principles, not details.[7] The right to habeas corpus is implicitly guaranteed by the reinstated provision, Article 8, and should be considered an integral part of the Declaration, an instrument that should be seen as providing broad human rights protection regardless of jurisdiction and not subject to derogation.[8]

Habeas corpus appears as a distinct provision in the second part of the International Bill of Human Rights, the International Covenant on Civil and Political Rights,[9] a binding treaty intended to elaborate the details of the Universal Declaration. While many procedural questions are not well defined, Article 9(4) of the Covenant has generally been interpreted by the Human Rights Committee and other authorities to provide broad protection with emphasis on review by a judicial body.[10] The European and Inter-American regional human rights systems also contain express habeas corpus guarantees. Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[11] has been subjected to the highest degree of judicial interpretation of international habeas corpus guarantees, and thus provides an important source of guidance on the scope and application of the right.[12] By contrast, Article 7(6) of the American Convention on Human Rights[13] is not as well-defined from a procedural standpoint but is interpreted in a manner that promotes its wide availability.[14]

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6. *See supra* § 2.2.

7. Comm'n on Hum. Rts., 3d Sess., 54th mtg., U.N. Doc. E/CN.4/SR.54 at 4 (June 10, 1948) (statement of Hansa Mehta).

8. *See supra* § 2.3.

9. 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter "Covenant"].

10. *See supra* § 3.2.

11. 213 U.N.T.S. 222 (entered into force on September 3, 1953) [hereinafter "European Convention"].

12. *See supra* § 4.1.

13. 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter "American Convention"].

14. *See supra* § 4.2.

Conclusion

While the guarantees of the International Bill of Human Rights and the regional instruments have been interpreted by courts and other authorities, this interpretation is limited. Based on these interpretative limitations and the actions of states, there are four common areas where vulnerabilities exist in habeas corpus protection. First, the availability of habeas corpus during armed conflict is challenged by questions about the interoperability of human rights law and international humanitarian law generally, as well as the interplay of the specific detention review provisions of each body of law.[15] While these issues are largely resolvable, states may still persist in untenable legal arguments and legitimate questions do remain, particularly about the proper framework for detention review in some situation during non-international armed conflict. Second, the possibility that states may derogate from habeas corpus obligations presents a serious threat to its effectiveness. The movement toward universal acceptance of the non-derogability of habeas corpus guarantees following the Inter-American Court of Human Rights' landmark advisory opinion *Habeas Corpus in Emergency Situations*[16] is underway, but is not complete.[17] This gap represents a shortcoming in habeas corpus protection, especially given the post-2001 tendency toward permanent emergencies. Third, territorial jurisdiction limitations of human rights obligations present a potential danger as they may encourage states to physically move detainees beyond the purported reach of the their human rights obligations. Nearly all authorities are in agreement that the detention of an individual is sufficient to establish the applicability of human rights instruments, at least those rights highly relevant to the detained person's situation such as habeas corpus.[18] Even so, questions remain about the proper way to provide review far afield. Fourth, the procedural requirements of habeas corpus can be manipulated in such a way to make the remedy ineffective. Given the limited procedural guidance provided by human rights institutions, most of which comes from the European Court, the post-2001 cases of United States courts highlight procedural issues that will likely need to be determined in the future.[19]

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15. *See supra* § 5.1.

16. Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 36 (Jan. 30, 1987).

17. *See supra* § 5.2.

18. *See supra* § 5.3.

19. *See supra* § 5.4.

Compelling reasons exist to close these gaps and to strengthen international habeas corpus guarantees. First, habeas corpus is essential to the protection of the individual. It serves as the primary safeguard against arbitrary detention, but also provides a means of preventing other rights violations such as torture or extrajudicial killings.[20] This is accomplished by ensuring what Larry May refers to as the normative principle of 'visibleness.'[21] Second, habeas corpus review is critical to the maintenance of the rule of law, which is founded on the notion that the law applies equally to the government. A novel theoretical understanding of international habeas corpus guarantees is required which recognizes that habeas corpus is uniquely suited to this role because it provides a judicial mechanism capable of regulating state action, and occupies a central place in the regulation of the state of exception, when the potential exists for the executive to legally suspend the legal order.[22] In both of these roles – protecting the individual and maintaining the rule of law – the existence of a non-derogable, international guarantee is of particular significance.

These justifications for strengthening habeas corpus force consideration of how this can be accomplished. Reliance on existing international law is potentially bolstered by the claim that habeas corpus represents a general principle of international law based on its inclusion in 118 or 181 national constitutions and may even rise to the level of *jus cogens*.[23] The creation of a new treaty defining the scope and applicability of habeas corpus and detailing the required procedures would have the unintended consequence of suggesting to states that they could opt out of what is increasingly seen as a non-derogable right – some would even argue a rule of *jus cogens* – by not signing the treaty.[24] The possibility that international institutions might provide habeas corpus review is an ambitious goal, but not a new one. Luis Kutner set forth the justifications for this approach as well as a detailed plan to do so a half century ago.[25] While this is a possibility worthy of long-term consideration, in

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20. *See supra* § 6.1.

21. LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS 100 (2011).

22. *See supra* § 6.2.

23. *See supra* § 7.1.1.

24. *See supra* § 7.1.2.

25. *See supra* § 7.1.3.

the short term, existing habeas corpus law provides a solid framework to accomplish the goal of an effective remedy that protects the individual and maintains the rule of law.[26] A robust, yet workable, form of habeas corpus emerges through the interpretation of existing guarantees, informed by an understanding of the history and significance of habeas corpus and guided by fundamental considerations of broad availability and adaptability.[27]

Several implications arise from this examination of habeas corpus in international law. First, gaps exist in existing international habeas corpus protection and should be closed to ensure effective and seamless availability of the remedy. Second, any attempts to strengthen the habeas corpus guarantees in human rights law should not be seen only as a means of better protecting the individual, but must also be thought of as an international policy choice aimed at maintaining the rule of law. Third, the effectiveness of habeas corpus in fulfilling these roles is predicated on the existence of a strong and independent judiciary committed to the rule of law and unwilling to bow to external pressures, illustrated by the courage of Justice Khanna's dissent in *A.D.M. Jabalpur v. Shukla*.[28] Fourth, given the critical role of habeas corpus, its availability will continue to be resisted by states seeking to operate in the absence of normative law but still purportedly within the framework of 'the law.'

Though habeas corpus is a discrete international human right, it must be viewed against the backdrop of its long history in domestic systems and in the context of the broad field of international law and the reality of state practices. As a result, limitations necessarily exist in an examination of the subject, several of which must be acknowledged. First, this examination may be influenced by the particular Anglo-American understanding of habeas corpus that dominates the literature and the author's own background. Second, the breadth of the topic prevents a comprehensive survey of domestic law or state practice. The former is therefore limited to an examination of constitutional provisions,[29] but does not include statutes or rules. The latter is presented by way of examples intended to provide illustration but which

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26. *See supra* § 7.1.4.

27. *See supra* §§ 7.2 & 7.3.

28. A.I.R. 1976 S.C. 1207. *See supra* § 7.2.4.

29. *See supra* § 7.1.1.

cannot be taken as empirical evidence. Third, certain issues that are important to the effectiveness of habeas corpus are simply beyond the scope of this study. For example, the question of how to ensure the existence of a strong, independent judiciary is of great relevance but is not addressed. Likewise, there is no discussion of how to make human rights enforceable where a state is unwilling to voluntarily do so.

Despite these limitations, the availability and effectiveness of the right to habeas corpus in international law is enhanced by establishing the current scope of the right, identifying potential challenges to its effectiveness, providing a new context for understanding its significance, and analyzing the possible means of enhancing the right. Further action is recommended. First, future international action related to habeas corpus should take into account the dual purposes of habeas corpus to protect the individual and maintain the rule of law,[30] and be guided by the fundamental considerations of broad availability and adaptability.[31] Second, an international organization such as the United Nations Human Rights Council should draft an authoritative declaration or statement of principles clarifying the scope and availability of the right,[32] with particular attention to the challenges identified herein.[33] Finally, consideration should be given in the long term to the possibility that international institutions, such as the proposed World Court of Human Rights,[34] take a role in providing habeas corpus review in situations where domestic courts are unwilling or unable to do so in a meaningful manner, as urged by Kutner a half-century ago.[35]

The development of the right to habeas corpus at the domestic level has been called both a milestone in the history of human liberty[36] and a milestone in the

30. *See supra* § 6.

31. *See supra* § 7.2.

32. *See supra* §§ 7.1.4, 7.2, & 7.3.

33. *See supra* § 5.

34. *See* MANFRED NOWAK & JULIA KOZMA, A WORLD COURT OF HUMAN RIGHTS (2009), http://www.udhr60.ch/report/hrCourt-Nowak0609.pdf.

35. *See supra* §§ 7.1.3 & 7.1.4.

36. Comm'n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 8 (May 10, 1948).

development of the rule of law.[37] The potential exists for international guarantees of habeas corpus to assume an equally important place. This examination of habeas corpus is a starting point.

37. TOM BINGHAM, THE RULE OF LAW 13 (2010).

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