STUDIES IN INTERCULTURAL HUMAN RIGHTS

Roza Pati

Due Process and International Terrorism

An International Legal Analysis

MARTINUS NIJHOFF PUBLISHERS

Due Process and International Terrorism

Studies in Intercultural Human Rights

VOLUME 1

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by

Roza Pati

MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2009

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Detailed Library of Congress Cataloging-in-Publication data are available on the Internet at http://catalog.loc.gov

Pati, Roza.
Due process and international terrorism / by Roza Pati.
p. cm. — (Studies in intercultural human rights ; v. 1)
Includes bibliographical references and index.
ISBN 978-90-04-17238-8 (hardback : alk. paper)
1. Due process of law. 2. Terrorism. I. Title.

K3251.P38 2009
345'.02—dc22

2009029036

ISSN: 1876-9861
ISBN: 978 90 04 17238 8

PRINTED IN THE NETHERLANDS.

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Preface

This book should be read by everyone who is interested to know more about the narrow borderline separating legally acceptable from unacceptable measures or acts in the fight against international terrorism. However, the book does not present easy solutions. It is not written by an author who has closed her eyes and mind vis-à-vis the danger for State and society emerging from terrorism. Certainly, the perspective that Roza Pati presents, clearly reflects her background: on the one hand, her grandfather was extra-judicially executed in the 1950s in Albania, hence her commitment to due process; on the other hand, she was an elected Member of Parliament and a member of the Cabinet, as the Secretary of State for Youth and Women in Albania, during the beginning of the democratization process of this country in the 1990s. She experienced a number of upheavals in the newly established democracy, and understands the responsibility of the State towards liberty of the individual, but also towards peace and security of its population and the democratic society. Consequently, she is seeing both sides of the medal. She fully appreciates the seriousness of the situation.

She does not belong to those who just bluntly, and more often than not, arrogantly, deliver their judgment. She gives the State what it needs to fulfill its protective functions, but by the same token she draws a line, which the State must never cross. The "cardinal principles of liberty," as Justice Davis had already put it nearly 150 years ago in the famous *Milligan* case (1866), must always be preserved. Torture as well as the creation of "black holes" where individuals are detained without having the chance of judicial supervision negate the right to recognition everywhere as a person before the law, a fundamental guarantee inherent in human beings' dignity.

Additionally, the book teaches us another important lesson. A society, firmly founded on the ideas of liberty, separation of powers and the rule of law will always be strong enough to regain its balance, even if the borderline mentioned above was overstepped, be it with good or bad intent.

Roza Pati's literate and profoundly researched study leaves the reader in a thoughtful mood. One recognizes the imperfection of our world, and is encouraged to strive for the better. The author and what she has to say deserve attention.

Eckart Klein
Potsdam, Germany

Acknowledgements

This book is an updated version of my doctoral dissertation entitled *Criminal Due Process Guarantees and International Terrorism as a State of Emergency: An International Legal Analysis*, submitted to the University of Potsdam Faculty of Law, Germany. It includes events up to October 15, 2008.

My first and deepest gratitude goes to my *Doktorvater*, Prof. Dr. iur. Eckart Klein, whose unfailing support, consummate expertise, and intellectual guidance accompanied this scholarly journey with exemplary critical dedication and encouragement. I owe abiding appreciation to Prof. Dr. iur. Siegfried Wiessner, the Editor-in-Chief of the Studies in Intercultural Human Rights, a series which this book has the exceptional honor to inaugurate. His academic rigor, his commitment to a world order of human dignity, and his challenge to excel were essential sources of inspiration. I am also grateful to Prof. Dr. Michael Reisman for his most gracious comments on my book, and for the invaluable time he dedicated to reading my manuscript.

At Universität Potsdam, Juristische Fakultät, I give special thanks to PD Dr. iur. Norman Weiß for reading my manuscript and offering his valuable comments, as well as to Prof. Dr. iur. Andreas Musil, who chaired my *rigorosum* committee.

I am also grateful to St. Thomas University School of Law, the place of my studies, my teaching, and my continuing academic work, for the superb conditions it has created for my research and writing. The rich collection of its law library and the skillful professionalism of its staff were indispensable to the success of my doctoral endeavor.

Last but not least, I remain forever indebted to my dear family whose unconditional support, understanding and love surrounded me in all the long days, months, years – the countless hours of work. I could have never been able to succeed in this project without their unselfish encouragement, generous care, warm wishes, blessings and prayers.

I respectfully bow to all of the above, since by them, as Horace would rhyme, I was taught *how best my pearls to thread…*

Roza Pati
Miami, U.S.A.

CHAPTER I Delimitation of the Problem

*Fiat justitia ne pereat mundus**

A. Due Process in Criminal Proceedings

Humanity is engulfed in "a new order of threat."[1] It is living in the age of a global battle against terrorism, a war, as it is often called, that it did not necessarily choose to fight. 21st century civilization is living in a bizarre "world where the name of God is sometimes associated with vengeance or even a duty of hatred and violence."[2] Barely one day passes by without bomb blasts somewhere on this planet, and their innocent victims making the headline news. Communities keep counting their dead. In the midst of this turmoil, society, in all of its layers, reacts and passes judgments of right and wrong, both morally and legally. These reactions not only differ from one individual to another, but, most of the time, they also diverge from group to group. Undoubtedly, one of these layers of society, the law makers and the legal profession, bears a heavy burden in that struggle. Torn between the ends of public security and effective administration of justice on one side, and the interests of the individual justly or unjustly accused on the other side, they become key actors in the search for fruitful approaches to adequately regulate the natural imbalance of power in criminal proceedings, this confrontation of the lone accused with the vast machinery of the state. While most of society's sentiments and apprehension, augmented by the media, rest with the victims in fear of the heightened potency of terrorism,[3] the legal profession

* Latin for "Let justice be done lest the world should perish." G. W. F. Hegel, Grundlinien der Philosophie des Rechts [Elements of the Philosophy of Right] (1821), para. 130. This formulation appropriately adjusts the Latin maxim *fiat justitia ruat coelum* which means "Let justice be done, though the heavens fall."

1 C. Warbrick, *Emergency Powers and Human Rights: The UK Experience*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 361, 392 (C. Fijnaut, J. Wouters & F. Naert eds., 2004).

2 Supreme Pontiff Benedict XVI, *Deus Caritas Est: Encyclical Letter to the Bishops, Priests and Deacons, Men and Women Religious and All the Lay Faithful on Christian Love*, Vatican, Dec. 25, 2005, *available at* http://www.vatican.va/holy_father/benedict_xvi/encyclicals/index_en.htm .

3 For comments on a victim-oriented approach as a contributing factor to potential denial of due process, and the influence of media as an important agent in this respect, see Susan Marks & Andrew Clapham, International Human Rights Lexicon 160 (2005). *See also* Peter Judson Richards, Extraordinary Justice: Military Tribu-

has to be fully preoccupied not only with the victim, but also with the victimizer. This seeming paradox, that might baffle the lay person, does in fact constitute the axis of a lawyers' work in a democratic society, where the standards of conduct are "the law" for all, where the rights, be they grounded in natural law[4] or granted by positive law, belong to all, and where the lawyers' job and professional duty is to achieve justice for their clients through effective legal representation, in the process adding a measure of justice to society.[5]

Due process of law is one of these rights, which is as important as it is most easily and most extensively violated. In order to be able to evaluate the process due an accused in today's war against terror, one should first know the basic legal guarantees, both domestic and international, as well as the standards that have already been set in this regard and the evolving trends and tendencies. It is widely accepted that justice can only be served through fair trials, and the prejudgment of guilt should be curbed at its inception. No matter how dedicated the justice system is in its search for truth, the legal process is run by humans, and thus cannot help but yield imperfections and deficiencies. The modern-day community, on a global scale, has, by and large, moved forward to accept and develop procedures that may benefit any accused, even the guilty one, and as it does so, it looks at the judicial infirmities of the past, which tell cautionary stories for the present and the future.

Once a crime has been reported or even suspected, and depending on its *prima facie* nature, type and scale, it immediately might become the central focus of interest of the political, social, and, most of all, the legal community. However, often in dis-

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nals in Historical and International Context 187-188 (2007). Professor Schabas notes that "whereas in the past human rights law sought to protect the human rights of the accused without real regard to guilt or innocence, it is now torn by another extreme, one that is oriented towards the victim and that thrives upon conviction." William A. Schabas, *Balancing the Rights of the Accused with the Imperatives of Accountability*, in From Sovereign Impunity to International Accountability: The Search for Justice in a World of States 154, 165 (Ramesh Thakur & Peter Malcontent eds., 2004).

4 Rights essentially do not derive from the state or any other external authority, consequently may not be taken away. They "derive from the inherent dignity of the human person," as noted in the Helsinki Final Act, Principle VII. Thus, any official behavior that affronts human dignity should be considered a violation of the rights of the person. Within the topic of our discussion, for example, it is incompatible with respect for inherent human dignity to punish detained persons by psychological or physical means that would humiliate them by ridiculing their beliefs, their origins or their way of life, or to deny them the capacity to assert claims to basic rights. For a detailed analysis of human dignity as a normative concept, the meaning of the inherent dignity of the human person, the conduct incompatible with it, as well as the relation of human dignity to human rights, see Oscar Schachter, *Human Dignity as a Normative Concept*, in Human Rights Law 101-107 (Philip Alston ed., 1996). *See also* Eckart Klein, *Human Dignity in German Law*, in The Concept of Human Dignity in Human Rights Discourse 145-159 (David Kretzmer & Eckart Klein eds., 2002).

5 Anthony D'Amato, *On the Connection between Law and Justice*, in Philosophy of Law 19, 20 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).

tinction from the rest of society, the legal community is simultaneously demanding of justice being served and of defendants' rights being respected. The latter constitutes the central demand on a true public order of human dignity, based on the liberty of the individual.

A broad array of issues and concerns regarding guarantees of due process of law in criminal proceedings arises right from the start of the reported crime or its initial suspicion, and incessantly shifts on up to the final point in case of a conviction, the serving of the sentence by the offender. The individual's vulnerabilities both in the investigative and in the adjudicative phase are numerous, and awareness of this critical exposure would likely yield the process due and a fair outcome, when it is undisputedly based on the laws of a country, human rights treaties and customary international law. But this legal process, like any other part of life, has its own shortcomings.

The parties involved in the pre-trial phase, particularly the individual and the police, might have different stories to tell. The defendant might have been arbitrarily arrested and detained or held *incommunicado*; he might not have been told the reasons for his arrest; in a U.S. context, he might have been unaware of the *Miranda* rights; he might have been refused his one phone call; his *habeas corpus* right might have been violated; his home could have been searched without a warrant; he could have been tortured at the police station; he could have been subjected to inhumane conditions during his detention. Later on, if a plea bargain is not entered into, in the legal systems where this procedure is available, the defendant will face trial, hoping for equal access to and equality before the court, in a speedy, fair and public hearing.

In a democratic system, trial procedures are very comprehensive, and concerns for, as well as aspirations to, natural or substantive justice override many other considerations of the legal system. However, at this stage, further vulnerabilities await the accused. Concerns about trial by a jury, where available, by a judge or by a mixed bench come to the fore, followed suit by the apprehension regarding his incrimination; his access to files of the prosecutor, to facilities and time to prepare his defense, to a translator/interpreter if needed; the possibility of cross-examination of witnesses; obedience or not to rules of evidence protecting him; capped by issues of a competent, independent and impartial tribunal, which refrains from the retroactive application of criminal laws, avoids double jeopardy, etc. The process, and the problématique of its fairness, continues with post-trial issues in the appeals phase. Is the appellate review going to be timely and genuine? Is there going to be a new trial in case of a gross miscarriage of justice? A new venue, if needed? Will there be compensation if the defendant has already suffered punishment as the result of a miscarriage of justice?

All of these questions and concerns constitute the institutional framework, the crucible within which to appraise the due process of law in a democratic society. They demand that, no matter how deliberative and reflective the process might be, no stone be left unturned to both capture and evaluate all of the aspects of this notion and their consequences, while searching for the truth and for justice. Before we address the notion of due process of modern times, however, we ought to look for its meaning and its roots: What, in essence, is due process? How did the concept of "due

process of law" come into being? What, in history, were the issues and vulnerabilities that brought about its legal paradigms of today?

Due process, a seemingly uncomplicated phrase, has come to have contested meanings. While those meanings are suggestive, they are hardly self-explanatory.[6] Semantically,[7] the word "process" has everyone in agreement; however, the word "due" has constantly been seen as the vague part of the concept. While its basic meaning as defined by the dictionary is "owed,"[8] the interpretation of what it entails in the context of a criminal proceeding has taken centuries to be developed. As with any other ambiguous or controversial term, "due process of law" remains a concept that cannot be described in one single phrase, nor has it been easy to arrive at the understanding that the legal community, municipal or international, have today of due process of law.[9] Judges and lawyers have struggled over centuries to give content to the phrase. They have at times reached certain standards, some of which persisted over time and some of which did not endure for long, in the never-resting, meandering stream of decisions. This history leads us to believe that it would be naïve to assume that now its meaning is ascertained for good.

In many respects, the enumeration of what is "owed" to the accused in the process of trial and punishment resembles a miniature general code of criminal procedure.[10] Many of the components of what is "owed" were first to find expression not only in

6 John V. Orth, Due Process of Law: A Brief History (2003), at Preface X.

7 As it will be seen in the course of this book, the semantic approach would not help us much. Dworkin was right to object to conventionalism, as a semantics approach, which seeks the nature of something by means of describing the thing's most obvious features, and then identifying those which are most essential, in explaining how the word is used. He calls this approach the "semantic sting." *See* J.G. Riddall, Jurisprudence 99 (1999). Dworkin picks up this issue again when he writes about originalism and fidelity to the Constitution. He argues that some interpreters wrongly perceive fidelity to the Constitution to be fidelity to its text. Addressing "textualists" such as Justice Scalia, he states that in interpreting the very same text he would reach "radically different conclusions" from theirs. In some circumstances, he writes, it could be justified to disregard fidelity to the text, and to be aware of the distinction between the semantic intention of the framers and their political or expectation intention. The Eighth Amendment's prohibition of "cruel and unusual punishment," for example, may reflect the punishments that were judged cruel by the "popular opinion of their day," but maybe the correct standards of "cruel" in popular opinion in the U.S. today might come to include, say, capital punishment, which he then would consider unconstitutional. *See* Ronald Dworkin, Justice in Robes 118-135 (2006).

8 Samuel Johnson, A Dictionary of The English Language (11th ed. 1779).

9 The scope of due process expanded with the shift of interests of power and law: first it was all about landed property, then other intangible interests appeared, then agreements and contracts, then the focus became civil rights, etc., and due process developed not only as a right to procedural fairness, but also as a substantive guarantee. For a detailed history of this development of due process, see David J. Bodenhamer, Fair Trial: Rights of the Accused in American History (1992).

10 *Id*. at 5.

codes or legislative actions but also through wearisome processes of pre-trial and trials, in the detention stations as well as in the courtrooms of several legal traditions. Understandably, this led to dissimilar standards. It is exactly the differences rather than the commonalities that bring about the need for a check of municipal due process against a minimum floor of guarantees, particularly in criminal proceedings, that have been agreed upon internationally. From a jurisprudential perspective, another point of debate could be its reference to a process of law which is owed to the accused because of it being granted by "the law of the land," thus reflecting a positivist stance, or rather because it is fair, right and just for a human to be entitled to an inherent right to due process of law, evidencing a natural law, dignity-based approach, drawing on and reaffirming the ethical dimension of this right.[11]

Any crime represents a threat to stability and it is in society's interest, through its government, to maintain order through punishment of any misdeeds.[12] However, it is also in the interest of the community to abide by the requirements of fairness in its search for truth and justice, bearing in mind that human rights are owed by States to all individuals within their jurisdiction. The representation of justice served comes to us, sometimes, through images of brutal processes and draconian punishments.

11 All three documents constituting the International Bill of Rights in their preamble paragraphs recognize "the inherent dignity and ... the equal and inalienable rights of all members of the human family". The same holds true for regional conventions of human rights protection. So, the American Convention on Human Rights expressly notes "that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human personality." The African Charter on Human and Peoples' Rights, also in the preamble recognizes "that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection." Courts have followed suit. The Inter-American Court of Human Rights in its *Advisory Opinion on Habeas Corpus in Emergency Situations*, for example, states that the rights protected by the Convention cannot, *per se*, be suspended even in emergency situations, because they are "inherent to man." *See* Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6), Advisory Opinion OC-8/87, 30 January 1987, Series A, No. 8, at 37, para. 18.

12 The world's first democracy condemned to death the world's most renowned philosopher, Socrates, because of his nonconformist attitude, some two and a half thousand years ago. A properly constituted court, a jury of some 500 peers, equal time for prosecutor and defense, a death penalty executed by asking Socrates to drink poison and walk until his feet grew heavy and cold – images of early justice or injustice in action. Socrates' famous humorous answer to his student Apollodorus who was saddened that the teacher was put to death unjustly echoes today: "My beloved Apollodorus, would you prefer to see me put to death justly?" For a historical account of fairness or unfairness of trials, convictions of the guilty or the innocent, see Brian Harris, State Trials from Socrates to Nuremberg 165-174 (2006).

In the England of Henry II,[13] the accused had to go through an ordeal[14] in order to prove his innocence or guilt. The oath[15] in trial was also part of the system based on the principle of the law that "denial is always stronger than accusation."[16] Since the communities were not prepared to pay for the cost of keeping prisons, it was easier and cheaper to execute or mutilate someone for having committed a bad crime. Gibbets and whipping posts were the symbols of the legal system of those times. The people believed in their fairness of establishing guilt or innocence in a judicial matter, because of their prevalent belief of God's presence and active intervention in earthly affairs and that God's judgment was at hand and immediate.[17] Before that,

13 King Henry II ruled England from 1154 to 1189. Of great importance in his reign was a series of the legal reforms which are considered to be the origins of common law due to their routine nature and wide applicability. For a detailed analysis of these legal reforms, the reconstruction of legal framework of English feudalism, the opinions of several legal historians on the actions taken by Henry II, as well as the influence they had in centuries to follow, see Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II,* 88 Colum. L. Rev. 433 (1988).

14 Henry II sent out his own judges from London to listen to cases throughout all of England's counties. The accused would have to go through one of these three ordeals: *Ordeal by fire:* an accused person held a red hot iron bar and walked three paces. His hand was then bandaged and left for three days. If the wound was getting better after three days, he was innocent. If the wound had clearly not got any better, he was guilty. *Ordeal by water:* an accused person was tied up and thrown into water. If he floated he was guilty of the crime he was accused of. *Ordeal by combat* was used by noblemen who had been accused of something. They would fight in combat with their accuser. Whoever won was right. Whoever lost was usually dead at the end of the fight. *Available at* http://www.historylearningsite.co.uk/medieval_law_and_ order.htm .

15 In most cases, the defendant would be allowed to bring forward an oath to prove his innocence. This was achieved with the aid of oath-helpers, the number of which depended on the nature and severity of the charge involved. The oath-helpers would know the facts behind the case as well as anyone else, which is why there was no need for them to give evidence. The defendant swore: *"By the Lord, I am guiltless both of deed and instigation of the crime with which N charges me"*, and the oath-helpers simply swore in support of this: *"By the Lord, the oath is pure and not false that M swore"*. Usually, that was enough, and the defendant walked away free. A man who was known to be guilty would have a hard job getting together the requisite number of oath-helpers. Also, the plaintiff would not grant the oath because a defendant might not be considered 'oath-worthy.' In this case, as well as in the case when he had failed to find enough oath-helpers, the defendant, who would not want to admit guilt, might have had to go to the ordeal, the judgment of God. *Available at* http://www.regia.org/law.htm.

16 This was a principle of law in Anglo-Saxon England but it continued to exist as a "relic" even in the *Leges Henrici Primi*. Biancalana, *supra* note 13, at 457.

17 The ordeal was performed in a ritual manner. A priest was usually present to invoke God's power and to bless the implements employed in the ordeal. In one typical formula, the priest asked God "to bless and sanctify this fiery iron, which is used in the just examination of doubtful issues." Priests would also inform the accused, "If you are innocent of this charge ... you may confidently receive this iron in your hand and the Lord, the just judge, will free you." The ritual element of the judicial ordeal emphasized the judgment

during the reign of Henry I, the *Leges Henrici Primi*[18] recorded some procedures that bear resemblance to some elements of due process. Thus, an unjust judgment, which was probably based on a wrong assignment of the burden or mode of proof,[19] bore grounds for bringing a case to "a judge of higher standing and wisdom,"[20] in case the process did not allow the defendant enough time to have his lord present, to prepare a defense, to seek counsel of his friends and relatives, or because judgment was rendered in the excused absence of a party.[21] Later, after the use of ordeals waned, mostly because in 1215 the Church banned the participation of clergy in them,[22] but also because of the revival of Roman Law in the twelfth century, increase of literacy and trust in written documents, the establishment of guilt or innocence was vastly

of God over the judgment of men. This ended when the Church felt its spiritual mission compromised by the involvement of priests in supervising ordeals. In 1215, the Fourth Lateran Council forbade priests from participating, and their absence made it impossible for the ordeal to continue as a formal legal procedure. *Available at* http://wps.ablongman.com/long_levack_west_1/0,8723,1123922-,00.html .

18 Leges Henrici Primi c. 43, 4 (L. J. Downer ed. & trans. 1972).

19 Biancalana, *supra* note 16.

20 Leges Henrici Primi, *supra* note 18, c.33, 2.

21 Biancalana, *supra* note 16.

22 Canon 18 of The Canons of the Fourth Lateran Council of 1215 states: "No cleric may pronounce a sentence of death, or execute such a sentence, or be present at its execution. If anyone in consequence of this prohibition *(hujusmodi occasione statuti)* should presume to inflict damage on churches or injury on ecclesiastical persons, let him be restrained by ecclesiastical censure. Nor may any cleric write or dictate letters destined for the execution of such a sentence. Wherefore, in the chanceries of the princes let this matter be committed to laymen and not to clerics. Neither may a cleric act as judge in the case of the Rotarii, archers, or other men of this kind devoted to the shedding of blood. No subdeacon, deacon, or priest shall practice that part of surgery involving burning and cutting. Neither shall anyone in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing; the earlier prohibitions in regard to dueling remain in force." *Available* at http://www.fordham.edu/halsall/basis/lateran4.html (last visited on June 4, 2006).

trusted to a jury of peers,[23] and even to torture[24] to obtain a declaration of guilt from

23 Juries were developed at least as early as the Dark Ages in England. The Anglo-Saxons passed on the system to the modern age; however, they may have been influenced by the customs of the Danes or earlier Saxon tradition. John Makdisi's theory is that trial by jury traces its origin directly to Islamic legal institutions. John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. Rev. 1635, 1713-1731 (1999). The English king Ethelred the Unready set up an early legal system through the Wantage Code of Ethelred, one provision of which stated that the twelve leading thegns (minor nobles) of each wapentake (a small district) were required to swear that they would investigate crimes without a bias. These juries differed from the modern sort by being self-informing; instead of getting information through a trial, the jurors were required to investigate the case themselves. King Henry II took a major step in developing the jury system. Henry II set up a system to resolve land disputes using juries. A jury of twelve free men were assigned to arbitrate in these disputes. Unlike the modern jury, these men were charged with uncovering the facts of the case on their own rather than listening to arguments in court. Henry II also introduced what is now known as the "grand jury" through his Assize of Clarendon. Under the assize, a jury of free men was charged with reporting any crimes that they knew of in their hundred to a "justice in eyre," a judge who moved between hundreds on a circuit. A criminal accused by this jury was given a trial by ordeal. When the trial by ordeal collapsed, the juries under the assizes began deciding guilt as well as providing accusations. Over time, English juries became less self-informing and relied more on the trial itself for information on the case. Jurors remained free to investigate cases on their own until the 17th century. Many English colonies adopted the jury trial system including the United States. *Available at* http://www.fordham.edu/ halsall/source/aclarendon.html (last visited October 28, 2007); also http://en.wikipedia.org/wiki/Jury_trial (last visited May 30, 2006).

24 In Continental Europe, judicial torture became the law of proof, while in England, where the jury trial was the rule, alternative ways were also present. The common law courts initially took the view that an accused person was not obliged to submit to trial by jury. It had started as an alternative to trial by ordeal which an accused could choose. Even with the abolition of trial by ordeal that remained the case. Submitting to the authority of the court was voluntary but there was no alternative form of trial. Clearly such an easy way of avoiding due process presented a bit of an obstacle to the "administration of justice." And like continental torture, the English devised a method of compelling assent. Following the passing of the Statute of Westminster 1275 those charged with capital offences who refused to plead were subjected to *peine forte et dure.* This involved the placing of progressively heavier stones on the chest until a plea was entered or the accused person died. Although *peine forte et dure* was strictly speaking not judicial torture – *i.e.* not designed to elicit evidence and was more akin to a punishment - it demonstrates that the English were no less inclined than their continental counterparts to use compellingly painful methods when procedure got in the way of process. *Peine forte et dure* was abolished by statute in 1772. In addition, although torture to gather evidence was never systematically employed in England, the Privy Council and the Crown, when sedition threatened between 1540 and 1640, issued a total of 81 warrants authorizing the use of torture. 52 of the cases involved crimes against the State and torture was most commonly applied to extract information about accomplices. However, 22 cases concerned ordinary felonies and the primary purpose in these cases was to extract confessions. And although Sir Edward Coke was proud that the common law did not permit torture, he was prepared,

the accused. In the same year, King John signed the Magna Carta, and in its Chapter 39, which is considered to be one of the most influential clauses, the trial by jury became an implied right:

> No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.[25]

The Magna Carta has been celebrated as the "palladium of English/British liberty," a legal statement of enduring influence in the jurisprudence of not only common law countries, and it is often seen as the origin of the entitlement to "due process of law."[26] The Great Charter "assumed legal parity among all free men to an exceptional degree."[27] Still, the point has been made, that the Magna Carta itself did not contain the words "due process," that "free men" was a restricted category, and that it provides

on a number of occasions, to serve as a commissioner to torture under the Royal warrants. See D. Jardine, A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth (1837), a*vailable at* http://www.spr-consilio.com/campbellsmith6.htm (last visited on June 4, 2006).

25 This translation stems from Justice Scalia's concurring opinion in *Pacific Mutual v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J.). In its original Latin, chapter 39 reads: *Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super cum ibimus, nec super cum mittemus, nisi per legale judicium parium suorum vel per legem terre. Available at* http://www. magnacartaplus.org/ magnacarta/latin.htm#latin-text.

Andrew T. Hyman, in *The Little Word "Due,"* 38 Akron L. Rev. 1 n. 16 (2005) elucidates the history of its translation from the Latin original by the courts. The Magna Carta was written in Latin, and the word "*vel*" between "*legale judicium parium suorum*"["Judgment of his Peers"] and "*legem terre*" ["Law of the Land"] has sometimes been translated as "*or*" (*e.g.* in Pacific Mutual v. Haslip, as cited *supra*) and sometimes as "*and*" (*see, e. g.,* Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring). New York's constitutional convention of 1777 addressed this issue: Gilbert Livingston successfully proposed a clause along the lines of the Magna Carta, which was then amended to change "and the judgment of his peers" to "or the judgment of his peers." *See* 1 Charles Z. Lincoln, Constitutional History of New York 522 (1906). The Virginia Declaration of Rights of 1776 also guaranteed, in section VIII, that "no man be deprived of his liberty, except by the law of the land or the judgement of his peers." *Available at* http://www.yale.edu/ lawweb/ avalon/virginia.htm. Jon Roland comments: "These usages suggest that 'law of the land' is distinguished from jury verdicts. However, in the Fifth and Fourteenth Amendments it is apparent that 'law of the land' and 'judgment of his peers' have been combined in the phrase 'due process.'" Jon Roland, *Due Process*, in 1 Encyclopedia of American Civil Liberties 456, 457 (Paul Finkelman ed., 2006).

26 Harry Evans, *Bad King John and the Australian Constitution*, Commemorating the 700th anniversary of the 1297 issue of Magna Carta, Occasional Lecture 17 October 1997, *available at* http://www.aph.gov.au/ senate/ pubs/occa_lect/flyers/171097.htm.

27 J.C. Holt, Magna Carta 278 (2nd ed. 1992).

that "free men are not to be dealt with except in accordance with law."[28] Harry Evans has stated, drawing on U.S. Supreme Court jurisprudence: "According to law simply means in accordance with whatever the law provides; due process of law implies what the law should provide."[29] Still, the obligation of treatment according to the law of the land was a great innovation, and it has taken on the meaning of treatment in accordance with the common law, including due process.[30]

The phrase "due process of law" as well as the removal of the restrictions of the guarantee to "free men" are, however, to be found first in a statute of Edward III of the year 1354. This enactment, entitled "Liberty of the Subject," reads, in relevant part:

> [N]o man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.[31]

Though these guarantees were lost sight of temporarily, the Magna Carta and, to a lesser degree, this statute came back with renewed importance as seventeenth century monarchs trespassed on English liberties.[32] The drafters of the American Bill of Rights chose the phrase "due process of law,"[33] making it an American axiom.

Key elements of the legal guarantee of due process have also been derived from several other distinct principles of law, mostly of Roman law origin, such as *nemo iudex in propria causa* (no man should be judge in his own cause, which can be construed to be related to the impartiality of the judiciary); *res judicata* (a case decided should not be relitigated: parallel to double jeopardy prohibition in criminal law); *audiatur et altera pars* (may the other party also be heard, analogous to equality of arms and cross-examination); *nullum crimen, nulla poena sine lege* (no crime, no penalty without a law, stating that the penal law cannot be enacted retroactively); *nemo tenetur seipsum accusare* (no one is bound to accuse himself) or its variation *accusare*

28 Evans, *supra* note 26.

29 *Id.*

30 In the Latin text of the Magna Carta, as the language was used then, we find the phrase "*legem terre*," which means "Law of the Land." It was Sir Edward Coke, a most influential author of commentaries on English statutes, a contemporary of Sir Francis Bacon and Shakespeare, who wrote that "law of the land" in the Magna Carta "meant common law," the ancient, customary laws, and other enacted laws, "and the common law required due process." Edward Coke, Institutes of the Laws of England 2:50 (London, 1648).

31 Cited in Evans, *supra* note 26; *see also* Roland, *supra* note 25, at 456.

32 Orth, *supra* note 6, at 7 (2003). The 1628 Petition of Right stated: "… no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land." *See also* Evans, *supra* note 26 (noting that the Petition of Right also cited the 1354 statute separately).

33 The U.S. Constitution, in the Fifth Amendment, followed by the Fourteenth, mandates that "no person shall … be deprived of life, liberty, or property, without due process of law."

nemo se debet, nisi coram Deo (no one is bound to accuse himself except to God, legal maxims banning mandatory self-incrimination and denoting that any accused person is entitled to make a plea of not guilty, and also that a witness is not obliged to give a response or submit a document that will incriminate him); *in dubio pro reo* (in doubt, on behalf of the accused; this saying expresses the judicial principle that in case of doubt the decision must be in favor of the defendant, *i.e.* anyone is innocent until there is proof to the contrary: presumption of innocence); *non bis in idem* (not twice in the same thing – a legal principle forbidding double jeopardy). Though both law and legal literature developed and became ever more sophisticated, these maxims have preserved their longstanding legal status and attractiveness, and I will be coming back to some of these maxims in the downstream flow of this paper.

Nevertheless, the mere existence of these principles does not necessarily mean that they were actively observed and applied; nor do they offer a ready-made solution for the courts.[34] Let us consider only one of the above mentioned maxims: *accusare nemo se debet, nisi coram Deo,* an early guarantee against self-incrimination. However, in Europe, for about five hundred years, replacing in the mid-thirteenth century the procedure of proof through ordeal, one of the harshest laws imposing mandatory self-incrimination, confession through judicial torture, was a routine feature of the law of proof.[35] It purported to achieve absolute certainty for human adjudication. While it was aimed at safeguarding the procedures of distinguishing guilt from innocence, as the suspect would be disclosing information that "no innocent person can know,"[36] it turned to be a macabre tool testing the accused's capacity to bear pain rather than his sincerity. For this reason, leading philosophers of the Enlightenment

34 Lord Wright, 1940. Whereas Lord Esher had spoken against Latin maxims since 1887: "I need hardly repeat that I detest the attempt to fetter the law with maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them." Both references available at: http://www.vancouverfamilylaw. com/maxims.html.

35 *See generally* John H. Langbein, Torture and the Law of Proof: Europe and England in the Ancien Régime (2006).

36 These words come from a celebrated German statute of 1532. John H. Langbein, *Torture and Plea Bargaining*, in Philosophy of Law 349, 351 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).

such as Voltaire[37] and Beccaria[38] were ardent critics of the law of torture and also, generally, of the criminal law in Europe and, particularly, France. In any event, most of these legal maxims quoted above have resisted the ravages of time, and they have also come to acquire additional meanings as they go through court interpretations and different circumstances of their legal context.

When analyzing criminal procedure, we are faced with the rise and fall of certain paradigms,[39] only to be replaced by new ones that still retain part of the old. All this

37 Voltaire (1694–1778), a French writer, essayist, deist and philosopher, in his Commentary on Beccaria's Crimes and Punishments (1766), noted that "[t]he torture is terrible…. Ingenious punishments, in which the human mind seems to have exhausted itself in order to make death terrible, seem rather the inventions of tyranny than of justice." This is how he describes the criminal process: "A man is accused of a crime. At once you lock him up in a wretched dungeon; you allow him no communication with any one; you load him down with irons as if you had already found him guilty. The witnesses who testify against him are heard in secret; he is confronted with them only for a moment; before hearing their testimony he must state his objections to them in detail; at the same time, he must name everyone who might support these objections, none of which are admitted after the reading of the testimony. If he shows the witnesses that they may have exaggerated certain facts or omitted others, or have been mistaken in some of their details, the fear of punishment will make them persist in their perjury. If circumstances described by the accused during interrogation be reported differently by the witnesses, that will be quite enough for ignorant or prejudiced judges to condemn an innocent man. What man is there who is not terrified by this procedure? What just man can be certain of not being crushed by it? O judges! If you want accused innocent men not to flee, give them the means of defending themselves." *Available at* http://www.constitution.org/volt/cmt_beccaria.htm .

38 Cesare Beccaria (1738-1794), a Milanese official, Enlightenment philosopher and one of the fathers of utilitarianism, wrote in his Essay on Crimes and Punishments (1764), Chap XVI: "No man can be judged a criminal until he be found guilty; nor can society take from him the public protection until it have been proved that he has violated the conditions on which it was granted. What right, then, but that of power, can authorize the punishment of a citizen so long as there remains any doubt of his guilt? This dilemma is frequent. Either he is guilty, or not guilty. If guilty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If he be not guilty, you torture the innocent; for, in the eye of the law, every man is innocent whose crime has not been proved." *Available at* http://www.fordham.edu/HALSALL/MOD/18beccaria.html .

39 Abolition of judicial torture was one of them, and, according to Langbein, it came as a result of the increasing professionalization of the continental judiciary and the development by them of alternative non-capital forms of punishment that allowed the continental systems to gradually let go of the practice. As less draconian penalties were imposed, the requirement of confession as an element of proof could be dispensed with and so could torture as a means of eliciting evidence. For a time the continental system operated two systems of criminal punishment - one based on confession attracted capital penalties and the other, based on wider categories of evidence, attracted new, ostensibly less severe penalties. Over the course of the second half of the 18th century, the continental systems had evolved their laws of proof sufficiently so that torture could be abolished. A work-

happens, as human generations witness clashes of, as well as dialogue among, legal traditions, institutions, tendencies and influences. Due process is no exception: it has come to change from an ambiguous term into a full-fledged practical legal concept running over several provisions, no matter how confused seems to be the distribution of the ideas involved in them, the haziness of the language used, and notwithstanding the intricacy with which they are to be "construed and applied;"[40] it has come to expand its protection establishing standards through the toilsome and refining work of lawyers both in domestic and international courts. Over the years, due process has developed as a barricade against "violations of natural justice,"[41] in order to ensure safeguards against the abuses by governments, arbitrary rulings and secretive proceedings of Star Chamber[42] type tribunals around the world. It would be fair to note in this section the farcical nature of trials in courts of Communist regimes,[43] and their notorious condemnations of political opponents of the government mostly relying on self-incrimination under torture and other pressure. Unfortunately, such

able system had developed which no longer relied on confession evidence. *See generally* Langbein, *supra* note 35.

40 J. E. S. Fawcett, The Application of the European Convention on Human Rights 85 (2d ed. 1987).

41 Orth, *supra* note 6, at 49.

42 The Star Chamber (Latin: *camera stellata*) was an English court of law at the Royal Palace of Westminster that sat between 1487 and 1641 when the court itself was abolished. The power of the Court of Star Chamber grew considerably under the House of Stuart, and by the time of Charles I of England it had become synonymous with misuse and abuse of power by the king and his circle. Court sessions were held in secret, with no indictments, no right of appeal, no juries, and no witnesses. Evidence was presented in writing. In the Star Chamber the council could inflict any punishment short of death, and frequently sentenced objects of its wrath to the pillory, to whipping and to the cutting off of ears. ... Retrieved from http://en.wikipedia.org/wiki/Star_Chamber (last visited May 30, 2006). More on the Star Chamber in 25 Encyclopedia Britannica 796 (Cambridge, 11th ed. 1910).

43 *See* comments related to Moscow "show trials" of 1936 and 1938, in Susan Marks & Andrew Clapham, International Human Rights Lexicon 158 (2005). Also, in Albania, in addition to numerous extra-judicial executions of anti-Communists and the clergy, mostly Catholic, several charade trials were set up in the years 1945 (gjyqi special/ special trial), 1947 (gjyqi i deputeteve/ the trial of members of parliament), and 1949 (gjyqi i Koci Xoxes/ the trial of Koci Xoxe) etc., where numerous persons, including a pregnant woman, were given the death penalty as the "enemies of the people." *See Ese per Diktaturen*, in *Gazeta 55*, 23 Shtator 2002 (*Essay on Dictatorship*, in Newspaper 55, Sept. 23, 2002; translated by the author), *available at* http://www.forumishqiptar.com/showthread.php?t=6048 . *See* also *Goditja ndaj Deputeteve te Opozites*, in *Gazeta Shqipetare*, 5 Tetor 2004 (*The Blow against the Members of Parliament of the Political Opposition*, in *Gazeta Shqipetare*, Oct. 5, 2004; translated by the author), *available at* http://www.albasoul.com/modules.php?op=modload&name=News&file= article&sid=1533.

contrivances are still employed to date, at the service of tyrants of all kinds and persuasions.[44]

From the time when the American constitution writers picked up the fancy phrase from the rich tradition of English constitutionalism in which these concepts were formed,[45] it has never stopped to intrigue and keep us busy wrestling with what we would like to consider the true meaning of "due process of law." In the aggregate, I consider it fair to note that constant changes in due process, be they additions or restrictions, came out of the necessity of the legal system to keep abreast with changing values[46] immanent in, and emanating from, society, and such judicial responses continue to adjust themselves to ever changing perceptions and social attitudes of the community towards facts of life,[47] as we struggle to properly balance order and liberty. So, is it easy or difficult nowadays to rebut the once trendy sensitivity that the legal system entertains criminal defendants at the expense of the social order?

B. Defining States of Emergency

It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.[48]

44 *See* the *Ken Saro Wiwa* case in Nigeria, where the African Commission of Human and Peoples' Rights found that in all stages of proceedings, almost every component of the right to a fair trial was violated, including the denial of the defendant's right to appeal. ACHPR, International PEN and Others (on behalf of Ken Saro Wiwa, Jr. and Civil Liberties Organisations) v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, *available at* http://www1.umn.edu/humanrts/ africa/ comcases/137-94_139-94_154-96_161-97.html.

45 Orth, *supra* note 6, at 6.

46 So, in the late seventeen century, John Locke refuted the absolute power of the monarch and the theory of the Divine Right of Kings, and he constructed a system within which citizens had rights that could, with moral justification, be asserted against the state. *See* J.G. Riddall, Jurisprudence 168 (1999). Further on in time, the prevailing interpretation of the scope of rights by courts has shown that societal values and conditions, as well as prevailing morals, allow for an evolutionary and dynamic understanding of legal concepts: they can, to a degree, be extended or limited. *See* Roza Pati, *Rights and their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 Berkeley J. Int'l L. 223, 244 (2005).

47 Consider the acceptance of judicial torture, and then its prohibition as *jus cogens*; the acceptance of death penalty, and its wide abolition. Also compare the dynamic nature of interpretations of the U.S. Constitution in Chief Justice Marshall's famous dictum in *McCulloch v. Maryland* that, after all "we must never forget that is *a constitution* we are expounding." 17 U.S. 316, 407 (1819).

48 William H. Rehnquist, Jr., All the Laws but One: Civil Liberties in Wartime (1998).

It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties…which makes the defense of the Nation worthwhile.

United States v. Robel, 389 U.S. 258, 264 (1967)

Self-preservation is a natural impulse, when confronted with the ultimate state of necessity. Individuals claim to be justified when they resort to whatever means necessary to defend themselves against a threat to their very existence. For them, in that situation, the limits of the legal system do not count. *Not kennt kein Gebot*.[49]

This argument has been transferred from the individual sphere to the realm of the community. Since time immemorial, groups of humans have defended themselves against outside threats using all means necessary. This was true for tribes, ancient empires, modern nation-states, democracies and dictatorships. In the state of need, the law with its restraints receded. As the Romans said, *inter arma silent leges*.[50]

Beyond war, internal threats to the established order have given similar rise to arguments of powers of preservation of the community outside the established channels and contents of the law. For the modern nation-state, Carl Schmitt has made the most focused argument for unlimited emergency powers of the state, legitimizing what he called a "dictatorship" understood as a means of defense against a threatened legal order. For him, the emergency was the hour of the Executive Branch.[51] When this ultimate need to defend the community arose, the other branches of government had to at least suspend their powers or cede them to a monocratic, vertically integrated leader or leadership system.

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49 *Notrecht*, in Friedrich Kirchner, Wörterbuch der philosophischen Grundbegriffe 397 (1907). Literally translated, this old German maxim means "Necessity knows no law."

50 "In times of war, the laws fall silent." The famous Latin phrase has been attributed to Cicero and his oration *Pro Milone*, *available at* http://www.thelatinlibrary.com/cicero/milo.shtml.

51 *Cf.* Carl Schmitt, Die Diktatur (1921); id., Politische Theologie (1922). *See also* Wolfgang Durner, Antiparlamentarismus in Deutschland 145 (1997) („diese Ausrichtung am permanenten Ausnamezustand als Stunde der Exekutive war bereits ein antiparlamentarischer Lieblingstopos von Carl Schmitt in Weimar"). In a comparative study of 1936, Carl Schmitt proclaimed that the hour of the removal of the separation between the legislative and the executive branch had arrived. Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)*, 6 ZaöRV 252, 266 (1936). The designation of a national emergency as „die Stunde der Exekutive" was expressly used by German Minister of the Interior Gerhard Schröder in his justification of a 1958 bill to amend the 1949 German Basic Law with provisions for a state of emergency. Bundesminister Gerhard Schröder, Bundestag, Sten. Ber., 3. WP., 124. Sitzung vom 28.9. 1960, S. 7177; BTDrucks. III/1800, cited in Eckart Klein, *§ 169: Der innere Notstand*, in VII Handbuch des Staatsrechts 387, 392 n. 25 (Isensee & Kirchhof eds., 1992). *See also* Hans-Jürgen Lange, Innere Sicherheit im politischen System der Bundesrepublik Deutschland 82 (1999).

Domestic legal systems largely accommodate that claim of individuals, through recognition of a broad claim to self-defense. For states at war, particularly those with democratic systems and separations of powers, constitutions allowed for concentration of power in the chief executive, as seen, for example, in the U.S. President's role and original power as Commander-in-Chief.[52] Internationally, war itself was largely available as an instrument of foreign policy until the United Nations Charter outlawed aggression, but left alive the states' inherent right to self-defense. Despite the limitations on the justifications for going to war (*ius ad bellum*), and the longer-standing curbs on the means and ways to conduct it (*ius in bello*), the freedom of states to act in cases of ultimate threat to their existence still, at times, receives affirmation, as in the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* who stated, in 1996, that "it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake."[53]

War as engaging other communities always involved a component of outside threat,[54] which left participating entities existentially vulnerable. Inside threats to established power structures, democratic or otherwise, could be equally grave, as they might imperil peace and tranquility of the land, its chosen structure of government, and ultimately, government itself. States have variously characterized the special legal order which they introduced to manage such crisis situations, using concepts such as "state of exception," "state of emergency," "state of alarm," "state of siege," "martial law," etc. What these legal regimes have in common is the resort, in many cases, to special powers of arrest and detention, to trials before military tribunals, sometimes the enactment of special criminal laws, at times applied retroactively, that limit the right to freedom of expression, association and assembly. History has further shown that, many times, in situations of turmoil, states have opted for the use of torture or other forms of ill-treatment from those considered foes of the state in order to extract information or confessions from them. At times, states have resorted to abductions and extrajudicial killings, and sometimes human beings were stripped of their protections in court when states ousted the judicial review of government actions via, *e.g.,* the writ of *habeas corpus*, for victims of arbitrary arrest and detention considered their enemies.

52 U.S. Constitution, Article II (1787).

53 *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, para. 97 (Adv. Op., July 8, 1996).

54 The same extraordinary situation exists when the state engages in massive violations of basic human rights, thus failing to keep its responsibilities as a sovereign member of the international legal system. The international community then reacts through diplomatic pressure, economic sanctions and ultimately even humanitarian intervention, which remains relevant despite some views that in the era of the war on terror "the national interests dominate foreign security policy." *See generally* Taylor B. Seybolt, Humanitarian Military Intervention: The Conditions for Success and Failure (2007), especially at 268.

In modern constitutional times, the question arose as to whether a state structuring its political authority for the state of normalcy and internal as well as external peace should foresee and to some degree regulate changes of authority for this time of threat. Eckart Klein has argued for the "constitutionalization" of such states of exception, as governmental authorities would be given appropriate legal yardsticks to orient their behavior during such crises, avoiding their tumbling into lawlessness, and guiding their return to the state of normalcy.[55]

As to this issue, an early, but still thought-provoking study of the history of Western emergencies was undertaken by Clinton Rossiter.[56] He starts with the observation that it is nations that have already achieved some level of democracy and still want to preserve it against an internal or external threat that grapple with the idea of establishing government powers for crisis times. He then describes certain types of emergency regimes and resulting effects in democratic orders. Referring to the French Revolution and its *state of siege*,[57] he grippingly notes: "No institution of crisis government existed under the *ancient regime*. It is unnecessary to suspend rights that do not exist or augment powers that are already absolute."[58] Consequently, it is the people living in democracies that have a better understanding of, and are more reluctant to let go of, their freedom and liberty achievements. Siding with the French model, he maintains the position that there should be formal legalities observed when resorting to emergency powers and there should be a strong reliance upon the legislature[59] to restrain abuses, which ordinarily would facilitate themselves by patterns like the military taking over police powers, the military courts exercising jurisdiction over civilians, and the issuance of overbroad orders and rules by the executive diverting from the legislature's authority on such matters. In this context, Rossiter also makes reference to the Weimar Republic and its Constitution. Its Article 48 formally allowed for, and described, emergency powers. This provision, however, did not prevent the President from dissolving the Reichstag that could have controlled the

55 Eckart Klein, *Der innere Notstand*, *supra* note 51, at 389. Rejecting the maxim *"Not kennt kein Gebot,"* Klein would argue for limitations upon emergency powers in crises not covered by the written constitution, limitations that orient themselves at the need to safeguard the highest values protected by the constitution. *Id.* at 411-413. Short of such system-wide crises, there are also malfunctions of the constitutional order, which can usually be dealt with by the institutions of the state of normalcy. Eckart Klein, *§ 168: Funktionsstörungen in der Staatsorganisation*, in VII Handbuch des Staatsrechts 361 (Isensee & Kirchhof eds., 1992)

56 Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (1948). In this study, the author describes the emergence of "constitutional dictatorships" in the United Kingdom and the United States in the nineteenth and early twentieth centuries.

57 The term itself comes from the time of the French Revolution where unlimited powers were given to a general in command of a besieged fortress. Later, such military powers were extended to a political state of siege exercising similar powers over urban populations during internal or external conflicts. *See* Rossiter, at 80-81.

58 *Id.* at 80.

59 *Id.* at 86-87.

emergency powers, issuing decrees at his political whim, and delaying the election of a new Reichstag,[60] ultimately paving the way for Hitler.[61] Some scholars also did not agree with Rossiter's conclusion recommending formal provisions for the state of emergency based on the French experience, since the French legislative control was illusory and did not really provide an effective check upon executive power.[62]

There seemed to have been a different approach to emergency powers in the common law tradition. In the U.S., for instance, like in the U.K., there was no precise definition of emergency powers. In the nineteenth century, the President acted on his discretion "without obvious basis in his delegated constitutional powers,[63] and sometimes on the basis of specific ordinary legislation[64] passed by Congress."[65] During the twentieth century, there has been an issuance of "broadly worded emergency laws that delegated expansive powers to the executive to issue regulations and to undertake unusual measures to cope with the crises….[A] high degree of legislative acquiescence resulted in an actual concentration of power in the President. All this occurred without any explicit change in the constitutional structure or any formal

60 *Id.* at 72.

61 For a pertinent historical analysis, see Peter Blomeyer, Der Notstand in den letzten Jahren von Weimar (1999).

62 *See* Joan Fitzpatrick , Human Rights in Crisis: The International System for Protecting Rights During States of Emergency 26 (1994), also referring to Paul Leroy, L'organisation Constitutionnelle et les Crises 74-78 (1966). For other important theories on states of emergency, *see* Frederick M. Watkins, The Problem of Constitutional Dictatorship (1940); Carl J. Friedrich, Constitutional Government and Democracy (1941); Herbert Tingsten, Les pleins pouvoirs (1948); and, most recently, Giorgio Agamben, State of Exception (Kevin Attell tr., 2005). The last author locates emergencies, or, as he calls them, "states of exception," in a zone of uncertainty between law and *anomie* similar to the Roman *iustitium*, which denoted a temporary halt of the entire legal system, where all organs of the law stopped their activity. He critiques prior authors in the field:

> The confusion of state of exception and dictatorship is the limitation that prevented both Schmitt in 1921 and and Rossiter and Friedrich after World War II from resolving the aporias of the state of exception. In both cases, the error was self-serving, since it was certainly easier to justify the state of exception juridically by inscribing it in the prestigious tradition of Roman dictatorship than by restoring it to its authentic, but more obscure, genealogical paradigm in Roman law: the *iustitium.* From this perspective, the state of exception is not defined as a fullness of powers, a pleromatic state of law, as in the dictatorial model, but as a kenomatic state, an emptiness and standstill of the law.

Giorgio Agamben, at 47-48.

63 Such acts include, *inter alia*, the ordering of a blockade in Southern ports by President Lincoln, the issuance of the Emancipation Proclamation in 1862, prior of its approval by Congress, the issuance of the "Lieber Code" for the armies in the field, though making rules for armed forces was a power of the Congress. Rossiter, *supra* note 56, at 226-235.

64 Such was, for instance, the suspension of the writ of *habeas corpus* in the areas under martial law, Act of March 3, 1863. *See* Rossiter, *supra* note 56, at 235-236.

65 Fitzpatrick, *supra* note 62, at 27.

suspension of liberties."[66] Indeed, a majority holding in the famous *Steel Seizure Case* of 1952 can be cobbled together from the three opinions in dissent and two opinions in the majority which would agree that a President has the implied power to respond to grave and imperative national emergencies.[67] It is to be noted, however, that Justice Robert H. Jackson, back from his experience as Chief Prosecutor in Nuremberg, explicitly rejected that route of reasoning. Enlightened by his experiences with the Weimar Constitution's arguably seamless transition into Hitler's dictatorship using Article 48's emergency powers, as well as, say, Argentina's tolerance of multiple *coups d'Etat* under the emergency provisions of its 1853 Constitution, he formulated, in timeless prose, that emergency powers "tend to kindle emergencies."[68]

As to international law, prior to 1945, it was basically up to the sovereign individual states, except from situations involving foreign nationals under the law of diplomatic protection, to determine how they should address situations of domestic emergencies. Since 1945, the human rights revolution has punctured this sovereignty of states to act as they please to confront internal threats. The need arose to determine whether, and, if yes, which, accommodations ought to be made to legitimate concerns of states facing groups intent on imposing their goals through violence, skirting established avenues of human rights and democracy. In particular, when states used special powers of arrest and detention, often unlimited in duration and severe in conditions, as well as trials before special tribunals with special procedures, while eliminating access to independent and impartial courts of law, traditional remedies and procedural protections, it was often hard to reconcile such measures with time-honored guarantees of due process.

International human rights instruments do try to envision, and legally encompass, this state of emergency and confine the potentially unlimited use, or abuse, of governmental power. They strike a balance between the need of the state for self-preservation and the individual right to dignity and freedom. They, essentially, put the onus of declaring an emergency on a state, limit that declaration to certain conditions, and except certain human rights guarantees from modification even in situations that threaten the life of a nation. Thus, while derogating from certain rights in times of emergency is legal under international law, the abusive use of the extraordinary powers that such situations confer on the states remains at all times unlawful. Hence, the need for a well-balanced power of emergency, the clarification and containment of abuse, and an abiding respect for human rights, whenever states resort to anti-subversive strategies in efforts to restore constitutional order and internal security.

Under these human rights regimes, to be examined in detail later in this study, there is thus a consensus about limiting the grounds justifying the proclamation of states of emergency to those in effect threatening the life of a nation. While a clear cut

66 *Id*. at 28.

67 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

68 *Id.* at 650.

rule[69] or an exhaustive list[70] of grave national life-threatening circumstances does not exist nor can or should necessarily be formulated, some narrowing of this concept can be reached by an analysis of where positive international law has included the situation of emergency in its normative provisions. The places for this inclusion are the derogation provisions in the various universal and regional human rights treaties as well as the pertinent jurisprudence of their respective monitoring bodies. Looking at four major universal or regional instruments of human rights protections, we encounter terms like "public emergency which threatens the life of a nation,"[71] "war or other public emergency threatening the life of the nation,"[72] "war, public danger,[73]

69 In 1984, the International Law Association Committee in its study on states of emergency commented as follows: "It is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society." ILA Paris Report (1984), at 59, para. I, quoted in Jaime Oraá, Human Rights in States of Emergency in International Law 31 (1992).

70 Since early on, studies have shown efforts made to list grounds on which a state of emergency can be proclaimed. For example, a study of the UN Commission on Human Rights, E/CN. 4/826 5 Jan. 1962, *Study of the Right of Everyone to be Free form Arbitrary Arrest, Detention and Exile*, p. 257, in paragraph 754, recapitulates the following relevant circumstances: "International Conflict, war, invasion, defense or security of the State or parts of the country; civil war, rebellion, insurrection, subversion, or harmful activities of counter-revolutionary elements; disturbances of peace, public order or safety; danger to the constitution and authorities created by it; natural or public calamity or disaster; danger to the economic life of the country or parts of it; maintenance of essential supplies and services for the community." *See also* Daniel O'Donnell, *States of Exception*, 21 Int'l Comm'n Jurists Rev. 52, 54 (1978).

71 ICCPR, Article 4.

72 ECHR, Article 15.

73 The notion of *public danger* contained in the American Convention on Human Rights (ACHR) and which is not explicitly found in other treaties refers to natural calamities such as floods, earthquakes etc, that do not necessarily threaten the internal or external security, but do cause problems of such an extent that would justify proclamation of a state of emergency. This was added on the basis of a proposal by El Salvador at the San José Conference that created the ACHR. For this and more on the legislative history of the American Convention, see The Inter-American System (Thomas Buergenthal & Robert E. Norris eds., 1984). *Id.* Vol. I, booklet 12, at 135, regarding the minutes of the 14th session, 17 November 1969.

or other public emergency that threatens the independence or security[74] of a State party."[75]

Such terms are relatively broad and do leave room for different interpretations of "life-threatening" *vel non* situations of the nation. Should such interpretation be left exclusively to the government of any nation? As the representative from Chile had pointed out during the drafting process of the ICCPR, "it [is] difficult to give a *precise legal definition of the life of the nation* [but it is] significant that the text did not relate to the life of the government or of the state."[76] Logically, it implies that "the population *per se* is menaced by some grave danger."[77] In the same vein, the ILA Committee's observation that each emergency case "has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society,"[78] seems to be going in the right direction. A better understanding of such concepts can be gained by looking back at the intentions and arguments stipulated and forwarded by the working groups who drafted these treaties. Reviewing the *travaux préparatoires* of these treaties displays a possible contradiction between the genuine concern of potential abuses of such phrases on one side, and the risk of being too specific and ex-

74 The notions of a threat to the *independence or security* of a state party contained in the ACHR differ from *the life of the nation* contained in other treaties. While it does not entirely leave it to the whim of the laws of a state to determine an emergency, it nevertheless leaves room for quite subjective interpretations. Some have considered them to be broader and less restrictive than the emergency envisioned in other treaties (*see* Oraá *supra* note 69, at 14; *see also* P.P. Camargo, *The American Convention on Human Rights,* Hum. Rts. J. 356 (1970)), others have found the lack of precision in the *doctrine of national security* in Latin American States to be a source of justifications on the part of some Latin American governments for their declarations of states of emergency on grounds of security, consequently bringing about many violations of human rights (*see* International Commission of Jurists, States of Emergency: Their Impact on Human Rights 416 (Geneva 1983); *see also* H. Montealegre, La Seguridad del Estado y los Derechos Humanos (Santiago de Chile, 1979), referred to in Oraá, *supra* note 69, at 15, n.23). The problem of human rights violations during states of emergency in Latin American States has been a constant concern of the Inter-American Commission on Human Rights. The Resolution on the Protection of Human Rights in Connection with the Suspension of Guarantees or "State of Siege" (*see* OAS Ser. L/V/II. 19, doc. 32 (16 May 1968) based on the report of Commissioner Martins with the same title (*see* OAS, Ser. L/V/II. 15, doc. 12 (11 Oct. 1966)) became the basis for discussion when drafting the derogation clause, and is important in its interpretation. These documents and their stipulations reveal conformity with the emergency standards of other pertinent treaties, *i.e.* a reference to a "war or other serious public emergency threatening the life of the nation or the security of the state," as noted in the above-mentioned Resolution.

75 ACHR, Article 27. Note that there is no derogations clause in the African Charter on Human and Peoples' Rights, and the African Commission on Human and Peoples' Rights has argued that the state parties cannot derogate from their treaty obligations even in emergency situations. *See infra,* Chapter IV. A.4.

76 U.N. Doc. E/CN.4/SR.330, at 4 (*emphasis added).*

77 Joan Fitzpatrick , *supra* note 62, at 10.

78 ILA Paris Report (1984), *supra* note 69.

clusive on the other; hence the option for a broader term,[79] while still preserving the limits on actions taken by states in such times of emergency and their international accountability for such acts.

Beyond this genetic and other treaty research, to be effectuated below, we may recognize that positive international law, as any law, is subject to change, and that its content – as here formulated in rather open-ended terms – , might be subject to different interpretations and progressive development, as the need arises. Thus, in the context of emergency limitations on human rights regimes, in particular, due process guarantees, it is important to take a broader look at the problem as such.

To this end, it might help to review several intellectual efforts at unpacking the concept of emergency and elaborating some typology of emergencies and their place, if any, in the human rights regime.

An interesting attempt to categorize emergencies is made by the Special Rapporteur Nicole Questiaux in her study titled: "*Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*,"[80] commissioned by the United Nations Sub-Commission for the Promotion and Protection of Human Rights. She developed a highly formalized ideal "reference model," according to which there should be a formal proclamation,[81] defining legally all the permissible grounds for exercise of emergency powers, respective time limits, description of non-derogable rights and/or other rights clearly subject to suspension or restriction, respective measures of control, and any potential changes in the scope of powers of various government institutions.[82] She then classified five digressions from her preferred ideal model: 1) the formal emergency not notified accordingly; 2) the de facto emergency, where rights are suspended without notification or proclamation of emergency, or continue to be suspended after the emergency has been lifted; 3) the permanent emergency characterized by continued and decreasingly valid extensions of emergency state; 4) the complex emergency, characterized by overlapping and confusing legal regimes through partial suspension of constitutional norms and issuance of complicated, voluminous, far-reaching decrees;[83] 5) the institutionalized emergency used by an authoritarian government to prolong an extended transitional emergency regime, questionably purporting to try to return

79 An excellent account of the discussions on the definition and description of an emergency is to be found in Oraá, *supra* note 69, at 11-16.

80 U.N. Doc. E/CN.4/Sub.2/1982/15 (*hereinafter* the "Questiaux Report").

81 Common law scholars would argue that common law states may not require a formal proclamation of a state of emergency and would still impose extraordinary security legislation by a compliant legislature to manage a crisis situation. They would further argue that such a crisis could also be managed very effectively through increased application of prior-enacted permanent national security legislation, and even without any suspension of constitutional provisions, or alterations in the separation of powers. *See* Fitzpatrick, *supra* note 62, at 6 and 22.

82 Questiaux Report, at paras. 73-95

83 As examples of this type, the author mentions the emergency situations of Turkey and Brazil. Questiaux Report, at 119-128.

democracy and restore constitutional order. She recommends the proliferation of permanent national security laws that would in turn limit chances for any of her five identified deviations. Some scholars have found this typology to be incomprehensive, and lacking in understanding of common law ways of handling a crisis,[84] while others considered it overall a "valuable study."[85]

Another categorization of interest within this study is the three groups of common law type non-declared emergencies initially drafted by Professor Tom Hadden of Queen's University, Belfast. They include: 1) low-level emergencies, in which special powers are introduced to deal with a relatively isolated terrorist threat; 2) temporary generalized emergencies, in which sets of emergency powers are introduced to deal with extensive disorders such as communal conflict; and 3) permanent or preventive emergencies, in which such temporary measures are made permanent to prevent the growth of organized opposition.[86]

Another typology would be the one formulated by the International Law Association (ILA). It notes the *de jure* emergencies, referring to the ones formally declared and/or notified, and the *de facto* emergencies, which are not formally notified. In the context of this paper it is of interest to see in more detail the latter group, which includes four types: 1) the "classic" *de facto* emergency, characterized by actual emergency conditions; 2) the "ambiguous or potential" *de facto* emergency, with no real tangible emergency conditions and a sudden change in application of security laws; 3) the "institutionalized" emergency, characterized by no real conditions of emergency, the lifting of a prior formal emergency, and the simultaneous incorporation of emergency laws into ordinary law; 4) the "ordinary" repression, characterized by no real conditions of emergency, and by permanent laws with extreme restrictions on human rights.[87]

Reading these classifications, one can obviously see, at best, the difficulty, if not the impossibility, of a precise definition and classification of states of emergency. In any type of out-of-normalcy situation one can find the inherent complexity of borderline characteristics of various classifications. In no circumstance is this difficulty of characterization more pronounced than in the field of so-called "terrorist" attacks. The question then arises, whether terrorist attacks can constitute legitimate grounds for measures based on a state of emergency, and what limits, if any, are to be placed on measures countering them.

84 Fitzpatrick, *supra* note 62, at 22.

85 Oraá, *supra* note 69, at 243.

86 Fitzpatrick, *supra* note 62, at 22-23, n. 75.

87 *Id.* at. 8-21.

C. Terrorist Acts as Grounds for a State of Emergency

It is during our most challenging and uncertain moments that our Nation's Commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).[88]

Let us start this section by referring to three observations emblematic of the complex relationship between terrorism, anti-terrorist measures, and human rights:

Observation 1: The Inter-American Commission of Human Rights has noted that democratic governments always maintain the rule of law when confronting terrorism; it is only states which do not enjoy the support of their people that will resort to measures equating state terrorism.[89] What it probably meant is that a democratic and civilized society faces even its gravest of crisis by taking tough measures, but respecting at all times fundamental human rights which are inherent in each person and emanate from the respect for human dignity.

Observation 2: Professor Fitzpatrick stated, based on 1987-88 scholarly comments, that the British Northern Ireland legislation addressing the threat posed by the IRA had "the effect of blurring a distinction… between emergency powers and anti-terrorism provisions," which would logically lead to a situation where "a permanent emergency state becomes the 'solution' to the emergency."[90]

Observation 3: At the time of *Brogan,*[91] the European Court of Human Rights had the tendency to justify a detention beyond the normal forty-eight hours without any judi-

88 *See also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-165 (1963): "The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action."

89 Report on the Situation on Human Rights in Argentina, OEA/Ser. L/V/II. 49, doc. 19, corr. 1, at 25-27 (1980).

90 Fitzpatrick , *supra* note 62, at 7, quoting J.D. Jackson, *The Northern Ireland (Emergency Provisions) Act 1987*, 39 N. Ir. L. Q. 235, 257 (1988). In many a time a number of countries that had declared states of emergency, would, with the passing of time, have certain measures of pieces of legislation transform into institutional restrictions indefinitely, ultimately sneaking them into the permanent legal system. Such was the case of Chile and its military courts trying civilians under the Anti-Terrorist Act. Human Rights Committee Reports, U.N. Doc. A/45/40 Annex VIII (1990), at para. 193. The same had happened in Poland U.N. Doc. A/42/40 (1987), at paras. 55-104, in Nicaragua, U.N. Doc. A/45/40 Annex VIII (1990), at paras. 388-425, etc.

91 ECtHR, Brogan and Others v. United Kingdom, Judgment of 29 November 1988, Series A, No. 145.

cial review and without charges brought against the detainee. Also, earlier in *Klass*,[92] it allowed the opening of letters and wiretapping for the protection of national security even without judicial review if they legislation provides for adequate safeguards and meets the test of proportionality. Such reasoning was based on the fact that terrorism as an organized crime had emerged in Europe after the Convention came into effect. Consequently, the interest of the society to be safe from terrorism outweighed the individual rights of the detainee.[93]

These three facts walk us straight into our time: we are caught up in a "war" against terrorism, and as a war we do not know what to expect of its duration. We are called to give up some liberties and accept a diminishment of our personal privacy for the greatest good of our very life, though we do not see the "war" interfering with our daily routine. We are convinced that we will address terrorism effectively by being "tough" on it in all directions. We realize that terrorism today is different from the political violence of the IRAs, ETAs or Red Brigades, and consequently it does warrant a novel approach.[94] And, we are undeniably living in an era when the statement "*A Week is a Long Time in Detention*"[95] sounds outdated and exotic while we still hold alleged terrorists in detention since 2001. In this pull-and-push perplexity, the situation needs to be properly understood: is the struggle against terrorism just the response of limited duration to an equally brief emergency? If so, people might be more inclined to tolerate the government as it does whatever needs to be done to handle this situation properly. Or, has the fight against terrorism become part of the 21st century's "clash of civilizations"? In this case, people likely will still opt for assisting the government in finding the best ways to tackle the problem, while, however, increasingly insisting to keep the longstanding democratic tradition of fundamental due process alive. This, at least as long as the threat of terrorism does not materialize again.

Modern terrorism of the bin Laden kind can be said to present a qualitatively different threat than the terrorisms of the past. The IRAs, ETAs and Red Brigades as well as other movements of revolutionary or secessionist character addressed themselves mostly to national issues, operated mostly within a country and did not count on much outside support. The terrorists plotting and executing September 11, 2001 operated on a much larger plane. Al Qaeda constitutes a global phenomenon. Inter-

92 ECtHR, Klass and Others v. Federal Republic of Germany, Judgment of 6 September 1978, Series A, No. 28, 2 EHRR 214 (1979-80). *Cf.* Heike Krieger, *Limitations on Privacy, Freedom of Press, Opinion and Assembly as a Means of Fighting Terrorism*, in Terrorism as a Challenge for National and International Law: Security versus Liberty? 51, 58-59 (2004).

93 Brogan, *supra* note 91, referring to Commission's decision, at 59.

94 Joseph S. Nye, Jr., *A North American Perspective*, in Joseph S. Nye, Jr., et al., Addressing the New International Terrorism: Prevention, Intervention and Multilateral Cooperation 5, 6-7 (2003).

95 *See* Stephen Livingstone, *A Week is a Long Time in Detention: Brogan and Others v. United Kingdom*, 40 N. Ir. L. Q. 288 (1989).

national conflicts seem to be "hotbeds that create the terrorists"[96] and nurture them.[97] Its threat is thus no longer purely internal, as earlier terrorist movements were. It is external as well.

As early as September 20, 2001, President George W. Bush outlined the parameters of this new war, the "war on terror":

> Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."[98]

This "war on terror"[99] thus will not be, and has not been, brief. It also involves international law as well as domestic law. The international law regimes for war, largely tailored to conflicts between states, have a hard time to be fitted to the needs of combat against a shadowy enemy who himself does not feel bound by any restrictions on his conduct. Should thus the domestic and international human rights protections

96 Madeleine Albright, quoted in Adam Lebor, Complicity with Evil: United Nations in the Age of Modern Genocide 249 (2006).

97 Arab students at Hamburg Technical University who had watched gruesome footage of Serbian atrocities of the 1992-1993 wars in Bosnia were easily recruited to form the Hamburg cell of Al Qaeda. Three of them, Mohamed Atta, Marwan al-Shehhi and Ziad Jarrah, piloted the three hijacked planes that flew into the World Trade Center and crashed in Pennsylvania. *Id.* at 249-251.

98 President George W. Bush, Address to a Joint Session of Congress and the American People, 37 Weekly Comp. Pres. Docs. 1347 (Sept. 20, 2001).

99 For recent discussions of terrorism and legal responses thereto, see W. Michael Reisman, *Aftershocks: Reflections on the Implications of September 11*, 6 Yale Hum. Rts. & Dev. L.J. 81 (2003); id., *International Legal Responses to International Terrorism*, 22 Hous. J. Int'l L. 3 (1999); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 Harv. Int'l L. J. 41 (2002); Steven R. Ratner, Jus Ad Bellum *and* Jus in Bello *after September 11*, 96 Am. J. Int'l L. 905 (2002); David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 Harv. Int'l L. J. 71 (2002); Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 Am. J. Int'l L. 835 (2001); Thomas N. Franck, *Terrorism and the Right to Self-Defense*, 95 Am. J. Int'l L. 839 (2001); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment,* 43 Harv. Int'l L. J. 83 (2002); Anne-Marie Slaughter, *An International Constitutional Moment*, 43 Harv. Int'l L. J. 1 (2002); John Alan Cohan, *Formulation of State Response to Terrorism and State-Sponsored Terrorism*, 14 Pace Int'l L. Rev. 77 (2002); Daniel Benjamin & Steven Simon, The Age of Sacred Terror (2002); Bernard Lewis, The Crisis of Islam: Holy War and Unholy Terror (2003).

apply, as modified, as the case may be, by their emergency provisions? How do we appropriately respond to the threat posed by terrorists while protecting the rights of the persons accused of terrorist activity? Should the regular fair trial and due process protections, in particular, be suspended or eliminated? Should they be modified?

In the course of this study, the author and the reader will have a long way to go before being able to answer any of these questions. A large part of the law has been already laid out by various bodies with authority, in particular courts, international and domestic. It will be analyzed below.

To get a flavor of the debate, let us see for a moment how the European Court reasoned about the grounds for detention in cases related to terrorism. In *Fox, Campbell and Hartley*,[100] the Court held that an objectively reasonable suspicion of involvement in criminal activity must be established on the grounds of Article 5(1)(c) of the European Convention of Human Rights. A *bona fide* belief of the arresting officer would not be enough, but it also added that this provision "should not be applied in such a manner as to put disproportionate difficulties in the way of the … authorities … in taking effective measures to counter organized terrorism… . [They] cannot be asked to establish the reasonableness of the suspicion grounding arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity."[101]

Again, in a terrorist threat setting, in 2001, the U.S. Congressional Joint Resolution of the Authorization for Use of Military Force,[102] declared as follows: "The president is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines, planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001." In 2004, in the *Hamdi* case,[103] the Supreme Court reviewed the powers used by the President. It looked at whether the resolution included an authorization by Congress to detain terrorists without charging them with a crime (*i.e.* whether it was a Congressional act which trumped the statutory limitation that Congress had previously passed about detaining American citizens without charging them with a crime). Symbolically, it concerned what Justice O'Connor, speaking for the majority, called, "essential liberties that remain vibrant *even in times of security concerns*."[104] The Supreme Court held that people deprived of their liberty have certain due process rights and that the President cannot exercise his powers as Commander-in-Chief without judicial review, including a court or a military tribunal under appropriate circumstances, but also concluded that the authorization for the use of military force constituted statutory authorization to detain a person who had been taken prisoner as an unlawful combatant. This actually

100 ECtHR, Fox, Campbell and Hartley v. United Kingdom, Apps. No. 12244/86 and 12383/86, Judgment of 30 August 1990, Series A No. 182, 13 Eur. H.R. Rep. 157 (1990).

101 Quoted in ECtHR, Ireland v. United Kingdom, Judgment of 18 January 1978, Series A, No. 25, at para. 34.

102 Authorization for the Use of Military Force, Pub. L. 107-40 [S. J. RES. 23], September 18, 2001.

103 Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

104 *Id*. at 2652 (*emphasis added*).

diverted from 18 U.S.C. 4001, the federal anti-detention statute, which stipulates that no citizen may be detained "except pursuant to an Act of Congress." Justice O'Connor took the view that the Presidential power allowed detention of even an American citizen who is a suspected terrorist without actually charging him with a crime for the simple reason that if released, he would likely return to the battlefield to plot and execute more lethal attacks on Americans. Justice Scalia dissented, holding that it was unconstitutional for the President to detain any individuals without charging them with some crime, unless *habeas corpus* is suspended, and this can only happen in very limited circumstances.

Finally, let us come back to Observation 3 mentioned above. The facts of the *Brogan* case have to do with detentions undertaken while, at that particular time, in the U.K. there was no proclamation of a state of emergency. We saw how the European Commission, the quasi-judicial body monitoring the European Convention on Human Rights, had reacted to the detentions phenomenon when a prolonged detention was challenged. However, the judicial body, the European Court of Human Rights, did not share the same opinion. It held that judicial review of detention left no room for flexibility, and it found a violation in such a case.[105] Following the Court's decision, rather than amending the law to rectify the problem, the U.K. filed a new notice of emergency, thus justifying its derogations. Such a progression of this issue practically suggested that no administrative detention could be justified if there were no states of emergency. It is at that time that scholars like Livingstone[106] found a week's period to be a long time in detention. However, history repeats itself in one aspect: the detentions up to seven days that occurred under the Prevention of Terrorism Act of 1984 were mostly sorts of short term administrative detentions for purposes of intelligence gathering[107] rather than pretrial detentions for prosecutions.[108]

Nowadays, the detentions under the U.S.A. PATRIOT Act[109] have mostly fulfilled the same function. Out of about 5000 persons detained since 2001 only a few of them have been charged and brought to trial on terrorism-related charges.[110] But is there a state of emergency, *de jure* or *de facto*, justifying such acts? Is the potential danger of terrorism a good enough ground under international law of human rights for such

105 Brogan, *supra* note 91, at 33.

106 *Supra* note 95.

107 Though, in *Brogan v. United Kingdom*, *supra* note 87, both the Commission and the Court supported the government's view that there existed a reasonable suspicion of involvement in terrorism, and their case was more like an ordinary criminal case in which enough evidence had been gathered during interrogation that there would have been charges brought by the prosecution.

108 *See* Fitzpatrick, *supra* note 62, at 47.

109 Pub. L. 107-56, 115 Stat. 272 (2001). The U.S.A. PATRIOT Act was signed into law on October 26, 2001.

110 *See* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 Yale L.J. 1753, 1777 (2004). For discussion of the Act and its application, see *infra* Chapter V, B.2.

a state of emergency? Are the "privatization of war"[111] by terrorist groups and the dramatic change in world politics justifiable grounds for a government to wage an endless war? Or, is it enough to curb terrorism by means of our "business as usual"[112] approach?

This study hopes to provide some insights toward an answer to these intricate, but unavoidable questions as posed throughout this introduction.

111 Phrase found in Joseph S. Nye, Jr., *supra* note 94, at 7.

112 *Ibid.*

CHAPTER II Criminal Due Process Guarantees in Peacetime: The International Legal Regime

The liberty of a person is the hallmark goal endorsed by a genuinely democratic society to express its ultimate regard for the human being and his dignity. In pursuing this objective, its constitutive process has designed the guarantees and the rules of conduct which preclude any unlawful and arbitrary curtailment or deprivation of rights, freedoms and liberties. One of these assurances is the due process of law in criminal proceedings, which now doubles as a central norm of the international law of human rights. As we trace the historical development and the course of legal change in the field of procedural due process, we come to realize that having gone through enormous battles, which continue into the present, due process still has a long way to go. Therefore, it appears cogent that before delineating due process in the era of international terrorism bringing about states of emergency, we focus on the due process guarantees in peacetime,[1] thus explicating the rule before sociopolitical reality brings forth the exception to it.

Due process is a right which society has always considered of fundamental importance, both in terms of the letter of the law or legal text and also of its spirit or intention. This can be evidenced by the enormous changes in meaning that this rule has undergone in the domestic laws of both adversarial and inquisitorial legal systems, as well as in the international law of human rights, and the extensive body of its interpretation by courts and scholars. It can also be illustrated by the fact that the right to due process guaranteed in Article 14 of the International Covenant on Civil and Political Rights (hereinafter ICCPR), was proposed[2] to be included as one of the non-derogable rights under Article 4 (2) of the ICCPR.

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1 In this section, the word "peacetime" is used to refer to situations of "normalcy" and not merely to "the absence of war." Situations of emergency are dealt with separately, *infra*, at Chapter III.

2 Draft Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994, at 59-62.

When pursuing social safety through an effective system of reasonable deterrence and just retribution,[3] the government automatically is cautioned against treating the accused and the criminals more severely than they deserve to be treated. Sanctions of criminal law, by nature, constitute a radical infringement of fundamental human rights, in a way they fit squarely with the motto: *no absolute freedom for the enemies of freedom*.[4] Consequently, any government that truly values the human dignity of persons under its jurisdiction, is obliged to employ the least intrusive means in the curtailment of the personal liberty of an accused, and provide the imperative safeguards for the accused in its process of crime punishment, to ensure that even persons accused of a crime are given the respect they are owed as humans. While accountability for any criminal offence is indispensable, it should be rendered through a due process of law, and obviously, it is in the nature of procedural guarantees to require states to undertake extensive positive measures to ensure these safeguards, which ultimately call for a highly developed legal system.[5]

Law and philosophy gave birth to the concept of due process as a guarantee against the abusive power of government, which, like fire, could be a "dangerous servant and a fearful master."[6] Shaped in domestic courts, through agreements or controversy as to its scope, the due process of law, undoubtedly embraces the fundamental concep-

3 The terms "deterrence" and "retribution" are at the heart of the discussion regarding punishment for crime, and proponents and theories in favor or against each purpose of punishment are numerous. However, it might be of interest here to note Immanuel Kant's theory on commitment to retribution as distinct from commitment to revenge or vindictiveness, and his opposition to the utilitarian thesis on criminal penalties as deterrence. In his book Metaphysical Elements of Justice, Kant writes, "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for society, but instead it must in all cases be imposed on a person solely on the ground that he has committed a crime; for a human being can never be confused with the objects of the law of things. ... He must first be found to be deserving of punishment before any consideration can be given to the utility of his punishment…." Jeffrie G. Murphy & Jules Coleman, Philosophy of Law: An Introduction to Jurisprudence 120 (1990), with further discussion of the philosophy of crime and punishment.

4 Eckart Klein, *Reflections on Article 5 of the international Covenant on Civil and Political Rights*, in Towards Implementing Universal Human Rights 127, 137 (Nisuke Ando ed., 2004).

5 Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 307, para. 3 (2nd revised ed. 2005). Also, positive steps to be taken by the state are generally required in order to have a proper functioning of the administration of justice. It is the state's responsibility to set up the necessary legal infrastructure. *See* Susan Marks & Andrew Clapham, International Human Rights Lexicon 159 (2005).

6 George Washington, quoted in James Crutchfield, George Washington: First in War, First in Peace (American Heroes) 21 (2005). The full statement goes like that: "Government is not reason; it is not eloquence; it is force! Like fire it is a dangerous servant and a fearful master."

tion of a fair trial,[7] which is in fact the terminology used in all universal and regional instruments of human rights protection. The international law of human rights is a much more recent creation of applicable values, however, through its treaty and non-treaty norms, through the vast case law of regional and international courts and tribunals, as well as through other authoritative interpretations,[8] it sets forth in detail the rights of the accused in peaceful and trouble-free times, demanding their global applicability to the entire world's legal systems. Like any other guarantee of human rights protection, fair trial too walks on a stony way, and any positive results, no matter how small they may seem,[9] bear significant importance.

This section focuses on the right to a fair trial, as it relates to criminal proceedings, enshrined in universal and regional multi-lateral treaties on human rights, in the jurisprudence of their respective judicial organs (courts, commissions, committees), as well as in customary law. Throughout this paper mention will also be made of non-treaty documents,[10] which have been adopted by the U.N. General Assembly

7 U.S. Supreme Court Justice Oliver Wendell Holmes in *Frank v Mangum*, 237 U.S. 309, 347 (1915).

8 *See generally* Louise Doswald-Beck & Robert Kolb, Judicial Process and Human Rights (2004).

9 Eckart Klein, *Participation in the International Covenant on Civil and Political Rights: How States Become State Parties*, in Verhandeln für den Frieden-Negotiating for Peace: Liber amicorum Tono Eitel, 369, 378 (Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann & Rüdiger Wolfrum eds., 2003).

10 Such as:

1) *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Body of Principles), adopted by consensus by the U.N. General Assembly in 1988, contains an authoritative set of internationally recognized standards, applicable to all states, on how detainees and prisoners should be treated. The principles set forth basic legal and humanitarian concepts and serve as a guide for shaping national legislation, *available at* http://www.unhchr.ch/html/menu3/b/h_comp36.htm.

2) *The Declaration on the Protection of All Persons from Enforced Disappearance,* adopted by General Assembly resolution 47/133 of 18 December 1992, characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission. The General Assembly proclaims the Declaration as a body of principles for all states and "urges that all efforts be made so that the Declaration becomes generally known and respected." *Available at* http://www.ohchr.org/ english/law/disappearance.htm.

3) *The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,* recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, urges that these principles should be taken into account and respected by Governments within the framework of their national legislation and practices. *Available at* http://www.ohchr.org/english/law/executions.htm#1.

4) *The Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules), adopted in 1955 by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders and approved by the U.N. Economic and Social Coun-

and other organizations, aiming at codifying or elaborating basic principles on specific components of a fair trial. These non-treaty instruments, though non-binding technically, nevertheless provide authoritative definitions on fair trial standards to which governments are expected to aspire. They also express the direction in which the law is evolving.[11]

When analyzing the due process international guarantees provided by universal and regional systems of human rights protection, this study will draw extensively

cil, set out what is "generally accepted as being good principle and practice" in the treatment of prisoners. In 1971, the U.N. General Assembly called on member states to implement these rules and to incorporate them in national legislation, *available at*: http://www.unhchr.ch /html/menu3/b/h_comp34.htm.

5) *The Basic Principles on the Role of Lawyers* were adopted by consensus at the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and welcomed by the U.N. General Assembly. The U.N. Crime Congress explained that "the adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession," *available at* http://www.ohchr.org/english/ law/lawyers.htm.

6) *The Guidelines on the Role of Prosecutors* were adopted by consensus at the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and welcomed by the U.N. General Assembly. The Guidelines were adopted in an effort to assist governments in "securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings," *available at* http://www.ohchr.org/english/law/prosecutors.htm.

7) *The Basic Principles on the Independence of the Judiciary* were adopted by the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the U.N. General Assembly in 1985. The principles, which apply to professional judges and lay judges as appropriate, were formulated to assist governments in securing and promoting the independence of the judiciary. They "should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general." *Available at*: http://193.194.138.190/html/menu3/b/h_comp50.htm.

8) *The United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, adopted by the U.N. Economic and Social Council (Resolution 1996/15) and endorsed by the U.N. General Assembly in 1984, restrict the use of the death penalty in countries which have not yet abolished it. Among other protective measures, they provide that capital punishment may only be carried out after a legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings. *Available at* http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm.

11 *See* Lawyers Committee for Human Rights, What is a Fair Trial? A Basic Guide to Legal Standards and Practice 2 (March 2000), *available at* http://www.humanrightsfirst.org/pubs/ descriptions/fair_trial.pdf .

from the materials offered in *Amnesty International's Fair Trials Manual*,[12] as well as in the publication entitled *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,*[13] compiled by the Office of High Commissioner for Human Rights and the International Bar Association. It will particularly base itself broadly on their classification of such guarantees during pre-trial arrest and detention, from investigation to trial, trial and appeal to final judgment. These manuals are a significant tool also in the recent growing practice of international trial observation, which has in turn generated influential interpretations of the fair trial guarantees.[14]

Pre-Trial Rights

In brief, pre-trial guarantees entail the following rights, as enshrined in universal and regional instruments of human rights protection:

1. *Rights to liberty and security of a person* include: right to personal liberty; protection against arbitrary and unlawful detention; presumption of release pending trial; prohibition of *incommunicado* detention, abductions and forced disappearances.
2. *Rights of detainees to information* include: right to be informed immediately of the reasons for arrest or detention; right to notification of rights; notification of the right to legal counsel; right to be informed promptly of any charges; notification in a language the person understands; rights of foreign nationals.
3. *Rights to legal counsel* include: right to the assistance of a lawyer; right to a lawyer in pre-trial stages; right to choose a lawyer; right to have a lawyer assigned free of charge; right to competent and effective counsel; right to have access to counsel; right to time and facilities to communicate with counsel; right to confidential communication with counsel.
4. *Rights to have access to the outside world* include: right to communicate and receive visits; prohibition of *incommunicado* detention; right to inform family of arrest or detention and place of confinement; right of access to family; rights of access of foreign nationals; right of access to doctors.
5. *Right to be brought promptly before a judge or other judicial official* includes the right of review of detention by a judge or other judicial officers authorized to exercise judicial power, and it implies "promptness."
6. *Rights to challenge the lawfulness of detention* guarantee: procedures allowing dispute of lawfulness of detention; continuing review (even in times of emergency); right to reparation for unlawful arrest or detention.
7. *Right to trial within a reasonable time or to release from detention* pending trial protects against unduly prolonged uncertainty for the accused and/ or detained,

12 Amnesty International Fair Trials Manual (Amnesty International Publications 1998).

13 Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (2003), *available at* http://www.unhchr.ch/html/menu6/2/training.htm.

14 Marks & Clapham, *supra* note 5, at 151.

and it involves considerations on the meaning of "a reasonable time," risk of flight, and asks for necessary diligence on the part of authorities.

8. *Right to adequate time and facilities to prepare a defense* involves considerations on the meaning of "adequate time;" access to information, documents, evidence; right to information about charges; time limits in information about charges; language this information is given; access to experts.
9. *Rights during interrogation* provide: safeguards for people undergoing interrogation; prohibition of coerced confessions; right to silence; right to an interpreter; keeping records of interrogation; review of interrogation rules and practices.
10. *Rights to humane conditions of detention and to freedom from torture* include: right to be held in a recognized place of detention; keeping records of detention; right to adequate medical care; presumption of innocence for people in pre-trial custody including segregation and differentiation from the convicted ones; gender-sensitive facilities and staff for women in custody; freedom from torture and ill-treatment; restriction of prolonged solitary confinement; restriction on use of force by law enforcement officials; unacceptability of physical pressure during interrogation; regulations on the use of restraints; body searches compatible with human dignity; prohibition of medical or scientific experimentation; examination and review of disciplinary offences within the detaining institution; right to reparation for torture or ill-treatment.

Trial Rights

1. *Rights to equality before the law and courts* include: right to equality before the law; right to equality before the courts; right to equal access to the courts; right to equal treatment by the courts.
2. *Rights to trial by a competent, independent and impartial tribunal established by law* guarantee: right to be heard by a tribunal established by law; right to be heard by a competent tribunal; right to be heard by an independent tribunal; separation of powers guaranteeing exclusive jurisdiction of the judiciary over judicial matters; observance of international standards in the appointment and conditions of employment of judges; objectivity in the assignment of cases; right to be heard by an impartial tribunal; challenges to the impartiality of a tribunal.
3. *Right to a fair hearing* realizes the principle of "equality of arms" between parties in a case.
4. *Right to a public hearing* warrants discussion of the requirements of a public hearing; permissible exceptions to a public hearing; violations of the right to a public hearing.
5. *Presumption of innocence* requires that the burden of proof rests with the prosecution; protects from prejudicial procedures impinging on the presumption of innocence; ensures respect for judgments of court and rule of law after acquittal.
6. *Rights not to be compelled to testify or confess guilt* includes: privilege against self-incrimination; right to silence; consideration of allegations of coercion at any stage.

7. *Exclusion of evidence elicited as a result of torture or other compulsion* includes exclusion of evidence elicited by torture or ill-treatment; exclusion of evidence elicited under duress; (also as in the case of Article 8(3) of the American Convention on Human Rights) "coercion of any kind."
8. *Prohibition of retroactive application of criminal laws and of double jeopardy* provides for: prohibition of prosecution for offences which were not crimes when committed; prohibition of double jeopardy (specific consideration of prohibition of double jeopardy under the ACHR and under statutes of international tribunals).
9. *Right to be tried without undue delay* warrants discussion on the meaning of "a reasonable time" depending on the complexity of the case, the conduct of the accused, and the conduct of the authorities.
10. *Rights to defend oneself in person or through counsel* include: right to defend oneself; right to defend oneself in person; right to be defended by counsel; advance notice of the right to counsel; right to choose defense counsel; right to have defense counsel assigned (right to free legal assistance); right to confidential communications with counsel; right to experienced, competent and effective defense counsel; prohibition of harassment and intimidation of counsel.
11. *Right to be present at trial and appeal* warrants discussion of trials in absentia, as well as on the right to be present at appeals.
12. *Rights to call and examine witnesses* include: right of the defense to question witnesses against the accused; opposition to and restriction of use of anonymous witnesses; limitations on the examination of prosecution witnesses; right to call and examine defense witnesses; rights of victims and witnesses.
13. *Right to an interpreter and to translation* includes right to a competent interpreter; right to have documents translated.
14. *Standards of judgments* include: right to a public judgment; right to know the reasons for the judgment; right to be judged by the decision-makers who attended the proceedings; right to judgment within a reasonable time.
15. *Standards of punishments imposed upon conviction of a crime* include: punishment only upon convicted after a fair trial; proportionality of penalties imposed to the gravity of the crime; punishments must not violate international standards; prohibition of corporal punishment; international standards of the conditions of imprisonment; prohibition of collective punishments.

Appeal Rights

The right to appeal guarantees: right to have an appeal; review by a higher tribunal; genuine review; fair trial guarantees during appeals.

The above enumerated standards constitute the basic international legal rules that control a state's power in its administration of justice in criminal proceedings, a *sine qua non* in a democratic society governed by the rule of law. They are aimed at effectively guaranteeing everyone's right to personal liberty and security at all times.

The following analysis will bring forth the reality of such standards as enshrined in international law instruments and as applied by the courts and those endowed with

the legal responsibility to safeguard the application of such standards. Many of these rights apply to pre-trial and trial stages. They are available in all universal as well as regional instruments of human rights protection. Some overlapping of guarantees in pre-trial and trial phases is almost unavoidable, though this study will be trying to keep it to a minimum, bringing out various facets of interpretations.

Subsequent to the analysis of the various treaty regimes, the study will highlight due process protections under customary international law and general principles of law. The chapter will end with a survey of due process guarantees in proceedings before international criminal tribunals.

A. Human Rights Treaties

1. The International Covenant on Civil and Political Rights and the Jurisprudence of the Human Rights Committee

This analysis will proceed from the most general and universal to the regional and specific rules at issue. It starts with the applicable guarantees under the International Covenant on Civil and Political Rights (hereafter ICCPR),[15] and their interpretation by the U.N. Human Rights Committee.

The present status of ratification of the International Covenant on Civil and Political Rights reflects a vast consensus of the international community on its content. This vast agreement on its standards, widespread state practice and *opinio juris* ultimately compel adherence to its protective formulations, and makes many of its provisions an expanded hard law version[16] of the UDHR, and the most authoritative expression of universally accepted minimum standards of human rights.[17] The ICCPR provides for an immense jurisprudence through its individual communications procedure guaranteed by the first Optional Protocol[18] to the ICCPR, presented to

15 The International Covenant on Civil and Political Rights (hereafter ICCPR), was opened for signature at New York on December 19, 1966, and it entered into force on 23 March 1976, in accordance with article 49, for all provisions except those of article 41; 28 March 1979 for the provisions of article 41 (Human Rights Committee), in accordance with paragraph 2 of the said article 41. As of September 26, 2008, there were 162 states parties and 71 signatories to ICCPR, http://treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&id=321&chapter=4&lang=en.

16 Christopher Harland, *The Status of the Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents*, 22 Hum. Rts. Q. 187 (2000).

17 Nowak, CCPR Commentary, *supra* note 5, at Preface (XI).

18 The First Optional Protocol to the ICCPR was opened for signature at New York on December 19, 1966, and it entered into force on 23 March 1976, at the same time as the Covenant. As of August 2, 2008, there were 111 states parties and 35 signatories of the First Optional Protocol to the ICCPR, http://treaties. un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en. There is also the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. It has been adopted and proclaimed by General Assembly Resolution 44/128 of 15 December 1989, and it entered into force

the Human Rights Committee (hereafter HRC),[19] a quasi-judicial body,[20] though the Committee has made it clear through its decisions on admissibility according to Article 2 and 3 of the Optional Protocol, that an international body cannot act as "a fourth

on July 11, 1991. As of September 26, 2008, there were 68 states parties and 35 signatories of the Second Protocol, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=136&chapter=4&lang=en.

19 The Human Rights Committee is a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights by its states parties. In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider inter-state complaints. The First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by states parties to the Protocol. *Available at* http://www2.ohchr.org/english/bodies/hrc/index.htm.

20 The Protocol's individual petition system permits victims of a violation of any of the rights provided for in the Covenant to file a communication with the HRC against the state party to the Covenant that they allege to have perpetrated the violation, after they have exhausted all the available domestic remedies. Contrary to what is customary in full judicial proceedings the Committee has no oral hearings. According to the Optional Protocol, Article 5, para. 1 the Committee restricts itself to "written information made available to it by the individual and the State Party concerned." In the same article, paragraph 3, the Optional Protocol also specifies that the Committee "shall hold closed sessions when examining communications." While these provisions do not legally exclude the possibility of having oral hearings as a preliminary phase before the submission of written final briefs by the parties and their examination in a closed meeting, the resource constraints on the work of the Committee and the backlog of communications have so far prevented the taking of this step. *See* Raija Hanski & Martin Scheinin, Leading Cases of Human Rights Committee 13-14 (2003). The proceedings in the HRC end with the adoption of "views," which constitute its findings or decisions. For more on the HRC, see Thomas Buergenthal, *The U.N. Human Rights Committee,* 5 Max Planck U.N.Y.B. 341, 366-368 (2001). Though the First Optional Protocol to ICCPR is silent on the follow up on or enforcement of HRC's views, the Committee has developed its own procedure to give effect to views by requiring State parties to include in their country report on actions taken to give effect to Committee's views. It also established the position of the Special Rapporteur for the follow-up on views. *Id.* at 373. For more on the practice of the HRC on this issue, see Marcus G. Schmidt, *Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanism and Beyond*, in The UN Human Rights Treaty System in the 21st Century 233 (Anne F. Bayefsky ed., 2000).

instance" applying domestic law.[21] The HRC[22] also monitors measures adopted by the states in order to give effect to the rights recognized in the Covenant and on the progress they have made in the enjoyment of those rights, through its review of state reports under the reporting procedure of Article 40 of the Covenant. In addition, it offers authoritative interpretation of the rights codified in the Covenant, known as General Comments[23] on thematic issues or its methods of work. General Comments, specific comments in the process of review of state reports, and the jurisprudence of the HRC established through the communications procedure complement each other[24] in developing and supporting the Committee's views and interpretations on the rights enshrined in the ICCPR.

21 One situation when this approach is applied is when the author's allegations are in their essence related to the assessment of facts, evidence and issues of domestic law by the courts, and the author does not provide facts and arguments to demonstrate why the assessment by the domestic courts entailed a violation of the Covenant, usually the right to a fair trial (Article 140). In *Moti Singh v. New Zealand* (Communication No. 791/1997, Decision on Admissibility adopted 12 July 2001, Report of the Human Rights Committee, Vol. II, U.N. Doc. A/56/40 (Vol. II), pp.228-240), the Committee stated: "The Committee notes that the author's remaining claims under Article 14 of the Covenant essentially relate to the evaluation of facts and evidence as well as to the implementation of the domestic law. The Committee recalls that it is in general for the courts of State parties, and not for the Committee, to evaluate the facts in a particular case and to interpret domestic legislation. The information before the Committee and the arguments advanced by the author do not show that the Court's evaluation of the facts and their interpretation of the law were manifestly arbitrary or amounted to a denial of justice. These claims are therefore inadmissible under Article 2 and 3 of the Optional Protocol." *Id.* at para. 6.11. *See* Hanski & Scheinin, *supra* note 20, at 18.

22 In addition to the HRC, there are six other treaty monitoring committees. There has been discussion of the desirability of having all such bodies, and that they are suffering of an "organizational crisis." Thomas Buergenthal has suggested that this issue could be addressed by a court and two consolidated committees, one dealing with state reporting and the other with individual and inter-state communications. *See* Thomas Buergenthal, *A Court and Two Consolidated Treaty Bodies*, in Bayefsky, *supra* note 20, at 299. For more contributions to this subject, see generally The Future of the UN Human Rights Treaty Monitoring (Philip Alston & James Crawford eds., 2000), as well as International Human Rights Monitoring Mechanisms: Essays in Honor of Jakob Th. Moeller (Gudmundur Alfredsson et al. eds., 2001).

23 General Comments, initially "laconic and hesitant," were transmitted by the HRC as directly related to the reporting procedure, whereas now they have turned into "a distinct juridical instrument, enabling the Committee to announce its interpretations of different provisions of the Covenant in a form that bears some resemblance to the advisory opinion practice of international tribunals…State parties and individuals increasingly rely on general comments to support their legal arguments before the Committee." *See* Thomas Buergenthal, *The U.N. Human Rights Committee,* 5 Max Planck U.N.Y.B. 341, 386-387 (2001).

24 Elizabeth Evatt, *Reflecting on the Role of International Communications in Implementing Human Rights*, 5(2) Austl. J. Hum. Rts. 20 (1999), *available at* http://www.austlii.

The basic enforceable minimum standards in the administration of justice embedded in the ICCPR and judgments[25] based on it have often influenced decisions taken by domestic courts,[26] which now frequently interpret and apply its provisions.[27] This implementation is made possible thanks to the tendency of direct applicability of the Covenant,[28] and the high standing that the ICCPR has in domestic law.[29]

This section focuses on the guarantees provided in the ICCPR, backed up with the vast interpretation of these norms by the HRC in its views regarding individual communications as well as in its General Comments, and the discussion will be divided into three parts: due process guarantees during pre-trial, trial, and appeal.

edu.au/au/journals/AJHR/ 1999/20.html, also referring to the case of *Toonen v. Australia* 488/1992, Views adopted 31 March 1994, A/49/40, Vol. II, at 226.

25 "Judgments based on the ICCPR may much more easily be shared among countries than rulings on national constitutions and human rights legislation, which are written in different languages, contain different provisions, and have different drafting histories." Harland, *supra* note 16, at 190.

26 Simpson v. Attorney General (1994) 1 HRNZ. This case was one of the most famous human rights cases in New Zealand. It alleged an unreasonable search of the plaintiff's home which amounted to a violation of the New Zealand Bill of Rights Act 1990. In its decision, the Court of Appeal stressed that the intention of the Bill of Rights was to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." The Court went on reasoning that the infringement of the rights of an innocent person deserved monetary compensation and that this "was consistent with a rights-centered approach to the Bill of Rights and international jurisprudence on remedies for human rights violations", referring to the jurisprudence on remedies of both the Human Rights Committee and the Inter-American Court of Human Rights. *Id.* at 42-43.

27 Christopher Harland's survey mentions several countries (like The Netherlands, Belgium, Italy, Venezuela, Senegal, Japan, Belarus) whose courts have applied, *inter alia*, articles 9, 14 and 15 related to issues of due process. *See* Harland, *supra* note 16, at 196.

28 Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 54 (1993).

29 In Annex B dealing with the status of the ICCPR in domestic law, Harland lists 48 countries which rank ICCPR above ordinary national law, 12 countries rank it equally with ordinary national law, 4 countries rank it equally with their constitution, and 2 countries rank it above their constitution. *See* Harland, *supra* note 16, at 257-260. Also, some constitutions make specific reference to international human rights treaties holding a higher rank than other treaties. *Id*. at 197.

a. Due Process before Trial

At the heart of due process during pre-trial lies the *right to liberty*[30] *and security*[31] *of person*. Article 9(1)[32] of the ICCPR specifically notes that "[n]o one shall be subjected to arbitrary arrest or detention,[33]" and that a deprivation of liberty could only be done "on such grounds and in accordance with such procedure as are established by law." Obviously, it represents a procedural guarantee.[34] There are two concepts that need to be best understood here: arbitrariness and lawfulness, because it is not the deprivation of liberty *per se* that is prohibited in the Covenant. Thus, before finding an arrest or detention arbitrary, it is essential to know when it is lawful. The principle of legality asks that the domestic law should have explicit grounds and clear cut procedures for arrest and detention, and such grounds and procedures must not only be well established by domestic legislation, but they must also comply with international standards.[35] The law, in substance (*i.e. grounds*) and procedure[36] must be clear,

30 The meaning of the term *liberty of a person* must be seen in its narrowest sense, and as one element of human liberty. It means the freedom of bodily movement, and it can only be interfered with in cases of forceful detention in a prison or other detention facility. *See* Nowak, CCPR Commentary, *supra* note 28, at 212, para. 3.

31 The notion of the security of a person is not the subject of this discussion, however it might be proper to note that the HRC has noted that the state is "under an obligation to take reasonable and appropriate measures to protect" the life of all persons under its jurisdiction and that "[i]t cannot be the case that, as a matter of law, States can ignore known threats to [their life] just because [they are] not arrested or otherwise detained." W. Delgado Páez v. Colombia, Communication No. 195/1985, Views adopted on 12 July 1990, U.N. GAOR, Doc. A/45/40 (vol. II), at 47, para. 5.5. So, "security of a person" covers more than persons under state custody, otherwise the Covenant would be rendered completely ineffective. The HRC has constantly reiterated this stance. *See* a recent case, Mariam Sankara et al. v. Burkina Faso, CCPR/C/86/D/1159/2003 (2006), Views adopted on 28 March 2006, para. 12.3.

32 Article 9(1) of the ICCPR reads:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

33 Nowak distinguishes between the terms "arrest" and "detention," the first meaning the act of deprivation of liberty for a period up to the moment the person is brought before the competent authority, while the latter referring to the state of deprivation of liberty following arrest, conviction, abduction, etc. Nowak, *supra* note 28, at 221, para. 21.

34 *Id.* at 211, para. 2.

35 *Id.* at 236, para. 51.

36 The HRC, in its Views adopted on July 20, 2000, in Communication No. 770/1997, *Gridin v. Russian Federation*, U.N. GAOR, Doc. A/55/40 (vol. II), at 175, para. 8.1., found a violation of Article 9 (1) when a warrant to arrest a person was issued more than three days later, contrary to the domestic law which required a warrant to be issued within 72 hours after arrest, and it held that the person had been "deprived of his liberty in violation of a procedure as established by law."

specific and predictable. Arbitrariness[37] occurs not only when the law is missing, but also when the law is vague, broad or unpredictable,[38] as well as when the enforcement of the law takes place arbitrarily.[39] Prolonged detention without charges is arbitrary. The HRC has, for example, concluded that holding a person in detention for a period of sixteen months without criminal charges against him, only to make him reveal the location of his brother, constitutes "arbitrary arrest and detention" and violates Article 9(1). The same provision is violated when a person is arrested without warrant and then kept in detention without any court order,[40] or when a person is kept in any form of detention, including house arrest, though there is a judicial order to release him.[41] However, detention is justified if exercised to prevent a person from fleeing after having committed a crime, and in such a case the HRC found detention on remand[42] to be legitimate under article 9(1).

The lawfulness of arrest and detention also requires that that deprivation of liberty must not be manifestly disproportional, unjust or unpredictable, or motivated by discrimination,[43] and that the arrest be carried out by competent officials authorized by law to order deprivation of someone's liberty. It includes as well the presumption of release pending trial. The HRC has noted that detention pending trial should not be the rule, but "an exception and as short as possible.[44]" Prohibition of arbitrary arrest

37 In the case of *Fongum Gorji-Dinka v. Cameroon*, CCPR/C/83/D/1134/2002, Views adopted on 10 May 2005, the HRC explained that "*arbitrariness* is not to be equated with *against the law*, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law," at para. 5.2., *available at*: http://www.bayefsky.com/./doc/cameroon_t5_iccpr_ 1134_2002.doc .

38 *See* the HRC's Views adopted on July 21, 1994, in Communication No. 458/1991, Albert Womah Mukong v. Cameroon, U.N. GAOR, Doc. A/49/40 (vol. II), at 181, para. 9.8, clarifying the meaning of the term "arbitrariness" states that "is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."

39 *See* Kurbonov v. Tajikistan, CCPR/C/86/D/1208/2003, Views adopted on 16 March 2006, para. 6.5., where the police officers had "groundlessly detained [the victim] there for 21 days without official record." *Available at* http://www.bayefsky.com/./doc/tajikistan_t5_iccpr_1208_2003.doc .

40 Communication No. 90/1981, L. Magana ex-Philibert v. Zaire, Views adopted on 21 July 1983, U.N. GAOR, Doc. A/38/40, at 200, paras. 7.2 and 8.

41 In *Fongum Gorji-Dinka v. Cameroon*, *supra* note 145, the HRC noted that "house arrest was imposed on him after his acquittal and release by virtue of a final judgment of the Military Tribunal," and it found it to be arbitrary, constituting a violation of Article 9 (1). *Id.* at para. 5.4.

42 A. W. Mukong v. Cameroon, *supra* note 38, para. 9.8.

43 Nowak, CCPR Commentary, *supra* note 28, at 225, para. 30.

44 HRC, General Comment 8, para.3, *available at* http://www1.umn.edu/humanrts/gencomm/hrcomms.htm.

and detention has gained the status of customary international law,[45] and it binds all states regardless of the fact whether they have ratified the ICCPR or not.

Incommunicado detention and *forced disappearances*[46] are other gross violations of due process. The HRC has found a breach of Article 9 of the Covenant in cases where people have been abducted by secret service agents,[47] held *incommunicado*[48] under domestic law, and later involuntarily disappeared[49] or even murdered.[50] The HRC has elaborated on this issue in its General Comment No. 20 on Article 7,[51] where it has required *expressis verbis* that "provisions should ... be made against *incommunicado* detention."[52] Foreign nationals must be notified of their right to contact their consulate and should be allowed to receive visits from the representatives of their government.[53]

45 *See* General Comment 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8, *available at* http://www1.umn.edu/ humanrts/gencomm/hrcom24.htm.

46 No wonder, forced disappearances became the first issue that the newly constituted Human Rights Council took up for discussion. The Council, in its first session, adopted by consensus the draft International Convention for the Protection of All Persons from Enforced Disappearance. *See U.N.: Mixed Start for New Human Rights Council: Body Must Be Even-handed in Addressing Rights Crises,* Human Rights Watch, June 30, 2006, *available at*: http://hrw.org/english/docs/2006/06/30/global13685.htm.

47 Communication No. 52/1979, Lopez Burgos v. Uruguay, Views adopted 29 July 1981, CCPR/C/13/D/ 52/1979.

48 Communication No. 176/1984, L. Peñarrieta et al. v. Bolivia, Views adopted on 2 November 1987, U.N. GAOR, Doc. A/43/40, at 207, para. 16.

49 Communication No. 540/1993, C. Laureano v. Peru, Views adopted on 25 March 1996, U.N. GAOR, Doc. A/51/40 (vol. II), at 114, para. 8.6.

50 Communication No. 612/1995, Arhuacos v. Colombia, Views adopted on 29 July 1997, in U.N. GAOR, Doc. A/52/40 (vol. II), at 181-182, para. 8.6.

51 General Comment No. 20, para. 11 states, *inter alia*: "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings."

52 General Comment No. 20, para. 11. *See also* Principle 16 of the Body of Principles, *supra* note 10, requiring that the family of any arrested or detained person be notified promptly of the arrest and the location of their family member, as well as of any change if the detainee is moved to another facility, as well as Rule 92 of the Standard Minimum Rules, *supra* note 10.

53 *See* Vienna Convention on Consular Relations, April 24, 1963, Article 36; Breard Case (Para. v. U.S.), 1998 I.C.J. 99 (Provisional Measures); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 104 (Judgment); Avena Case (Mex. v. U.S.), Judgment of 31 March 2004, in Reisman et al., International Law in Contemporary Perspective 1018-1028 (2004).

Relevant to our discussion is also *the preventive detention for reasons of public security or public order***.** The inherent vagueness of the definition of these terms could easily result in legal uncertainty and consequently in a violation of international law. The HRC in General Comment No. 8 on Article 9 of the Covenant has stated that "... if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, *i.e.* it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted."[54] Article 9 (2)[55] provides that anyone arrested must be immediately[56] informed of legal and factual grounds[57] for the deprivation of their liberty, so that they would be able to challenge the legality of detention before a competent judicial authority, and if charged, to start preparing their defense. Also, although the ICCPR does not expressly provide for the right to the notification in a language that the person concerned understands, the HRC has clarified its view that this should be the case,[58] further-

See also id., at 104-140; and Body of Principles, *supra* note 10, Rule 16(2); Standard Minimum Rules, *supra* note 10, Rule 38.

54 General Comment No. 8, para. 4.

55 Article 9 (2) of the ICCPR states:

> Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

56 The HRC in *P. Grant v. Jamaica* concluded that informing a person of charges against him seven days after his arrest amounts to a violation of Article 9 (2), (s*ee* Communication No. 597/1994, P. Grant v. Jamaica, Views adopted on 22 March 1996, U.N. GAOR, Doc. A/51/40 (vol. II), at 212, para. 8.1.), whereas a delay of 45 days does not meet its requirements (*see* Communication No. 248/1987, G. Campbell v. Jamaica, Views adopted on 30 March 1992, at 246, para. 6.3).

57 A violation of Article 9 (2) was found in the case of *L. B. Carballal v. Uruguay* where the victim was arrested on grounds of "subversive activities" without giving a meaning to the term under the penal legislation. Communication No. R.8/33, L. B. Carballal v. Uruguay, Views adopted on 27 March 1981, U.N. GAOR, Doc. A/36/40, at 128-129, paras. 12-13. Also in the case of *Drescher Caldas v. Uruguay* (43/1979), 21 July 1983, 2 Sel. Dec. 80, the Committee held that "it was not sufficient simply to inform [the detainee] that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him." Violation was also found in the case of *Kelly v. Jamaica*, where the victim was not informed of the facts of the crime for which he was arrested nor the identity of the victim for several weeks, *see* Kelly v. Jamaica (253/1987), 8 April 1991, Report of the HRC, U.N. Doc. A/46/40, 1991, para. 5; nor was it sufficient to inform the detainee that he was arrested on the orders of the President of the country, *see* Communication No. 414/1990, P. J. Mika Miha v. Equatorial Guinea, Views adopted on 8 July 1994, U.N. GAOR, Doc. A/49/40 (vol. II), at 99, para. 6.5.

58 Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 8, *available*

more carefully interpreting the relationship between the two information obligations provided by this provision.[59]

Article 9(3)[60] guarantees *prompt judicial control of the detention* for the purposes of criminal justice. The HRC determined that this promptness should not exceed a few *days*,[61] and that this delay should have a justification.[62] Thus, detention of a person for seven days, without an arrest warrant and without being brought before a judge, was found to violate this provision.[63] *A fortiori*, the holding of persons for a period of two months without being notified of the reasons and without being brought before a court constitutes a breach of Article 9.[64] Effective judicial review in the case of detention is important in order to assess whether the arrest is lawful, whether detention is necessary or whether the person should be released pending trial, as well as in order to safeguard the fundamental rights of the detainee.

This provision also guarantees review of detention by a judge or other judicial officers authorized to exercise judicial power, which means that those exercising judicial authority must be "independent, objective and impartial in relation to the issues

at http://www1.umn.edu/humanrts/gencomm/hrcom13. htm (last visited on June 13, 2006).

59 *See* Griffin v. Spain, Communication No. 493/1992, where a Canadian tourist was arrested at 11:30 pm, searched and found 68 kilograms of hashish. In absence of an interpreter at that time, he was informed of the charges against him, the following morning. In para. 9.2., the Committee argues: "that although no interpreter was present during the arrest, it is wholly unreasonable to argue that the author was unaware of the reasons for his arrest. In any event, he was promptly informed, in his own language, of the charges held against him."

60 Article 9(3) of the ICCPR states:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

61 *See* paragraph 2 of General Comment No. 8 on Article 9 of the ICCPR: Right to liberty and security of persons, (30/06/1982), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c125 63ed00483bec?Opendocument. *See also* L. Stephens v. Jamaica, Communication No. 373/1989, Views adopted on 18 October 1995, U.N. GAOR, Doc. A/51/40 (vol. II), at 9, para. 9.6.

62 M. Freemantle v. Jamaica, Communication No. 625/1995, Views adopted on 24 March 2000, U.N. GAOR, Doc. A/55/40 (vol. II), at 19, para. 7.4.

63 Kurbanov v. Tajikistan, Communication No. 1096/2002, CCPR/C/79/D/1096/2002 (2003), para. 7.2., *available at* http://www1.umn.edu/humanrts/undocs/1096-2002.html.

64 Bee et al. v. Equatorial Guinea, CCPR/C/85/D/1152&1190/2003(2005), Views adopted 31 October 2005, para. 6.2., *available at* http://www.bayefsky.com/./doc/equatorialguinea_t5_iccpr_1152_1190_ 2003.doc.

dealt with."[65] So, in the case of *Kulomin v. Hungary,* the HRC concluded that "[i]n the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9(3)."[66] The same was concluded in a recent case against Belarus,[67] where the Committee argued that "it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with."

"Trial within a reasonable time" or "release" is another safeguard of Article 9(3), which also sanctions that: "It shall not be the general rule that persons awaiting trial shall be detained in custody." The term "reasonable time" of pre-trial detention has been assessed by the HRC on a case-by-case basis. Issues factoring into a "reasonable time" include: the seriousness of the alleged offence; the nature and severity of the penal sanctions; risk of relapse into crime; concerns for public order due to the gravity of the offence; concerns of pressure on witnesses and risk of collusion; and the risk of flight of the accused if released. The national authorities' performance and the need that they display "special diligence" in conducting the proceedings, particularly as regards the complexity and special characteristics of the investigation, are also considered. In dealing with complaints related to undue delay, the HRC has generally concluded that considerations of written proceedings of criminal investigations, "evidence gathering," or budgetary constraints[68] are not justifications for detention lasting four years after arrest in that particular case, and the Committee had found a violation of Article 9(3).

This provision indirectly provides for release from pre-trial detention in exchange for bail,[69] and though states are allowed a broad discretion in this respect, the HRC found a violation of Article 9(3) in the case of *Hill v. Spain*, stating that "[t]he mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in Article 9(3) of the Covenant."[70]

65 Vladimir Kulomin v. Hungary, Communication No. 521/1992, CCPR/C/50/D/521/1992 (1996), para. 11.3., *available at* http://www1.umn.edu/humanrts/undocs/html/VWS52156.htm.

66 *Ibid.*

67 Yuri Bandajevsky v. Belarus, CCPR/C/86/D/1100/2002, Views adopted on 28 March 2006, para. 10.3., *available at* http://www.bayefsky.com/./doc/belarus_t5_iccpr_1100_2002.doc.

68 N. Fillastre and Bizouarn v. Bolivia, Communication No. 336/1988, Views adopted on 5 November 1991, U.N. GAOR, Doc. A/47/40, at 306, para. 6.5.

69 Nowak, CCPR Commentary, *supra* note 28, at 234, para. 47.

70 Michael and Brian Hill v. Spain, Communication No. 526/1993, CCPR/C/59/D/526/1993, Views adopted on 2 April 1997, *available at* http://www1.umn.edu/humanrts/undocs/html/VWS526.HTM.

Article 9(4)[71] guarantees *the right to have the legality of detention decided in a speedy fashion by a court.* There are a number of legal procedures that stem from this provision. First, the HRC has argued that the right to challenge the legality of one's deprivation of liberty must be effectively available, and in the case of *H. G. Dermit on behalf of G. I. and H. H. Dermit Barbato*[72] the Committee found a violation of Article 9(4) because the person had been held incommunicado and in this way "effectively barred from challenging his arrest and detention."[73] Also in two cases against Uruguay, namely *Santullo Valcada v. Uruguay*[74] and *W. T. Ramírez v. Uruguay,*[75] the Committee found a violation of article 9(4) since the persons deprived of their liberty were denied an effective remedy to challenge their arrest and detention, since the writ of *habeas corpus* has been inapplicable to them. Breach of this provision was also found in a case where the person was detained for twenty three days without right to challenge the legality of his detention, because he was detained under a decree on measures against terrorism.[76] Thus, this provision asks for procedures such as habeas corpus that are simple, expeditious as well as free of charge if the detainee does not have the necessary means to pay for it.[77]

The guarantee provides that the proceedings to challenge the lawfulness of detention be brought before a court in order to ensure "a higher degree of objectivity and independence," as the HRC held in the case of *M. I. Torres v. Finland*,[78] where the detention order was only confirmed after seven days and by the Minister of the Interior, thus in violation of Article 9(4) requirements of "a court" and "without delay." As regards the notion of *without delay*, while the HRC notes that "the adjudication of a case by any court of law should take place as expeditiously as possible…it must [however] be assessed on a case by case basis."[79]

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71 Article 9(4) of the ICCPR states:

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

72 Communication No. 84/1981, H. G. Dermit on behalf of G. I. and H. H. Dermit Barbato, Views adopted on 21 October 1982, U.N. GAOR, Doc. A/38/40.

73 *Id.* at 133, para. 10.

74 Communication No.R.2/9, E. D. Santullo Valcada v. Uruguay, Views adopted on 26 October 1979, U.N. GAOR, Doc. A/35/40, at 110, para. 12.

75 Communication No. R.1/4, W. T. Ramírez v. Uruguay, Views adopted on 23 July 1980, at 126, para. 18.

76 Yuri Bandajevsky v. Belarus, *supra* note 67, paras. 10.2. and 10.4. Bandajevsky was detained under the Presidential Decree "On the urgent measures for the fight of terrorism and other particularly dangerous violent crimes," which limited his defense options.

77 *See also* Body of Principles, *supra* note 10, Principle 32(2), whereas Principles 11 (3), 32 and 39 provide for the right of continuing review of the legality of detention at reasonable intervals.

78 Communication No. 291/1988, M. I. Torres v. Finland, Views adopted on 2 April 1990, U.N. GAOR, Doc. A/45/40 (vol. II), at 99-100, para. 7.2.

79 *Id.* at 100, para. 7.3.

In interpreting Article 9(4), the HRC has placed crucial importance on *the right of access to and assistance of a lawyer.* In the case of *G. Campbell v. Jamaica,*[80] the Committee found a violation of Article 9(4), because the person detained was denied access to legal representation for about four months, consequently "he 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."[81] A violation was also found when the detained has had no access to legal representation for an interval of two months and a half.[82] In general, the HRC has emphasized that "all persons arrested must have immediate access to counsel."[83]

The last paragraph of Article 9[84] provides for *a right to compensation* applicable to all unlawful or arbitrary arrests and detentions.[85] The HRC has thus held that in case of arbitrary arrests the state is "under an obligation to take effective measures to remedy the violations … suffered, to grant [the victim] compensation under article 9, paragraph 5, of the Covenant, on account of his arbitrary arrest and detention, and to take steps to ensure that similar violations do not occur in the future."[86]

Before analyzing Article 14 of the ICCPR, which is the key universal provision regarding fair trial, it is of significance to examine Article 10,[87] which provides for

80 Communication No. 248/1987, G. Campbell v. Jamaica, Views adopted on 30 March 1992, U.N. GAOR, Doc. A/47/40.

81 *Id*. at 246, para. 6.4.

82 Communication No. 330/1988, A. Berry v. Jamaica, Views adopted on 7 April 1994, U.N. GAOR, Doc. A/49/40 (vol. II), at 26, para. 11.1.

83 Concluding Observations of the HRC: Georgia, CCPR/C/79/Add.74, 9 April 1997, para. 28. Note also that the UN Special Rapporteur on Torture has recommended that anyone who has been arrested "should be given access to legal counsel no later than 24 hours after the arrest." *Report of the UN Special Rapporteur on Torture*, U.N. Doc. E/CN.4/1990/17, 18 December 1989, para.272; *see also* U.N. Doc. E/CN.4/1995/34, 12 January 1995, para. 926. *See further* Principle 15 of the Body of Principles, *supra* note 10, which states that a detainee must be able to communicate with counsel within "a matter of days."

84 Article 9(5) of the ICCPR provides:

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

85 General Comment No. 8(16), U.N. GAOR, Doc. A/37/40, at 95, para. 1 and at 96, para. 4.

86 Monja Jaona v. Madagascar, Communication No. 132/1982, U.N. Doc. Supp. No. 40 (A/40/40) (1985), at 179, para. 16, *available at* http://www1.umn.edu/humanrts/undocs/session40/132-1982.htm .

87 Article 10 of the ICCPR states:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.
>
> (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

the *humane treatment of detainees.* This is a very important provision, because in conditions of enclosed facilities, the persons deprived of their liberty are extremely vulnerable as far as power relationships are concerned.[88] In such circumstances, violations of the right to life and physical integrity, right to privacy, right to secrecy of correspondence, freedom of religion, information and expression, etc. are more likely to happen. In its General Comment 21, the HRC has noted that no hardships or constraints should be imposed upon detainees except those "resulting from the deprivation of their liberty...." It goes on to state that "[p]ersons deprived of their liberty enjoy all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment."[89] It is the duty of the states to treat persons in their custody with respect for their inherent dignity and nothing can justify inhumane treatment. More specifically, the HRC has held that states are obliged to provide all detainees and prisoners with services that will satisfy their essential needs,[90] such as food,[91] washing and sanitary facilities,[92] bedding,[93] clothing,[94] medical care,[95] access to natural light,[96] recreation, physical exercise, facilities to allow religious practice and com-

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

88 *See* Nowak, CCPR Commentary, *supra* note 28, at 242, para. 2.

89 Human Rights Committee, General Comment No. 21 on Article 10, paras. 3 and 5.

90 *See* in this respect generally Kelly v. Jamaica, (253/1987), 8 April 1991, Report of the HRC, U.N. Doc. A/46/40 (1991); Párkányi v. Hungary (410/1990), 27 July 1992, Report of the HRC, U.N. Doc. A/47/40 (1992).

91 *See* Standard Minimum Rules for the Treatment of Prisoners, *supra* note 10, Rules 20 and 87.

92 Yuri Bandajevsky v. Belarus, *supra* note 67, para. 10.6. A violation was found since the detainee "did not have items of personal hygiene or adequate personal facilities," *available at* http://www.bayefsky.com/./doc/belarus_t5_iccpr_1100_2002.doc .

93 In *Fongum Gorji-Dinka v. Cameroon*, *supra* note 41, the HRC held that holding a person in "a wet and dirty cell without a bed, table or any sanitary facilities" violates the detainee's right under Article 10 (1). The HRC adds that detainees "must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners (1957)." *Id*. at para. 5.2.

94 Standard Minimum Rules for the Treatment of Prisoners, *supra* note 10, Rules 17, 18, and 88; *also*, Body of Principles, *supra* note 10, Principles 15-16.

95 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 10, Principle 24; Standard Minimum Rules for the Treatment of Prisoners, *supra* note 10, Rules 22-25, 91; *also see* Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, Article 6 (imposing a duty on officials to ensure the health of prisoners), at http://www.unhchr.ch/html/menu3/b/h_comp42.htm.

96 The HRC found treatment contrary to Article 7 and Article 10 in the case of *Polay Campos v. Peru* (Communication No. 577/1994), where the detainee could not "have more

munication with others[97] including those in the outside world. So the HRC found a violation of Article 10(1) of the ICCPR in the case of *Griffin v. Spain*[98] where the detainee had been held in a 500-year-old prison under totally unacceptable inhumane conditions. Prolonged solitary confinement in total isolation from the outside world also amounts to inhumane treatment, as does *incommunicado* detention and forced disappearance.[99] In a recent case, the HRC had an interesting interpretation of Article 10 (1) when considering a detainee of Aboriginal status. The Committee found the solitary confinement to a dry cell to be "incompatible with his… status as an Aboriginal, for whom segregation, isolation and restriction of movement within prison have a particularly deleterious effect."[100] Article 10(2) (a) requiring that the accused persons be segregated from the convicted ones, "save in exceptional circumstances," and also be subject to separate treatment appropriate to their status as un-convicted persons, relates to the principle of presumption of innocence fundamental to any criminal proceedings. The HRC found a violation in a recent case where the detainee was "kept in a cell with 20 murder convicts" [101] and the state had failed to adduce "any exceptional circumstances which would have justified its failure to segregate the author from such convicts in order to emphasize his status as an un-convicted person." The qualification "save in exceptional circumstances" was used by the U.S. when adding an understanding to Article 10(2)(a), upon ratification of the ICCPR, noting that it allows for disregard of segregation of the accused from the convicted on grounds of the dangerousness of the accused, or of his option of waiving such a right for such purposes as to participate in special programs.[102]

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than 10 minutes' sunlight a day." *See* Hanski & Scheinin, *supra* note 20, at 175, para. 8.7.

97 Polay Campos v. Peru (Communication No. 577/1994). For a year, held in total isolation, restrictions were placed on correspondence of the detainee with his family, and the HRC considered this inhuman treatment, inconsistent with the standards of Article 7 and Article 10. *See* Hanski & Scheinin, *supra* note 20, at 174, para. 8.6.

98 Griffin v. Spain, *supra* note 59, at 52, paras 3.1 and 9.2. The facts of the case indicated that the 500 year old prison was infested with rats, lice and cockroaches. Men, women and children were held 30 people to a cell. Detainees were exposed to the cold and the wind. There was excrement on the floor and sea water was used for showers and often for drinking. Detainees were given urine-soaked mattresses and blankets, despite the existence of new bed linen. There was a high incidence of suicide, self-mutilation, fights and beatings.

99 Nowak, CCPR Commentary, *supra* note 28, at 245, para. 10.

100 Brough v. Australia, CCPR/C/86/D/1184/2003, Views adopted 17 March 2006, para. 9.1, *available at* http://www.bayefsky.com/./doc/australia_t5_iccpr_1184_2003.doc .

101 Fongum Gorji-Dinka v. Cameroon, *supra* note 41, para.5.3.

102 David P. Steward, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of Reservations, Understandings, and Declarations*, 42 DePaul L. Rev. 1183, 1199 (1993), referring to Senate Comm. on Foreign Relations, International Covenant on Civil and Political Rights. S. Exec. Rep. No. 23, 102d Cong., 2d Sess. (1992), reprinted in 31 I.L.M. 645, 656 (1992).

b. Due Process during Trial

Article 14[103] of the ICCPR is one of the most comprehensive provisions delineating due process guarantees in criminal proceedings, and there is extensive case law and

103 Article 14 of the ICCPR states:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

other interpretation of the HRC substantiating the understanding and functioning of all its paragraphs and sub-paragraphs. This article provides for a universal right to a fair trial in a suit at law,[104] and it is a provision based on liberal principles of the separation of powers and the independence of the judiciary vis-à-vis the executive.[105]

Article 14(1) starts by guaranteeing the right of access to court, which means that no law, administrative procedures, or lack of material resources can prevent someone from addressing a court or a tribunal in order to assert his rights. It also provides for *equality before the courts and tribunals*, side by side with Article 26 which provides for equality before the law. This is a fundamental protection of the right to a fair trial encompassing pre-trial and trial proceedings, ensuring not only equal access to court, but also guaranteeing a correct application of laws by the judiciary assuring that every person appearing before the court is not discriminated against on grounds of gender, race, origin, financial status, or even gravity of offence. It also connotes prohibition of separate courts based on races, sexes, religious beliefs, etc. and thus problematizes the admissibility of special courts such as military courts, and the potentiality of trying civilians in these courts.[106]

The same paragraph stipulates that "everyone shall be entitled to a *fair* and *public* hearing by a *competent, independent and impartial tribunal* established *by law*." The notion of *fairness in a hearing* in all suits at law encompasses a diversity of situations, and it has to be seen as an umbrella for a number of guarantees provided for in the rest of paragraphs, some of which have already been discussed. According to the HRC, the fairness of a trial is not a mere summing up of the individual guarantees provided for in Article 14; it is the whole conduct of the trial that determines its fairness. Under these circumstances, the states not only should observe these guarantees rigorously and without exception, but fairness might also impose further obligations on states,[107] particularly in special cases, such as the ones where capital punishment might be at stake.[108] A fair hearing includes several elements, with *audiatur et altera pars* and the principle of equality of arms as its corner stones,[109] but also including

104 The term "suit at law" refers to all kinds of court proceedings, including administrative proceedings, as it hinges on the nature of the right and not the status of one of the parties. *See* Dominic Mc Goldrick, The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights 415 (1994).

105 Nowak, *supra* note 5, at 306, para. 2.

106 *Id.* at 309, para. 7.

107 *See generally* General Comment No. 13, and particularly its paragraph 5, *supra* note 58. This study will reference General Comment No. 13 on Article 14, as well as General Comment No. 32 that has been recently adopted, U.N. Doc. CCPR/C/GC/32 (2007).

108 Communication No. 272/1988, A. Thomas v. Jamaica, Views adopted on 31 March 1992, U.N. GAOR, Doc. A/47/40, at 264, para. 13.l.

109 This principle would mean that the prosecutor and the defendant should have equal access to hearings, inspection of records, submission of evidence, witnesses etc., so that ultimately both parties are entitled to full equality of treatment, though not absolutely requiring equal means and resources. Bottomline: the trial must not "put the accused

deference to the principle of adversarial proceedings and expeditious procedures.[110] The HRC reasoned on the grounds of equality of arms in the case of *J. Campbell v. Jamaica*,[111] where the author of the communication complained that he had not had a fair trial because he had been placed at a disadvantage, when his ten-year-old son had been detained in order to intimidate him and testify against him. The Committee found a violation of the right to a fair trial, stating that seemingly no "special circumstances existed to justify the detention of the author's minor child," and it also found a possible intimidation that questioned the reliability of the testimony attained under such circumstances.[112]

The following section will discuss, one by one, the various elements of Article 14 constituting a fair trial. Generally, however, the HRC found a violation of Article 14(1) in the case of *Gridin v. Russian Federation*,[113] because the judge did not control the hostility and extreme pressure created in the court room[114] by the people who were screaming that the defendant should be sentenced to death.[115] In another circumstance, a *nolle prosequi* plea was entered by the prosecutor after the defendant had pleaded guilty to manslaughter and, according to the Committee, this had enabled the prosecution to start fresh on exactly the same charge, violating in this way the right to a fair trial.[116] A violation was also found in the case of *N. Mpandanjila et al. v. Zaire,*[117] where the accused, political opponents of President Mobutu Sese Seko, had been subjected to arbitrary detention, had not been heard during pre-trial stages, were not summoned to court and thus were denied a fair and public trial.

unfairly at a disadvantage." *See* Delcourt v. Belgium, ECtHR, Judgment of January 17, 1970, Series A, No. 11, para. 34.

110 *See* Case of Morael v. France, (207/1986), 28 July 1989, Report of the HRC, (A/44/40), 1989, at 210. *See also* Fei v. Colombia, Communication No. 514/1992, CCPR/C/53/D/514/1992 (1995), where the HRC makes the point of expeditious proceedings.

111 Communication No. 307/1988, J. Campbell v. Jamaica, Views adopted on 24 March 1993, U.N. GAOR, Doc. A/48/40 (vol. II).

112 *Id*. at 44, para. 6.4.

113 Communication No. 770/1997, Gridin v. Russian Federation (Views adopted on 20 July 2000), U.N. GAOR, Doc. A/55/40 (vol. II). The author alleged, *inter alia*, that the court room was crowded; *id*. at 173, para. 3.5.

114 *Id.* at 176, para. 8.2. Other cases of the HRC stressing the principle of equality of arms include: Jansen Gielen v. The Netherlands, Communication No. 846/1999, CCPR/C/71/D/846/1999 (2001), para. 8.2; Morael v. France, *supra* note 218, para. 9.3; Guesdon v. France, Communication No. 219/1986, CCPR/C/39/D/219/1986 (1990), para. 10.2; Wolf v. Panama, Communication No. 289/1988, CCPR/C/44/D/289/1988 at 80 (1992), para. 6.6; Fei v. Colombia, *supra* note 218, para. 8.4.

115 Gridin, *supra* note 113, at 173, para. 3.5.

116 The HRC noted that in the circumstances of this case the "purpose and effect" of the *nolle prosequi* "were to circumvent the consequences" of the author's guilty plea, and was not used to discontinue the proceedings against the defendant. *See* Communication No. 535/1993, L. Richards v. Jamaica, Views adopted on 31 March 1997, U.N. GAOR, Doc. A/52/40 (vol. II), at 43, para. 7.2.

117 Mpandanjila et al. v. Zaire, (138/1983), 26 March 1986, 2 Sel. Dec. 164.

The phrase "justice must not be secret," holds in itself the idea of better finding the truth publicly, as well as the right of the public in a democratic society.[118] Obviously, the provision guarantees for a public *hearing*, but no publicity of other stages of criminal proceedings. As regards the right to a *public hearing,* the HRC has noted that "the publicity of hearings is an important safeguard in the interest of the individual and of society at large."[119] The Committee states that trials in secret naturally violate Article 14(1), when there is nothing to justify this procedure within the ICCPR,[120] and it goes on mandating that "both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish."[121] The HRC has found a violation of the right to a public hearing in cases brought against Peru, where the trial was conducted in precincts by "faceless judges," and it urged that no trials be held behind closed doors, even in cases involving terrorism-related offences.[122] Even if the trial were not to be public because of exceptional circumstances[123] enumerated in Article 14(1), the rendering of the judgment has to be made public:[124] the precept of publicity of the decision applies nearly without restric-

118 Nowak, *supra* note 5, at 323-325, paras. 31-33. Nowak distinguishes between *dynamic publicity* of the proceedings of the judicial organs, *i.e.* the way the decision is made, and the *static publicity* of the judgment as a tool to supervise the proceedings when they have been completed. *Id*. at para. 31.

119 The HRC further emphasizes that "a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons." General Comment No. 13 on Article 14 (1984), para. 6.

120 Communication No. 74/1980, M. A. Estrella v. Uruguay, Views adopted on 29 March 1983, U.N. GAOR, Doc. A/38/40, at 159, para. 10. *Also see* Darmon Sultanova v. Uzbekistan, CCPR/C/86/D/915/2000 (2006), Views adopted on 30 March 2006, para. 7.5., where violation was found because the trial was largely held *in camera*.

121 Communication No. 215/1986, G. A. van Meurs v. the Netherlands, Views adopted on 13 July 1990, U.N. GAOR, Doc. A/45/40 (vol. II), at 59, para. 6.1. The HRC further observes that "courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing." *Id.* at para 6.2.

122 Preliminary Observations of the HRC: Peru, CCPR/C/79/Add.67, 25 July 1996, at para. 26.

123 Such exceptional circumstances include: *morals*, such as a hearing about a sexual offence (Z.P. v. Canada, No. 341/1998, paras. 4.6 and 5.6.); *public order*, which includes order in the courtroom (Gridin v. Russian Federation, *supra* note 113, at paras. 3.5 and 8.2.); *national security* relating to important and secret military facts or protection of judges; interest of the private lives of the parties; or interests of justice, which means only those extraordinary cases where the trial is endangered by the emotional expressions of the audience. *See* Nowak, *supra* note 5, at 325-326, paras. 34-35.

124 Preliminary Observations of the HRC: Peru, *supra* note 122, at 124, para. 6. *See* also Human Rights Committee General Comment 13, para. 4, noting that this applies to judg-

tion,[125] and the right to publication of judgments can be claimed by anyone, not just the parties, and even if the parties choose to waive this right.[126]

In order to uphold the rule of law and the effective protection of human rights, *competent, independent and impartial tribunals*[127] *established by* law are a must in any modern constitutional state. This guarantee is also enshrined in Article 14(1).

A *competent tribunal* is one which has jurisdiction over the subject matter and the person to hear the case, and it conducts the trial within any applicable time limit prescribed by law. Moreover, this jurisdictional power must be determined generally and independent of the case, by a statute or an unwritten norm of common law, which establishes the tribunals and delineates the subject matter and the territorial scope of their jurisdiction.[128] *Established by law* also means that the court should be properly composed.[129] Interpretation of "competency" could be extended to mean that judges have to be knowledgeable, skilled, and effective in their judicial expertise. Towards this end training and continued education of judges, particularly in international standards of human rights law is critical. Otherwise, implementation of human rights law will remain a wish-well cause. The HRC has emphasized such a need for judges, other legal professions and law enforcement officers.[130]

Independence of the judiciary is part of the theory of separation of powers, which creates a system of mutual checks and balances that controls any abuse of power. An independent tribunal would be able to render judgments according to law only, free of any influence imposed on them by the executive,[131] legislation or any other actor related to power. This provides for the possibility of protection of the human rights

ments rendered by all courts, including special and military courts and courts of appeal.

125 Nowak, *supra* note 5, at 323, para. 31. The only restriction in this respect is found in Article 14 (1) for cases "where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

126 *Id*. at 329, para 40.

127 As per Nowak, "[n]ormally, the term *tribunal* corresponds to that of national and civil courts, although a tribunal denotes a substantively determined institution that may deviate from the formally (and nationally) defined term *court*." *Id.* at 319, para. 23.

128 *Id.* at para. 24.

129 The HRC found a violation of Article 14 (1) in the case of *Yuri Bandajevsky v. Belarus*, *supra* note 67, because of "the unchallenged fact that the court that tried the author was improperly constituted" which in turn "means that the court was not established by law." *Id.* at para. 10.10.

130 As in the case of Libyan Arab Jamahiriya, U.N. GAOR, Doc. A/54/40 (vol. 1), para. 134; or in the case of Sudan, U.N. GAOR, Doc. A/53/40 (vol. I), para. 132.

131 In the case of *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, CCPR/C/49/D/468/1991 (1993), at para. 9.4., the HRC noted "that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant." In the case of *Pastukhov v. Belarus*, Communication No. 814/1998, CCPR/C/78/D/814/1998 (2003), at para. 7.3., the HRC considered "that the author's dismissal from his position as a judge of the Constitutional Court, several years before the

and fundamental freedoms of the individual, and it is the judges' responsibility to base their judgments on domestic law, including where applicable, the international law of human rights. The independence of the judiciary is the best guarantee that people will not take justice in their own hands. The individual independence of judges, to be free from fear of personal criticism or reprisals[132] of any kind, can be threatened in many ways, such as by the manner in which the judges are appointed[133] or elected,[134] the insecurity of tenure,[135] inadequate remuneration,[136] etc. For this reason, in its case

expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary."

132 The HRC has noted that judges must not be subjected to disciplinary action because of opposition to the merits of the case or cases they decide, and it expressed its concern in the above case concerning Belarus where "two judges were dismissed by the President ... on the ground that in the discharge of their judicial functions they failed to impose and collect a fine imposed by the executive." *See* U.N. GAOR, Doc. A/53/40 (vol. I), para. 149.

133 So, the HRC was concerned that in Bolivia the nomination of judges was not based on their competence but on their political affiliation; *see* U.N. GAOR, Doc. A/52/40 (vol. I), para. 224. In Zambia, Article 14 of the Covenant has not been complied with because judges were appointed or dismissed by the President without these decisions having been taken in consultation with some independent legal authority, even where the President's decisions must be ratified by Parliament; *see* U.N. GAOR, Doc. A/51/40, para. 202. In Slovakia, the appointment of judges was made by the Government with approval of Parliament, and the HRC noted that it could have a negative effect on the independence of the judiciary; *see* U.N. GAOR, Doc. A/52/40 (vol. II), para. 379. In Kyrgyzstan, lack of full independence of the judiciary was seen in the fact "that the applicable certification procedure for judges, the requirement of re-evaluation every seven years, the low level of salaries and the uncertain tenure of judges may encourage corruption and bribery;" *see* U.N. GAOR, Doc. A/55/40 (vol. I), para. 405.

134 The HRC has also expressed concern about the compatibility of the election system of certain judges in the United States with Article 14, particularly considering "the impact which the current system of election of judges may, in a few states, have on the implementation of the rights" guaranteed by article 14, and it welcomed "the efforts of a number of states in the adoption of a merit-selection system." It went on recommending that the election system of the appointment of judges through elections be replaced by a system of appointment on merit by an independent body.

135 The HRC has found the practice of executive recertification or review of judges to be incompatible with the requirement of the independence of the judiciary. So, for Lithuania, where the District Court judges had to undergo a review by the executive after five years of service in order to secure permanent appointment, the HRC recommended that "any such review process should be concerned only with judicial competence and should be carried out only by an independent professional body; *see* U.N. GAOR, Doc. A/53/40 (vol. 1), para. 173. Also, for Peru the HRC recommended that "the requirement for judges to be recertified be reviewed and replaced by a system of secure tenure and independent judicial supervision;" *see* U.N. GAOR, Doc. A/51/40, para. 352.

136 For details regarding the necessity for establishing the proper mechanisms to achieve the independence of the judiciary see Basic Principles on the Independence of the Judiciary, *supra* note 10, Principles 7, 10, 11, 12, 17-20.

law the HRC has unequivocally held that "the right to be tried by *an independent and impartial tribunal is an absolute right* that may suffer no exception,"[137] which means that it cannot be derogated from at any time under any circumstances. In addition to the above-mentioned institutional independence, the term also means administrative independence such as in the assignment of cases to judges within their court; financial independence, having enough funds to function effectively, which would also avoid yielding to outside pressures and corruption; jurisdiction competence to determine jurisdiction in order to be able to decide if issues are within their competence; and, at all times, it means total independence in the decision-making process of each case. The criterion of independence, however, presupposes not only separation of powers, but also the ability to stay free from the influence of powerful social groups such as the media, industry, political parties, religious entities, and so on.[138]

The right to an *impartial tribunal* means that in deciding cases the judges must base their judgment on facts in accordance with the law. They should be able to do that without any direct or indirect interferences, pressures, enticements, or threats, from anyone. Impartiality has to do with the particular holding of a given case, where the judge is not biased in any way, has no personal interest in the matter, is not guided by emotions, led by political motives, or influenced by "media justice."[139] The HRC has clarified the notion of "impartiality" to imply "that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."[140] The HRC has further noted that in addressing a jury, the presiding judge must not give instructions that are either arbitrary, amount to a denial of justice, or violate his obligations of impartiality.[141]

Article 14(2) guarantees the right *to be presumed innocent until proven guilty*; this right conditions all the proceedings until pronouncement of final judgment. Presumption of innocence represents a norm of customary international law,[142] binding in this way all states, regardless of their status of ratification of the Covenant, and despite the fact that it might have not reached the status of a peremptory norm.[143]

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137 *See* Communication No. 263/1987, M. Gonzalez del Río v. Peru (Views adopted on 28 October 1992), U.N. GAOR, Doc. A/48/40 (vol. II), p. 20, para. 5.2 (*emphasis added*).

138 Nowak, *supra* note 5, at 320-321, para 26.

139 *Id.* at 321, para. 27.

140 Communication No. 387/1989, Arvo O. Karttunen v. Finland, Views adopted on 23 October 1992, U.N. GAOR, Doc. A/48/40 (vol. II), at 120, para. 7.2.

141 Communication No. 731/1996, M. Robinson v. Jamaica, Views adopted on 29 March 2000, U.N. GAOR, Doc. A/55/40 (vol. II), para. 9.4 at 128.

142 *See* General Comment 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6 (1994), para. 8, *available at* http://www1.umn.edu/humanrts/ gencomm/hrcom24.htm .

143 For a discussion of customary international law, peremptory norms of international law and the issue of the prohibition of reservations or derogations from them, see generally Eckart Klein, *A Comment on the Issue of Reservations to the Provisions of the Covenant Representing (Peremptory) Rules of General International Law*, in Reservations to Hu-

The HRC in its General Comment 13[144] clarifies that the presumption of innocence implies that the accused has the benefit of doubt and that the burden of proof of the charge lies with the prosecution, and that guilt has to be proved beyond a reasonable doubt, otherwise the accused must be found not guilty according to the ancient principle *in dubio pro reo*.[145] The HRC explains that it is "a duty for all public authorities to refrain from prejudging the outcome of a trial."[146] This prejudgment can be manifested in acts like adverse public comments by authorities such as high-ranking law enforcement officials making public statements portraying the accused as guilty,[147] excessive "media justice," or trial by anonymous judges, which ultimately compromises the presumption of innocence.[148] A change of venue could be considered in cases when expressions of hostility towards the accused could jeopardize the presumption of innocence, but the HRC allows an element of discretion on the part of a judge in decisions concerning the venue issue.[149] Also, an excessive period of preventive detention affects the presumption of innocence.[150]

It was noted above that the ICCPR does not expressly provide for the right to the notification of legal and factual grounds for the arrest and detention, in a language that the detainee understands. However, Article 14(3)(a) provides the right of the accused "to be informed promptly and *in detail* in a language which he understands of the nature and cause of the charge against him." At this stage, the HRC has clarified that this applies to all persons charged with a criminal offence, even if they are not detained,[151] and that the charge can be stated "either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based."[152] The HRC also cautions in the case of trials *in absentia*, that "the necessary steps

man Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation 59 (Ineta Ziemele ed., 2004).

144 *Supra* note 58.

145 Nowak, *supra* note 5, at 330, para. 44.

146 General Comment No. 13, para. 7.

147 *See* Gridin v. Russian Federation, *supra* note 113, paras. 3.5. and 8.3.

148 Communication No. 577/1994, R. Espinosa de Polay v. Peru, Views adopted on 6 November 1997, UN Doc. GAOR, A/53/40 (vol. II). In this case the victim was tried by a special tribunal of "faceless judges" who were anonymous and did not constitute an independent and impartial court.

149 Communication No. 591/1994, I. Chung v. Jamaica, Views adopted on 9 April 1998, U.N. GAOR, Doc. A/53/40 (vol. II), p. 61, para. 8.3.

150 Cagas et al. v. The Philippines, Communication No. 788/1997, 23 October 2001, CCPR/C/73/D/788/1997, para. 7.3., where "the Committee is of the opinion that the excessive period of preventive detention, exceeding nine years, does affect the right to be presumed innocent and therefore reveals a violation of article 14 (2)."

151 *Supra* note 58, at para. 8.

152 *Ibid.*

should be taken to inform the accused beforehand about the proceedings against him."[153]

Article 9(4), the *right of access to and assistance of a lawyer,* is furthered in Article 14(3)(b) which entitles everyone charged with a criminal offence "to have adequate time and facilities for the preparation of his defense[154] and to communicate with counsel of his own choosing," as well as Article 14(3)(d), which, *inter alia,* provides the right of the accused "… to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." In interpreting this right, the HRC has concluded that such legal assistance should be effectively available[155] and offered in good time in order to be able to prepare his defense.[156] Also, in its General Comment 13 regarding the meaning of notions contained in Article 14(3)(b), the HRC explained that "*adequate time*[157] depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer."[158] The HRC continues to explain that the confidentiality of communication between the accused

153 Communication No. 16/1977, D. Monguya Mbenge v. Zaire, Views adopted on 25 March 1983, U.N. GAOR, Doc. A/38/40, 138, paras. 14.1-14.2. Express violation of the duty to inform of the nature and the cause of the crime was also found in the case of Kurbanov v. Tajikistan, *supra* note 63.

154 Adequate time and facilities should be provided both to the defendant and his lawyer. *See* Basic Principles on the Role of Lawyers, *supra* note 10, Principle 21.

155 *See* Communication No. R.2/8, B. Weismann Lanza and A. Lanza Perdomo v. Uruguay, Views adopted on 3 April 1980, U.N. GAOR, Doc. A/35/40, at 118, para. 16; and Communication No. R.1/6, M. A. Millán Sequeira v. Uruguay, Views adopted on 29 July 1980, at 131, para. 16.

156 *See* Communication No. R.7/28, I. Weinberger v. Uruguay, Views adopted on 29 October 1980, U.N. GAOR, Doc. A/36/40. In this case the HRC found a violation of this provision because the person concerned did not have access to any legal assistance at all during the first ten months of his detention. *Id* at 119, para. 16. It is interesting to note here that New Zealand for some time held that the legal aid was to be available even for communications procedure before the HRC, until it was reversed by the Court of Appeal in the case of Wellington District Legal Services Committee v. Pauline Eunice Tangiora [1998] 1 NZLR 129. See for this Elizabeth Evatt, *supra* note 24. Several paragraphs of Article 14 were also violated in the case of Bee et al. v. Equatorial Guinea, *supra* note 64, para. 6.3.

157 The HRC has noted that if the counsel and the accused consider that they have not had sufficient time and facilities to prepare for the defense, particularly in cases when a capital punishment is at stake, it is "incumbent upon them to request the adjournment of trial." *See* Communication No. 349/1989, C. Wright v. Jamaica, Views adopted on 27 July 1992, U.N. GAOR, Doc. A/47/40, at 315-316, para. 8.4.

158 General Comment No. 13, para. 9.

and his lawyer is a requirement of the provision and that this communication should be held "without any restrictions, influences, pressures or undue interference from any quarter."[159] The same paragraph guarantees that this communication should be with *counsel of the accused's own choosing*, except in cases when it is provided free of charge, and in some countries, on grounds of indigence, the defendant may not choose his own counsel, but is provided with legal aid through a public prosecutor's office or by court appointment.[160] A violation was found in the case of *Lopez Burgos v. Uruguay*,[161] where the defendant was obliged to accept the *ex officio* appointment of a colonel as his legal counsel.[162] Moreover, the HRC has cautioned the domestic courts to ensure that "the conduct of a case by the lawyer is not incompatible with the interests of justice," and the lawyer must use his best judgment in the interests of the client he represents.[163]

Article 14(3)(d), trial *without undue delay,* has been interpreted by the HRC in conjunction with paragraph 5 which provides for the right of the accused to have his conviction and sentence reviewed by a higher tribunal according to law. In such interpretation the HRC has also noted the need for *duly reasoned judgments* for all instances of appeal so as to create the conditions for an effective enjoyment of the right of the convicted person to have his conviction and sentence reviewed by a higher tribunal.[164] Undue delay can be assessed for any stage of proceedings, from pre-trial through appeal. In determining whether has been an undue delay in a case, the conduct of both the accused and the state has to be considered, and the burden of proof for justifying any delay, like complexity of a case or deliberate misconduct of the accused, lies with the state.[165] Long pre-trial detentions are considered undue delay.[166]

159 The HRC jurisprudence confirms this stance. Violation of Article 14 (1) (b) was found in the case of Nazira Sirageva v. Uzbekistan, CCPR/C/85/D/907/2000 (2005), Views adopted on 1 November 2005, where Mr. Siragev's lawyer was prevented from seeing him confidentially, and had also been denied access to the Tashkent City Court's records, under different pretexts. *Id*. at para. 6.3. *Available at:* http://www.bayefsky.com/./doc/uzbekistan_t5_iccpr_907_2000.doc .

160 Steward, *supra* note 102. In the understandings to the ICCPR, the U.S. also included that there is not necessarily a right to counsel, with respect to offences for which imprisonment is not imposed. *Id*. at 1200, referring to Senate Comm. on Foreign Relations, International Covenant on Civil and Political Rights. S. Exec. Rep. No. 23, 102d Cong., 2d Sess. (1992), reprinted in 31 I.L.M. 645 (1992), at 656.

161 Communication No. R.12/52, S. R. López Burgos v. Uruguay, Views adopted on 29 July 1981, U.N. GAOR, Doc. A/36/40.

162 *Id.* at 183, para. 13.

163 Communication No. 708/1996, N. Lewis v. Jamaica, Views adopted on 17 July 1997, U.N. GAOR, Doc. A/52/40 (vol. II), at 251-252, para. 8.4.

164 *See* Communication No. 320/1988, V. Francis v. Jamaica, Views adopted on 24 March 1993, U.N. GAOR, Doc. A/48/40 (vol. II), at 66, para. 12.2.

165 *See* for this issue Hill v. Spain, *supra* note 70, para. 12.4. *See also* Thomas v. Jamaica, *supra* note 108, para. 9.5.

166 Hill v. Spain, *supra* note 70, para. 12.4.

In cases involving capital punishment, which runs under the qualification of the requirement for interests of justice, the HRC has emphasized that effective legal representation is "axiomatic" at all stages of the proceedings.[167] The issue of *free legal aid* is provided for in Article 14(3)(d), and it has a two-pronged requirement: "where the interests of justice so require," and "if [the accused] does not have sufficient means to pay for it." In this respect a violation was found in the case of *P. Taylor v. Jamaica*,[168] as "the absence of legal aid ... denied the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court in a fair hearing."[169]

Article 14(3)(d) also provides that everyone has to be *tried in his presence,* and the HRC found a violation of this provision in the case of *Mbenge v. Zaire,*[170] where summonses were issued only three days before the trial and there had been no attempt to send them to the accused, who was living abroad, and whose address was known. Though the HRC does not seem to totally exclude trials in absentia, it notes that such a trial could be compatible with the Covenant, only if the accused is summoned "in a timely manner and informed of the proceedings against him." It is the obligation of the State to show in such cases that the principles of a fair trial are at all times respected.[171]

Within this section it is necessary to briefly note the necessity of observance of human rights during criminal investigations. While certain limitations to rights are inherent in the condition of deprivation of liberty, there are a number of rights that should be observed at all times. The most important right is the right to *freedom from torture, cruel or inhuman treatment or punishment* as guaranteed by Article 7 of the ICCPR, demanding non-interference on the part of the state. This is a universal right that has risen to the level of *jus cogens*,[172] from which no derogation is permitted.[173] It should be respected at times of peace as well as war, without exception in

167 *See* Shukurova v. Tajikistan, CCPR/C/86/D/1044/200, Views adopted on 17 March 2006, para. 8.5. *Also see* Aliev v. Ukraine, Communication No. 781/1997, Views adopted on 7 August 2003, para. 7.3.

168 Communication No. 707/1996, P. Taylor v. Jamaica, Views adopted on 14 July 1997, U.N. GAOR, Doc. A/52/40 (vol. II).

169 *Id. at* 241, para. 8.2.

170 Mbenge v. Zaire, (16/1977), 25 March 1983, 2 Sel. Dec.76, at 78.

171 Communication No. 699/1996, A. Maleki v. Italy, Views adopted on 15 July 1999, U.N. GAOR, Doc. A/54/40 (vol. II), at 183, paras. 9.2-9.3.

172 For an analysis of inter-relationship between the *jus cogens* legal status of certain international crimes, like torture, and the respective legal implications, *obligationes erga omnes*, see M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & Contemp. Probs. 63 (1996).

173 Eckart Klein, *Reservations, supra* note 143, at 62. *Also see* M. Cherif Bassiouni, *States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law,* in Non-Derogable Rights and States of Emergency 125 (Daniel Premont ed., 1996).

any circumstances[174] in the course of criminal investigations and all stages of judicial proceedings. States are under an *obligatio erga omnes*[175] to take effective legislative, administrative, judicial and other necessary measures to prevent torture from occurring in any territory under their jurisdiction,[176] and even superior orders cannot be invoked as a justification of torture.[177] The HRC in its General Comment No. 20[178] has expressed the opinion that prolonged solitary confinement of the detainee could amount to torture or ill-treatment.[179] Depriving detainees of food and drink for five consecutive days is also considered ill-treatment incompatible with Article 7.[180] The Committee has instructed states to make certain that any detention facilities are free from any equipment liable to be used to cause torture or ill-treatment,[181] and has made it mandatory for enforcement personnel, police officers and any other persons involved in the custody or treatment of any individual in the custody of the state, to receive appropriate instruction and training.[182] In a case where the state responded to allegations of torture in custody, that the beating had been committed by the co-detainees, the Committee, finding a violation, reasoned this way: "a State party is responsible for the security of any person it deprives of liberty and, where an individual deprived of liberty receives injuries in detention, it is incumbent on the State party to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations."[183] The HRC has also made clear that "the burden

174 *See, e.g.,* article 4(2) of the International Covenant on Civil and Political Rights; article 27(2) of the American Convention on Human Rights; article 15(2) of the European Convention on Human Rights; article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and article 5 of the Inter-American Convention to Prevent and Punish Torture. *See* further Body of Principles, *supra* note 10, Principle 6: "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." *Also see* Code of Conduct for Law Enforcement Officials, *supra* note 95, Article 5: "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

175 *See generally* Bassiouni, *supra* note 173.

176 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2 (1).

177 *Id.* Article 2 (3)

178 General Comment No. 20 on Article 7 (1992), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol) /6924291970754969c12563ed004c8ae5?Opendocument .

179 *Id.* at para. 6. *See* also *Polay Campos v. Peru*, *supra* note 96.

180 Bee et al. v. Equatorial Guinea, *supra* note 64, para. 6.1.

181 *Supra* note 178, at para. 11.

182 *Id.* at para. 10.

183 Nazira Sirageva v. Uzbekistan, *supra* note 159, para. 6.2.

of proof that the confession was made without duress is on the prosecution,"[184] and that "it is essential that complaints about torture must be investigated promptly and impartially by competent authorities."[185] In the context of this paper it is also worth noting that the HRC has cautioned states against exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment through returning them to a country known to resort to such means, by way of their extradition,[186] expulsion or *refoulement*.[187] States, at all times, are asked to live up to their obligations and to apply the higher level of protection,[188] whether that higher level is offered by the domestic law or international agreements a state is party to. According to the Committee, another practice that could constitute cruel, inhuman or degrading treatment are prolonged judicial proceedings,[189] particularly in cases involving capital punishment, though this penalty could be lawful according to some domestic laws.[190] The HRC has extended the scope of Article 7 to also prohibit "corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."[191] In a recent case, the HRC found a breach of Article 7, "inhuman treatment" in the failure on the part of the authorities to notify the author of the communication of the execution of family members, and to give information

184 *See* Kurbonov v. Tajikistan, CCPR/C/86/D/1208/2003, Views adopted on 16 March 2006, para. 6.3., *available at:* http://www.bayefsky.com/./doc/tajikistan_t5_iccpr_1208_2003.doc.

185 Shukurova v. Tajikistan, *supra* note 167, para. 8.2. *See* also Darmon Sultanova v. Uzbekistan, CCPR/C/86/D/915/2000 (2006), Views adopted on 30 March 2006, para. 7.2. and 7.3., where the Committee finding a violation of Article 7, Article 14 (2)and (3)(g) noted that "allegations of torture were brought to the attention of the authorities by the victims themselves, and that they were ignored." Also the burden of proof was laid on the accused as to whether the confession was voluntary.

186 *See* generally the jurisprudence of the HRC regarding extradition cases of Kindler v. Canada, Ng. v. Canada and Cox v. Canada, analyzed in Margaret De Merieux, *Extradition as the Violation of Human Rights. The Jurisprudence of the International Covenant on Civil and Political Rights*, in 14 Netherlands Q. Hum. Rts. 23-33 (1996). The article, *inter alia,* brings forth the arguments of the HRC in considering extradition of the victims by Canada to the U.S. a breach of Article 7 of the Covenant, based on the fact that the conditions on death row as well as the "abhorrent" method of execution constituted cruel and inhumane treatment.

187 General Comment No. 20, *supra* note 178, para. 9.

188 Eckart Klein, *Article 5 of the International Covenant on Civil and Political Rights*, in Towards Implementing Universal Human Rights, 127, 141 (Nisuke Ando ed., 2004).

189 *See* Carlton Reid v. Jamaica, Communication No. 250/1987, CCPR/C/39/D/250/1987 (1990). In paragraph 6.5., the HRC states that "the author's continued uncertainty as to whether or not a warrant for his execution will be issued, and the concomitant mental anguish, amounts to cruel, inhuman and degrading treatment in violation of article 7." *Available at* http://www1.umn.edu/humanrts/undocs/session39/250-1987.html.

190 Steward, *supra* note 102. That is why the U.S. added a reservation to Article 7 of the ICCPR. *See* Senate Comm. on Foreign Relations, *ibid.*

191 General Comment No. 20 (Art. 7), *supra* note 178, at para. 5.

about their burial places.[192] Recently, in *Boucherf v. Algeria,*[193] the Committee found a violation of Article 7 on several counts, such as "the degree of suffering involved in being held indefinitely without contact with the outside world,"[194] the disappearance and repeated torture of the victim, and "the anguish and stress caused to the author [of the communication] by the disappearance of her son and the continued uncertainty concerning his fate and whereabouts."[195]

Among other rights to be observed is the respect for one's private life, home and correspondence, guaranteed by Article 17 of the ICCPR. This article brings to the fore issues of wire tapping, searches and interference with correspondence. Though there is no case law of the Committee regarding these issues, the HRC has expressed its opinion in its General Comment No. 16,[196] which in paragraph 8 explains that even in cases related to interferences in conformity with the Covenant "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted." It goes on to clarify that article 17 "requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*… without interception." On the issue of surveillance, electronic or of any other type, the HRC asks that "interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited," and searches should be restricted to a search for necessary evidence, and they should be carried out in a manner consistent with the dignity of the person who is being searched.

Article 14(3)(c) guarantees that in criminal proceedings everyone has the right "*to be tried without undue delay.*" The HRC interpreted this paragraph in its General Comment No. 13[197] commenting that the accused shall be tried without undue delay from the time when a trial commences to the time a judgment is rendered. It asks that all stages must take place *without undue delay*, and that in order to make this right effective, "a procedure must be available in order to ensure that the trial will proceed 'without undue delay,' both in first instance and on appeal."[198] The case law of the Committee testifies to the time frames considered as "undue delay." So in the case of *Earl Pratt and Ivan Morgan v. Jamaica*,[199] three years and nine months were too

192 Shukurova v. Tajikistan, *supra* note 167, para. 8.7. The HRC argued that "the secrecy surrounding the date of execution, and the place of burial, as well as the refusal to hand over the body for burial, have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress." *Ibid.* The same argument is used in the case of Darmon Sultanova v. Uzbekistan, *supra* note 185, para. 7.10.

193 Boucherf v. Algeria, CCPR/C/86/D/1196/2003 (2006), Views adopted on 30 March 2006, *available at* http://www.bayefsky.com/./doc/algeria_t5_iccpr_1196_2003.doc.

194 *Id.* at para. 9.6.

195 *Id.* at para. 9.7.

196 General Comment No. 16 on Article 17 (1988), para. 8, *available at* http://www.unhchr.ch/tbs/doc.nsf/ (Symbol)/23378a8724595410c12563ed004aeecd?Opendocument.

197 *Supra* note 58.

198 *Id.* at para 10.

199 Communications Nos. 210/1986 and 225/1987, E. Pratt and I. Morgan v. Jamaica, Views adopted on 6 April 1989, U.N. GAOR, Doc. A/44/40, at 229, para. 13.3.

long a time for the Court of Appeal to issue a written judgment, and it violates Article 14(3)(c) as well as Article 14(5),[200] because according to the Committee "in all cases, … accused persons are *entitled to trial and appeal without undue delay,* whatever the outcome of those judicial proceedings turns out to be,"[201] and oversights are not a justification. Even a delay of two years,[202] or twenty nine months[203] from arrest to trial was considered *undue delay* and was found to be in violation of Article 14(3)(c).

Article 14(3)(g) guarantees in criminal proceedings the right of the accused *"not to be compelled to testify against himself or to confess guilt,"* and this extends throughout all stages of the judicial proceedings. The HRC has considered this provision in close connection with Article 7 and Article 10(1), which respectively guarantee freedom from torture and other cruel, inhuman or degrading treatment and respect for the inherent dignity of the human person. So the Committee has noted that in many cases state authorities resort to unlawful means in order to compel the accused to confess guilt or to testify against himself, and it asks for laws that would quash any evidence provided by such methods,[204] and that judges must be authorized "to consider any allegations made of violations of the rights of the accused during any stage of the prosecution."[205] The HRC also held that this right guarantees "absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt."[206] In this respect violations were found in cases where the persons accused were forced into signing statements that incriminated them,[207] as well as in cases where recourse to torture and duress

200 As the delay did not allow the authors of the communication to appeal to the Privy Council, availing themselves of the guarantees provided in Article 14 (5), their right "to have [their] conviction and sentence … reviewed by a higher tribunal according to law."

201 E. Pratt and I. Morgan v. Jamaica, para. 13.5.

202 Communication No. 672/1995, C. Smart v. Trinidad and Tobago, Views adopted on 29 July 1998, U.N. GAOR, Doc. A/53/40 (vol. II).

203 Communication No. 564/1993, J. Leslie v. Jamaica, Views adopted on 31 July 1998, U.N. GAOR, Doc. A/53/40 (vol. II).

204 *Supra* note 58, at para. 14. *See also* General Comment No. 20, s*upra* note 178, at para. 12, where the HRC states that "it is important for the discouragement of violations under article 7 [of the ICCPR] that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."

205 *Ibid*., at para. 15. *See* also Alexandros Kouidis v. Greece, CCPR/C/86/D/1070/2002, Views adopted on 28 March 2006, para. 7.5., where the Committee finding a violation of Article 14 (3) (g), notes that this provision "entails an obligation of the State party to take account of any claims that statements made by accused persons in a criminal case were given under duress. In this regard, it is immaterial whether or not a confession is actually relied upon, as the obligation refers to all aspects of the judicial process of determination." *Available at* http://www.bayefsky.com/./doc/greece_t5_iccpr_1070_2002.doc .

206 Communication No. 330/1988, A. Berry v. Jamaica, Views adopted on 7 April 1994, U.N. GAOR, Doc. A/49/40 (vol. II), at 28, para. 11.7.

207 Communication No. R.12/52, S. R. López Burgos v. Uruguay, Views adopted on 29 July 1981, U.N. GAOR, Doc. A/36/40, at 183, para. 13; and Communication No. R.18/73, M. A.

was exercised to compel the accused to confess guilt.[208] The Committee has held that any allegations of self-incrimination under duress should be brought by the accused or his lawyer to the attention of the trial judge.[209] When the state failed to investigate allegations of torture, which were "in fact made during the actual trial but was neither recorded nor acted upon," the HRC has found a violation of this provision, because the victim's conviction was based on the confession of guilt under duress.[210]

Article 14(3)(e) guarantees that everyone charged with a criminal offense has the right *"to examine, or have examined,*[211] *the witnesses* against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." This provision is an important element of the principle of the equality of arms, ensuring that parties have equal access to the introduction of evidence[212] by interrogating witnesses. The HRC has, however, noted that it does not provide for "an unlimited right to obtain the attendance of witnesses requested by the accused or his counsel."[213] This interpretation seems to be somehow in conformity with the U.S. understanding of this provision that the defendant's right to obtain witnesses on his behalf is based on his showing a necessity of such witness for his defense.[214] The HRC has further argued that if any issues arise with respect to this provision, or in any other matter related to preparation of defense, the accused or his lawyer should bring them to the attention of the judge.[215] Thus, the Committee found

Teti Izquierdo v. Uruguay, Views adopted on 1 April 1982, U.N. GAOR, Doc. at 186, para. 9.

208 Communication No. 74/1980, M. A. Estrella v. Uruguay, Views adopted on 29 March 1983, U.N. GAOR, Doc. A/38/40, at 159, para. 10; and Communication No. 328/1988, R. Z. Blanco v. Nicaragua, Views adopted on 20 July 1994, U.N. GAOR, Doc., A/49/40 (vol. II), at 18, para. 10.4.

209 Communication No. 330/1988, A. Berry v. Jamaica, Views adopted on 7 April 1994, U.N. GAOR, Doc. A/49/40 (vol. II), at 27, para. 11.3.

210 *See* Kurbanov v. Tajikistan, *supra* note 63, at paras. 7.4. & 7.5.

211 The active and passive formulation of this right is based on the distinction of two legal systems, respectively accusatorial and inquisitorial trials. *See* Nowak, *supra* note 5, at 342, para 68, as he refers to Noor Muhammad, *Due Process of Law for Persons Accused of Crime*, in The International Bill of Rights 138 et seq. (Louis Henkin ed., 1981).

212 However, there are different stances on the use of anonymous evidence. The proponents find it to be "a necessary feature of a system of international criminal justice that has to protect those who come forward to give testimony of mass atrocities;" whereas its opponents label it to be "an unjustified constraint on the right of defendants to cross-examine witnesses." *See* Marks & Clapham, *supra* note 5, at 160.

213 Communication No. 237/1987, D. Gordon v. Jamaica, Views adopted on 5 November 1992, U.N. GAOR, Doc. A/48/40 (vol. II), at 10, para. 6.3.

214 Steward, *supra* note 102, at 1200, referring to Senate Comm. on Foreign Relations, *ibid.*

215 Communication No. 356/1989, T. Collins v. Jamaica, Views adopted on 25 March 1993, U.N. GAOR, Doc. A/48/40 (vol. II), at 88-89, para. 8.1.

a violation of the provision in the case of *C. Reid v. Jamaica*[216] where the trial judge refused to postpone the trial so as to enable the lawyer to prepare his examination of witnesses,[217] though the legal aid attorney was only assigned to the accused on the day of his trial. A violation was also found in another case involving Jamaica,[218] where a statement of a witness for the prosecution was not made available to the defense, obstructing in this way its cross-examination of witnesses. In a recent case the HRC found a breach of this provision because "none of the witnesses were present in the court room despite numerous requests to this effect from all eight co-defendants."[219]

Two principles, namely *nullum crimen sine lege* and *ne bis in idem (res judicata)* are of utmost importance in any criminal proceeding. Article 15(1)[220] guarantees *freedom from ex post facto laws,* and it refers to both national and international law in this respect. It also prohibits the imposition of a heavier penalty than the one sanctioned for the offence at the time it was committed. This principle is important to ensure the foreseeability of law in a society governed by the rule of law, where the crime classifications as well as the respective penalties are clear and accessible to the public. The HRC found a violation of this provision in the case of *I. Weinberger v. Uruguay,*[221] where the author was condemned for acts which did not constitute a crime at the time committed. This provision bars the imposition of a penalty heavier than the one which was valid at the time the offence was committed, and also provides for retroactive application of a lighter penalty on the offender if, after the commission of the offence, but before sentencing, the law has changed to sanction a lighter penalty,[222] with a tendency to make the criminal law more humane.[223] However, it is important to note the qualification contained in Article 15(2), which states that "[n]othing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the

216 Carlton Reid v. Jamaica, Communication No. 250/1987, CCPR/C/39/D/250/1987 (1990), *available at* http://www1.umn.edu/human rts/undocs/session39/250-1987.html.

217 *Id*. at 91, para. 11.3 read in conjunction with para. 4, at 87.

218 *See* Peart and Peart v. Jamaica, Communications Nos. 464/1991 & 482/1991, CCPR/C/54/D/464/1991& 482/1991 (1995), paras. 11.4. & 11.5, *available at*: http://www1.umn.edu/humanrts/undocs/html/464-482-1991.html.

219 Darmon Sultanova v. Uzbekistan, *supra* note 185, para. 7.5.

220 Article 15(1) of the ICCPR states: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

221 Weinberger v. Uruguay, *supra* note 156, at 119, para. 16.

222 Nowak distinguishes between reversible and irreversible penalties and concludes that the right to retroactive application of a lighter penalty generally applies only in cases where a penalty is irreversible, mentioning as exceptions cases of death penalty, life imprisonment, and corporal punishment. *See* Nowak, *supra* note 5, at 365-367, paras. 18-21.

223 *Id.* at 365, para. 18.

general principles of law recognized by the community of nations." This is the only exception to the prohibition of retroactive laws and it has been interpreted to mean that states may apply retroactive domestic criminal laws in punishing such crimes as war crimes, crimes against peace and humanity, torture, slavery, etc., which violate customary international law.[224] The HRC has called attention to the non-derogable nature of Article 15, as it relates to the principle of legality of criminal liability and punishment.[225]

The prohibition of double jeopardy is provided for in Article 14(7) stating that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." This provision mandates *ne bis in idem* within the law and penal procedure of each country,[226] but it does not guarantee it in different national jurisdictions.[227] It is worth mentioning here, that within the U.S., though it is one national jurisdiction, the prohibition of double jeopardy does not hinder trial in state and federal courts, or in two states for the same crime of one defendant.[228] It is also important to note that some states permit a new criminal trial, even if a person has been acquitted or convicted, in cases of extraordinary circumstances such as serious procedural flaws or the coming to light of new facts,[229] and have consequently made reservations to Article 14(7). The HRC has, however, encouraged States parties to reconsider such reservations.[230]

c. Due Process in Appeal

The right to judicial review of a conviction is guaranteed by Article 14(5), which states that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Thus, this provision mandates

224 *Id.* at 368, para. 24. Whereas in effect, Article 15 (2) merely restates the position that persons may be held accountable for violations of international customary law, it allows States to legislate to this effect. *See What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, by Lawyers Committee for Human Rights (March 2000) *available at* http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf.

225 Hanski & Scheinin, *supra* note 20, at 157, referring to General Comment No. 29 (72) on states of emergency.

226 *See* Nowak, *supra* note 5, at 356, para. 99.

227 Communication No. 204/1986, A. P. v. Italy, Decision adopted on 2 November 1987, U.N. GAOR, Doc. A/43/40, at 244, para. 7.3. stating, *inter alia,* that "The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given state."

228 For this reason, the U.S. added an understanding to Article 14(7) stating that prohibition of double jeopardy applies only when the judgment of acquittal has been rendered by the court of the same governmental unit, whether federal or state. This understanding was followed by criticism on the part of Lawyer's Committee for Human Rights, International Human Rights Law Group, etc. *See* Steward, *supra* note 102.

229 Nowak, *supra* note 5, at 357, para. 100.

230 *See supra* note 58 regarding Procedural Guarantees in Civil and Criminal Trials, at para. 19.

for the existence of higher courts of appeal in any domestic legislation, and the phrase "according to law" does not leave room for interference with this right, but has to do with the way this right has to be exercised; it requires that the domestic law should establish procedures and modalities to regulate the process of appeal.[231] According to the HRC, the ICCPR provides for the full review of legal and material aspects of someone's conviction and sentence, including the evaluation of the evidence and the conduct of the trial.[232] Accordingly, the HRC found a violation of this provision in the case of *Gomez v. Spain*,[233] since the Spanish Supreme Court could not re-evaluate the evidence. Consequently this provision requires preservation of sufficient evidentiary material until completion of the appeals procedure.[234] In a most recent case, the HRC argued that the "supervisory review" invoked by the state was only limited to issues of law, and thus it could not be characterized as an "appeal." [235] As mentioned above, legal assistance should be available in all stages of a criminal process including appeal, and the HRC finds a violation of Article 14(5), on the grounds of lack of effectiveness of appeal, where a lawyer abandons all grounds of appeal contrary to the wishes of the client, or where there is no lawyer to submit grounds of appeal.[236] For the right to appeal to be effectively available it is also needed that the courts give reasoned judgments in a timely fashion,[237] and that the transcripts of the trial be produced without

231 In para. 10.4. of the Communication No. R.15/64, C. Salgar de Montejo v. Colombia, Views adopted on 24 March 1982, U.N. GAOR, Doc., A/37/40, at 173, the HRC states: "The Committee considers that the expression *according to law* in article 14 (5) of the Covenant is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined *according to law* is the modalities by which the review by a higher tribunal is to be carried out."

232 Communications Nos. 623, 624, 626, 627/1995, V. P. Domukovsky et al. v. Georgia, Views adopted on 6 April 1998, U.N. GAOR, Doc. A/53/40 (vol. II), at 111, para. 18.11. This stance of the HRC was previously stated in the case of *Perera v. Australia*, Communication No. 536/1993, para. 6.4., where it noted that Article 14(5) "does not require that a Court of Appeal proceed to a factual retrial, but that a court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial." *See* Nowak, *supra* note 5, at 349, para. 82.

233 Communication No. 701/1996, Gómez v. Spain. Views adopted on 20 July 2000, U.N. GAOR, Doc. A/55/40 (vol. II), at 109, para. 11.1.

234 The HRC has concluded that failure to preserve such evidential material, indispensable to perform an effective review, constitutes violation of Article 14 (5). *See* Communication No. 731/1996, M. Robinson v. Jamaica, Views adopted on 29 March 2000, U.N. GAOR, Doc. A/55/40 (vol. II), at 130, para. 10.7;

235 *See* Yuri Bandajevsky v. Belarus, *supra* note 67, at para. 10.13. The HRC further noted that "even if a system of appeal may not be automatic, the right to appeal within the meaning of article 14, paragraph 5, imposes on States parties a duty substantially to review conviction and sentence, both as to sufficiency of the evidence and of the law." *Ibid*.

236 Hill v. Spain, *supra* note 70, at 18, para. 14.3.

237 The HRC has expressed grave concerns for the unavailability of reasoned judgments. *See, e.g.* C. B. [name deleted] v. Jamaica, Communication No. 260/1987, CCPR/C/39/

undue delay.[238] Also, the HRC has held that the proceedings on leave to appeal could be conducted in absence of an oral hearing provided that full review of judgment is made in conformity with Article 14(5).[239] All the guarantees of a fair and public trial must also be observed in appellate proceedings,[240] and should a sentence be imposed first at the appeal proceedings, the person convicted must be offered a further appeal.[241]

The HRC's pronouncements of an effective remedy include new trial,[242] while the ICCPR itself is the only major treaty which provides clearly for a *right to compensation for miscarriage of justice.* This right is guaranteed in its Article 14(6) stating that:

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

This provision noticeably provides for compensation where there is conclusive evidence that the convicted has been the victim of a miscarriage of justice, and that he or she has not contributed to that effect. However, in the U.S., the federal law does not generally provide for such a right if the arrest or detention has been made in good faith, even if it is finally concluded that it has been unlawful. That is why the U.S. attached an understanding to Article 9(5) and Article 14(6), to mean that such compensation could be subject to reasonable requirements of domestic law.[243] This provision generally brings to the fore the necessity for the state to take positive steps

D/260/1987 (1990), para. 6.3; Reid v. Jamaica, Communication No. 355/1989, CCPR/C/51/D/355/1989 (1994), para. 14.3.

238 In the case of *Pinkney v. Canada*, the HRC found a violation of the provision on the grounds of a delay of 34 months for the author's leave to appeal to be heard, because of delay in producing transcripts of the trial. *See* Communication No. R.7/27, L. J. Pinkney v. Canada, Views adopted on 29 October 1981, U.N. GAOR, Doc. A/37/40, at 113, para. 35, read in conjunction with para. 10 at 103,.

239 Bryhn (represented by Mr. John Ch. Elden) v. Norway, Communication No. 789/1997, CCPR/C/67/D/789/1997 (2 November 1999), para. 7.2.

240 *See supra* note 58, at para. 17.

241 Nowak, *supra* note 5, at 351, para. 86.

242 Eckart Klein, *Individual Reparations Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee*, in State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights 27, 30-31 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

243 Steward, *supra* note 102, at 1198.

in its obligation to fulfill the precise requirements of this right.[244] However, the provision does not provide a general right to compensation in all cases of reversal after conviction.[245] It is understood that pardons based on equity give no arguments for compensation.[246]

2. *The European Convention on Human Rights and Fundamental Freedoms and the Jurisprudence of the European Court of Human Rights*

In Europe's constitutional heritage, fair procedure is essential in applying the rule of law.[247] At the outset, it should be noted that the European Convention on Human Rights,[248] adopted in 1950 by the Council of Europe is the first and, to date, the most efficacious system of protecting individual rights under international law, providing

244 In his CCPR Commentary, *supra* note 5, Nowak analyzes the following prerequisites in order to claim compensation for miscarriage of justice: a) conviction must be final and may relate to any criminal offence; acquittal on appeal gives no right to compensation; b) the conviction must be formally reversed, or the person convicted must be pardoned after a new or newly discovered fact has shown conclusively that there has been a miscarriage of justice, and that this delay in the disclosure of the fact is not attributable to the person convicted; the person convicted has already suffered punishment, which generally means prison term, but also unlawful arrest or detention; and compensation will be granted *according to law*, which means that the states cannot circumvent compensation by not enacting the required laws. *Id.* at 353-355, paras. 90-96. Also, positive steps to be taken by the state are generally required in order to have a proper functioning of the administration of justice. It is states' responsibility to set up the necessary legal infrastructure. *See* Marks & Clapham, *supra* note 5, at 159.

245 *See* Hanski & Scheinin, *supra* note 20, at 155 (2003). The authors illustrate this assumption with the case of Terry Irving v. Australia (Communication No. 880/1999), Decision on Admissibility adopted on 1 April 2002, a case in which the author Scheinin, member of the HRC at that time, had dissented. *Id*. at n. 37.

246 The HRC found no right to compensation where the complainant's pardon was not due to proof of a miscarriage of justice, but was based on considerations of equity. *See* Muhonen v. Finland, Communication No. 89/1981, para. 11.2, quoted in Nowak, *supra* note 5, at 354, para. 93.

247 Pierre Garrone, *Opening Address*, in The Right to a Fair Trial 6, 8 (European Commission for Democracy through Law, 2000).

248 The Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe. It was opened for signature in Rome on 4 November 1950 and entered into force in September 1953. Taking as their starting point the 1948 Universal Declaration of Human Rights, the framers of the Convention sought to pursue the aims of the Council of Europe through the maintenance and further realisation of human rights and fundamental freedoms. The Convention was to represent the first steps for the collective enforcement of certain of the rights set out in the Universal Declaration. For a recent account of the European Convention on Human Rights, see Steven Greer, The European Convention on Human Rights: Achievements, Problems and Prospects (2007).

a vast catalogue of rights and freedoms, specific limitations to the exercise of such rights and freedoms, as well as highly developed and effective monitoring and adjudicative mechanisms. A number of its provisions guarantee the due process of law, and the anthology of the case law of the former European Commission as well as the European Court of Human Rights provides by far the most fascinating interpretation of this right, which ever more constitutes a common mould for European criminal procedure. This section will spotlight several provisions related to the overall notion of due process of law and fair trial, as basic elements of the notion of the rule of law; namely, Article 5 centrally dealing with powers of arrest and pre-trial detention, and Article 6 enshrining minimum guarantees of a fair trial. A number of other articles that do have some bearing on the right to a fair trial could also be shortly mentioned. Such articles include: Article 2, the right to life as it relates to cases effecting a lawful arrest; Article 3, prohibiting torture and degrading treatment, relevant mainly in situations of detentions and arrest; Article 4, prohibiting slavery and forced labor, significant also in punishments; Article 7, prohibition of retroactivity of laws and penalties; Article 8, respect for private and family life, as it pertains to the use of invasive ways of gathering evidence; Article 10, freedom of expression, applicable in the rights and limits of the media in airing or publishing issues dealing with investigation or trial. Ample case law of the Court has given meaning to the substance of these provisions, through narrow or broad interpretation, sometimes through its doctrine of the *margin of appreciation*,[249] and other times through its consideration of the Convention as a *living instrument*.[250]

249 On the application of the doctrine of "margin of appreciation" in judging the validity of the restrictions on rights, see Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Perspective*, 23 Berkeley J. Int'l. L. 223, 254-255 (2005). For more details on the doctrine, see Howard Charles Yourov, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (1996); *see also* Christian Bonat, The European Court of Human Rights, published by The Federalist Society for Law and Public Policy Studies (2000) at http://www.fed-soc.org/Intllaw&%20AmerSov/eurocourthr.pdf.

250 This term has been used by the court to interpret certain articles in the light of current trends of thought and modern social conditions. In the case of *Tyrer v. The United Kingdom*, 5856/72 [1978] ECHR 2 (25 April 1978) regarding, *inter alia,* corporal punishment, at paragraph 31, for example, the Court recalled that "the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions." *Available at* http://www.worldlii.org/cgi-worldlii/disp.pl/eu/cases/ECHR/ 1978/2.html?query=title%28tyrer+near+united+kingdom%29 (last visited on July 20, 2006). In a more recent case, based on "major social changes in the institution of marriage…as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality," the Court dropped the restriction to "men and women" in the case of transsexuals. *See* Goodwin v. United Kingdom, 35 EHRR 18 (2002), para. 100.

a. Due Process before Trial

Modern legal systems allow administrative detention based on an executive order as a precaution against a predicted criminal action,[251] in the same way as the detention based on a reasonable suspicion that the person deprived of his liberty has been involved in some criminal conduct. That entrenches the administration of justice from potential obstructions by those detained.[252] Article 5 (1)[253] of the European Convention on Human Rights is the most comprehensive provision dealing in detail with the legality of detention in regards to substance and procedure. It specifically enumerates the lawful grounds allowing for deprivation of the liberty of a person. The European Court of Human Rights has noted that this list is exhaustive and "must be interpreted strictly."[254] Furthermore the European Court has constantly held that the "object and purpose" of this article is "precisely to ensure that no one should be deprived of his

251 This category of permissible deprivation of liberty, called by some "preventive detention," is by a wide interpretation considered to be authorized by the Article 5 (1) (c) of the ECHR, and it does not necessarily mean that it requires proof that the detainee has already committed a crime. Such detention is based on the grounds that a person deprived of his liberty could potentially be involved in criminal conduct against national interests. For a detailed analysis of this issue, see Claire Macken, *Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR*, 10 Int'l J. Hum.Rts. 195-217 (2006). Macken concludes that preventive detention is specifically provided for in Article 5 (1) (c) as lawful arrest and detention "reasonably considered necessary to prevent his committing an offence." *Id*. at 214.

252 *See generally Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile*, U.N. Doc. E/CN.4/826/Rev.1 (1964).

253 Article 5 (1) of the European Convention on Human Rights provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

254 Bouamar v. Belgium, ECtHR, Judgment of 29 February 1988, Series A, No. 129, at 19, para. 43.

liberty in an arbitrary fashion."[255] Any arrest and detention not only has to be based on legal substantive grounds and follow the procedure of national law, but it should also meet the standard of lawfulness set by Article 5(1) of the Convention.[256] In considering this issue, the Court explained the paramount importance of the fact that the applicable national law, for that matter, "all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail."[257]

The accountability of States for persons in their custody is a legal obligation of utmost importance and magnitude. The language of the Court and that of the HRC seem to converge in the cases dealing with forced disappearances. In *Çakici v. Turkey*[258] the Court found a "particularly grave violation of the right to liberty and security of person,"[259] and it clarified that "the recording of accurate holding data concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5 § 1."[260]

But how has the European Court interpreted the *lawfulness of detention*? The Court has indicated that Article 5(1)(c) of the European Convention "permits deprivation of liberty only in connection with criminal proceedings,"[261] and within the grounds of our topic, Article 5(1)(c) allows "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on

255 X v. United Kingdom, ECtHR, Application No. 7215/75, Judgment of 5 November 1981, para. 43.

256 It might be of interest to mention here that we will see a number of landmark cases of the Court involving the United Kingdom. The U.K. ratified the Convention in 1951. In the year 2000, the Human Rights Act 1998 came into force. However, the theory of parliamentary sovereignty influenced the bill noting that in the case of conflict between an Act of Parliament and an article of the Convention, the English courts are to apply the Act of Parliament, though they can make a "declaration of incompatibility," which in turn would empower the executive to amend the incompatible legislation by issuing an Order. Interestingly, the same act requires the courts to interpret legislation in a way that would be compatible with the Convention. Nevertheless, the Court's decisions have obliged the U.K. to change some of its rules of criminal procedure, such as the ones dealing with wire tapping, indeterminate sentencing, the right to silence etc. *See* European Criminal Procedures 37-38 (Mireille Delmas-Marty & J.R. Spencer eds., 2002).

257 *See* paragraph 54 of the case of Steel and Others v. United Kingdom, ECtHR, Judgment of 23 September 1998, (67/1997/851/1058). The Court made reference to a number of cases against United Kingdom, when reasoning on the conformity of detention with domestic law. *Available at* http://www.worldlii.org/ eu/cases/ECHR/1998/95.html.

258 Çakici v. Turkey, ECtHR, Judgment of 8 July 1999, Reports 1999-IV.

259 *Id.* at 616, para. 107.

260 *Ibid*. at para. 105.

261 Ciulla Case v. Italy, ECtHR, Judgment of 22 February 1989, Series A, No. 148, at 16, para. 38.

reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so." The notion of "*reasonable suspicion*" is no doubt what has mostly engaged the Court in its interpretation. The criterion of "reasonable suspicion" that someone has committed a crime does not only mean that an objective observer has to be satisfied, but it is also to be regarded in view of conditions surrounding the case. It would be of interest to see how the Court has treated the "reasonableness" of detention based on domestic legislation in cases dealing with the crime of terrorism. In the case of *Fox, Campbell and Hartley v. the United Kingdom,* [262] the Court argues that "in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences, ... the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime,"[263] but still it asks for prudence when it notes: "Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1 (c) is impaired...."[264] Also, while the Court is aware of the importance of retaining confidential sources for reasons of detention in crimes of this caliber, nevertheless it asks to "be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured"; and it goes on requiring that "the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence."[265] The Court found a violation of Article 5(1) on the grounds that the government had failed to support that there existed a "reasonable suspicion;"[266] deprivation of liberty was decided on subjective suspicion, rather than facts. But the Court also notes that the facts raising a suspicion do not necessarily need to be of the same level with the ones justifying a conviction, or the bringing of a charge.[267] This seems to be in conformity with the intent of lawmakers as expressed in the *travaux préparatoires* which stated that "it may, however, be necessary in certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention

262 Fox, Campbell and Hartley v. United Kingdom, ECtHR, Judgment of 30 August 1990, Series A, No. 182.

263 *Id.* at 16-17, para. 32.

264 *Ibid.*

265 *Id.* at 17-18, para. 34.

266 The Court reasoned that though two of them had been previously convicted for terrorism connected with the IRA , it was only the arresting officers who had a genuine suspicion that they were involved in those terrorist acts, but there was not established a "reasonable suspicion" to "satisfy an objective observer that the applicants may have committed these acts." *Id.* at para. 35.

267 *See* Selcuk v. Turkey, 21768/02 [2006] ECHR 19 (10 January 2006), para. 23. No violation was found on grounds of Article 5 (1). *Available at* http://www.worldlii.org/eu/cases/ECHR/2006/19.html .

to commit the crime do not of themselves constitute a penal offence."[268] However, protection against abuse of such a restriction was ensured through the requirement that the person detained had to be brought promptly before a judicial authority. Any broad interpretation of Article 5 § 1 (c) as providing a general power of preventive detention was rejected in the *Lawless* case.[269]

The right of detainees to be *informed promptly of reasons for arrest and charges against them* is guaranteed by Article 5(2).[270] The Court has reasoned that the term "promptly" should be strictly construed, though "intervals of few hours" due to unavoidable delay do not necessarily amount to a violation.[271] The ECHR is the only treaty providing that the reasons for arrest should be given in a language that the detainee understands. The Court has also placed importance on the fact that the essential legal and factual ground for the arrest should be made known in a "simple, non-technical language that [the accused] can understand,"[272] and that telling the detained that they are arrested on suspicion of being terrorists, without clarity of legal and factual grounds, would violate Article 5(2).[273]

The language of Article 5(3)[274] of the ECHR is almost the same as the respective articles in the ICCPR and the ACHR, and the interpretation of the Court as regards the notion of *"promptness"* is equivalent to that of the HRC, as it limits the degree of

268 Conference of Senior Officials, *Report to the Committee of Ministers* Doc. CM/WP 4(50) 19, at 14, in Marc J. Bossuyt, Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights 260 (1987).

269 Lawless v. Ireland (No. 3), No. 00000332/57, ECtHR, Judgment of 1 July 1961: "… [T]he detention of G. R. Lawless is not covered by Article 5, paragraph 1 (c) (art. 5-1-c), since he was not brought before the competent judicial authority during the period under review; that paragraph 1 (c) (art. 5-1-c) authorizes the arrest or detention of a person on suspicion of being engaged in criminal activities only when it is effected for the purpose of bringing him before the competent judicial authority; that the Commission has particularly pointed out in this connection that both the English and French versions of the said clause make it clear that the words 'effected for the purpose of bringing him before the competent judicial authority' apply not only to the case of a person arrested or detained on 'reasonable suspicion of having committed an offence' but also to the case of a person arrested or detained 'when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'" *Id.* at para. 9.

270 Article 5(2) of the ECHR provides:

> Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

271 Fox, Campbell and Hartley v. United Kingdom, *supra* note 262, para. 42.

272 *Id.* at para. 40.

273 *Id.* at para. 41.

274 Article 5(3) of the ECHR states:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

flexibility attached to it.[275] In the context of this study it would be of interest to note that the Court does not justify "lengthy periods of detention without appearance before a judge or other judicial officer," even in the cases dealing with special legislation regarding involvement in terrorist acts. Dispensing altogether with "prompt" judicial review because of difficulties relating to such acts "would import into Article 5(3) a *serious weakening of a procedural guarantee* to the detriment of the individual and would entail consequences *impairing the very essence of the right* protected by this provision. The Court thus has to conclude that none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest. The undoubted fact that arrest and *detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 (3)*."[276] Thus, unduly prolonged proceedings result in unlawfulness of pre-trial detention. In addition, in order to satisfy the requirements of both Article 5(1)(c) and Article 5(3), it does not suffice to base the reasonable suspicion for deprivation of liberty on objectively verifiable facts showing that a person has committed an offence, even when caught *in flagrante delicto*. If that were the case, the presumption of innocence would be compromised. So, there is a need to prove that there are objectively verifiable grounds for pre-trial detention, such as risks of absconding, pressure on witnesses, interference with evidence, etc.[277]

For the European Court, the legitimacy of the decision-making body within the meaning of Article 5(3) requires that the judicial officer "must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty."[278] So, "the officer must be independent of the executive and the parties … and must have the power to make a binding order for the detainee's release,"[279] otherwise, he cannot be considered satisfactorily independent. The Court particularly cautions against such an officer being an *auditeur militaire* or a public prosecutor who could potentially intercede in ensuing proceedings in the capacity of a prosecuting authority.[280] This jurisprudence was confirmed in a recent case, where the Court noted that the prosecution authorities were not endowed with attributes of *independence* and *impartiality* because "not only [they] belonged to the executive

275 Brogan and Others v. United Kingdom, ECtHR, Judgment of 29 November 1988, Series A, No. 145, at 32-33, para. 59.

276 *Id.* at 33-34, para. 62 (*emphasis added).*

277 For more details and case illustrations, see Nuala Mole & Catharina Harby, The Right to a Fair Trial: a Guide to the implementation of Article 6 of the European Convention on Human Rights 25-27 (Human Rights Handbooks, No. 3, 2001).

278 Assenov and Others v. Bulgaria, ECtHR, Judgment of 28 October 1998, Reports 1998-VIII, at 3298, para. 146.

279 *Ibid.*

280 Brincat v. Italy, (73/1991/325/397), 26 November 1992; De Jong, Baljet and van den Brink v. the Netherlands, (8805/79;8806/79;9242/81) 22 May 1984, 77 Ser. A 23.

branch of the State but also concurrently performed investigative and prosecution functions in criminal proceedings and were a party to such proceedings."[281]

Within the meaning of Article 5(3) the pre-trial detention of an accused person should not exceed a *reasonable time.* The Court has reasoned that the requirement of reasonable suspicion is a *sine qua non* for the lawfulness of continued detention, but after a certain lapse of time, it would not provide enough grounds for continuous detention. What come into play are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, might outweigh the rule of respect for individual liberty.[282] In other words, the deprivation of liberty should be based on other relevant and sufficient grounds, and the government should display special diligence in the conduct of such proceedings.[283] When considering the risk of flight as a ground for detention, the Court has observed that the gravity of the sentence should not be the only reason to keep someone in detention.[284] The risk of relapsing into crime is another ground for continued detention, and in the context of this paper, it is of interest to note the European Court's reasoning that the national authorities should take into account the involvement in previous offenses, and their nature, as well as the sentences imposed as the result of this involvement.[285] When considering these grounds for continued detention versus other preventive measures, such as bail or police custody, the Court asks of domestic authorities to give in detail their arguments that could factor into obstructing the course of trial and a violation is found where this has not been the case.[286] The detention would

281 W.B. v. Poland, 34090/96 [2006] ECHR 22 (10 January 2006), para. 51, *available at* http://www. worldlii.org/eu/cases/ECHR/2006/22.html.

282 Harazin v. Poland, 38227/02 [2006] ECHR 10 (10 January 2006), para. 37, *available at* http://www. worldlii.org/eu/cases/ECHR/2006/10.html.

283 *Id.* at para. 39. As regards *special diligence*, the Court noted that: "the delay of nearly two years in opening the trial should be considered significant and it cannot therefore be said that the authorities displayed "special diligence" in the conduct of the criminal proceedings against the applicant." *Id.* at para. 48. *See also* Assenov and Others v. Bulgaria, *supra* note 278, at 3300, para. 154.

284 Yagci and Sargin v. Turkey, ECtHR, Judgment of 8 June 1995, Series A, No. 319-A, at 19, para. 52.

285 Toth v. Austria, ECtHR, Judgment of 12 December 1991, Series A, No. 224, at 19, para. 70.

286 So, in the case of Golek v. Poland, 31330/02 [2006] ECHR 462 (25 April 2006), at paragraph 57, the Court notes: "during the entire period of the applicant's pre-trial detention, the authorities did not envisage the possibility of imposing on the applicant other 'preventive measures' – such as bail or police supervision – expressly foreseen by Polish law to secure the proper conduct of criminal proceedings. … What is more, it does not emerge from the relevant decisions that at any stage of the applicant's detention the authorities considered that those other measures would not have ensured his appearance before the court or that the applicant, had he been released, would have in any way obstructed the course of the trial. Nor did they mention any factor indicating that there was a risk of the applicant's tampering with evidence, absconding, going into hiding or evading any sentence that might be imposed." The Court found a violation on the grounds

also continue to be legitimate if the public order remains actually threatened, and this would be subject to the existence of "sufficient evidence," because the Court is of the opinion that even with respect to an offence as grave as participation in a terrorist attack, the prejudice to the public order disappears after a certain time.[287] The presumption of innocence and the rule of respect for individual liberty should prevail in all applications for release pending trial.[288] This did not happen in the case of *Harazin v. Poland*.[289] The Court found "a manifest disregard for the principle of the presumption of innocence" on the part of the District Court, according to which the detention for two years and eight months was justified, *inter alia,* because of the risk of detainee's tampering with evidence or absconding further aggravated by the fact that the applicant had not confessed fully.[290] In addition, circumstances of the case such the age of the detainee are also to be considered,[291] as is the complexity of the case when dealing with organized crime.[292]

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of the applicant's pre-trial detention of three years and over two months. *Id.* at para. 59. Case *available at* http://www.worldlii.org/eu/cases/ECHR/2006/462.html.

287 Tomasi v. France, ECtHR, Judgment of 27 August 1992, Series A, No. 241-A, at 36, para. 91.

288 Assenov and Others v. Bulgaria, *supra* note 278, at 3300, para. 154.

289 Harazin v. Poland, *supra* note 282.

290 *Id*. at para. 44.

291 Selcuk v. Turkey, *supra* note 267, in paragraph 36 the Court finds a violation of Article 5(3) reasoning as follows: "… having regard particularly to the fact that the applicant was a minor at the time, the Court finds that the authorities have failed to convincingly demonstrate the need for the applicant's detention on remand for more than four months."

292 In a recent case, while challenging government's arguments on the "complexity of a case" as a ground for reasonableness of detention, the Court argued that where there was no indication that the defendant was a member of an organized crime group, detention of two years and almost six months was unreasonable. In the Court's view, "[i]t does not appear therefore that his case presented particular difficulties for the investigation authorities and for the courts to determine the facts and the degree of responsibility of each accomplice, as would undoubtedly have been the case had the proceedings concerned organized crime." Telecki v. Poland, 56552/00 [2006] ECHR 695 (6 July 2006), para. 34, *available at* http://www.worldlii.org/eu/cases/ECHR/2006/695.html . Moreover, even in cases dealing with organized crime, the authorities are not given unlimited power to prolong detention. In the context of this study, it is worth considering how the Court reasoned regarding the complexity in dealing with organized crime: "…the judicial authorities relied on the fact that the applicant had been charged with being a member of an organized criminal group. In this regard, the Court considers that the existence of a general risk flowing from the organized nature of the alleged criminal activities of the applicant may be accepted as the basis for his detention at the initial stages of the proceedings (*Górski v. Poland*, No. 28904/02, § 58, 4 October 2005) and in some circumstances also for subsequent prolongations of the detention. It is also accepted that in such cases, involving numerous accused, the process of gathering and hearing evidence is often a difficult task. In these circumstances, the Court considers that the need to obtain voluminous evidence from many sources and to determine the facts and degree of alleged responsibility of each of the co-defendants, constituted relevant and sufficient grounds

Article 5(4)[293] in the interpretation of the European Court of Human Rights guarantees the arrested or the detained person *the right to institute proceedings for review by a court of the lawfulness of deprivation of liberty,* both procedurally and substantively[294] to prevent arbitrariness. This holds true also for the detention on remand which should be periodically reviewed in short intervals.[295] Thus in *Assenov and Others v. Bulgaria*, the Court found a violation of Article 5(4) because the detained was held in pre-trial detention for two years and his continued detention was only reviewed once and without oral hearing.[296] On the contrary, in cases when the lawfulness of a person's continued detention was examined several times throughout proceedings by competent authorities, the Court used this finding as an argument to challenge the allegations of an "unreasonable" detention.[297] As to the issue of the right to an *oral hearing*, the Court has interpreted that Article 5(4) requires "an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses"[298] particularly in cases involving potential long terms of imprisonment as well as in cases where the characteristics of the personality and level of maturity of the detained would play a role in deciding on the need for continued detention. Case law of the Court also shows that this provision has been interpreted in a way that it is necessary to give the detainee "the opportunity to appear at the same time as the prosecutor so that he [can] reply to his arguments,"[299] and a violation of article 5(4) has been found in cases where the principle of equality of arms had not been respected. The Court has also noted that further review of continued detention is necessary, and just because the initial detention was decided on by a court, this does not justify the lack of periodic review of

for the applicant's detention during the period necessary to terminate the investigation, to draw up the bill of indictment and to hear evidence from the accused. Moreover, the Court considers that in cases such as the present concerning organized criminal groups, the risk that a detainee if released might bring pressure to bear on witnesses or other co-accused, or might otherwise obstruct the proceedings, is in the nature of things often particularly high." In spite of this, the Court found a violation of Article 5(3), because the detention of four years was still not justified. *See Celejewski v. Poland*, No. 17584/04, 4 May 2006, para. 37, *available at* http://www.worldlii.org/eu/ cases/ECHR/2006/526.html. *See also Dudek v. Poland*, no. 633/03, 4 May 2006, para. 36, *available at* http://www.worldlii.org/eu/cases/ECHR/2006/527.html .

293 Article 5(4) of the ECHR states:

> 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.

294 Assenov and Others v. Bulgaria, *supra* note 278, at 3302, para. 162.

295 *Ibid.*

296 *Id*. at 3303, para. 165.

297 W.B. v. Poland, *supra* note 281, para. 68.

298 Hussain v. United Kingdom, ECtHR, Judgment of 21 February 1996, Reports 1996-I, at 271, paras. 59-60.

299 Kampanis v. Greece, ECtHR, Judgment of 13 July 1995, Series A, No. 318-B, at 48, para. 58.

lawfulness of detention. The Court goes even further stating that the same principles apply in certain circumstances to the detention after conviction by a court.[300] The *right to a speedy review by a court* in cases challenging continued detention guaranteed in Article 5(4) has been interpreted by the Court in several cases. An interval of one month was considered reasonable,[301] whereas a period of five and a half months from the time the detainee applied for review until the time the investigating judge dismissed the application was not considered sufficiently *speedy*.[302] In the case of *E. v. Norway*, [303] a period of eight weeks from the application to the judgment was found in violation of Article 5(4).

Article 5(5)[304] guarantees an *enforceable right to compensation*, and it can be considered to have been violated even in the cases where there is no enforceable claim for compensation before the domestic courts.[305] However, the Court has clarified that though "the status of 'victim' may exist even where there is no damage [resulting from the breach], … there can be no question of 'compensation' where there is no pecuniary or non-pecuniary damage to compensate."[306]

b. Due Process during Trial

Considered an omnibus provision,[307] and described as "a pithy epitome of what constitutes a fair administration of justice,"[308] Article 6 of the ECHR[309] provides for the

300 Iribarne Pérez v. France, ECtHR, Judgment of 24 October 1995, Series A, No. 325-C, at 63, para. 30.

301 Bezicheri v. Italy, ECtHR, Judgment of 25 October 1989, Series A, No. 164, at 11, para. 21.

302 *Id.* at 12, paras. 22-26.

303 E. v. Norway, ECtHR, Judgment of 29 August 1990, Series A, No. 181, at 28, para. 66.

304 Article 5(5) of the ECHR provides: "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

305 Brogan and Others v. United Kingdom, *supra* note 275, at 35, paras. 66-67.

306 Wassink v. Netherlands, ECtHR, Judgment of 27 September 1990, Series A, No. 185-A, at 14, para.38.

307 Francis G. Jacobs & Robin C.A. White, The European Convention on Human Rights 122 (1996).

308 J.J. Cremona, *The Public Character of Trial and Judgment in the Jurisprudence of the European Court of Human Rights*, in Protecting Human Rights-The European Dimension: Studies in Honor of Gérard J. Wiarda 107 (F. Matscher & Herbert Petzold eds., 1990).

309 Article 6 of the ECHR states:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

right to a fair trial. As one of the most vulnerable rights, it comes as no surprise that the Commission's and Court's jurisprudence on this article offer a wealth of clarified standards that have also served as models for other regional legal texts, as well as their respective monitoring bodies' jurisprudence. It is an article more cited and violated than any other.[310]

Article 6 (1) stipulates, *inter alia,* that "[i]n the determination of his civil rights and obligations or of any criminal charge against him,[311] everyone is entitled to *a fair and public hearing* within a reasonable time by an independent and impartial tribunal established by law." The Court has submitted that the prominent place held by the right to a fair trial in the administration of justice in a democratic society precludes a restrictive interpretation of Article 6 (1) otherwise any interpretation "would not correspond to the aim and the purpose of that provision."[312] In reasoning on the fairness of the trial, the European Court found a violation of Article 6 (1), in the case of *Botten v. Norway*,[313] where the domestic court had convicted the defendant without having summoned or heard him in person. The lack of a genuine possibility for the accused person to challenge evidence, cross-examine witnesses, and confront all charges, was

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and the facilities for the preparation of his defense;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

310 Garrone, *supra* note 247.

311 For a detailed analysis of the notions of *civil rights and obligations* as well as *criminal charge*, *see* Jacobs & White, *supra* note 307, at 128-136 (1996), noting, *inter alia*, that the Court has adopted "a liberal interpretation of the concept of civil rights and obligations." *Id.* at 130. As to the notion of criminal charge, it is noted that the concept is autonomous and that relevant considerations in its determination include "the nature of the offence charged, the severity of the sanction imposed, having regard in particular to any loss of liberty which was a characteristic of criminal liability, and the group to whom the offence applied. *Id.* at 134. Whereas the term "charge," according to the Court, is "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence." *Id.* at 135, quoting Eckle v. Germany, 5 EHRR 1 (1983), para. 73 of the judgment. *See also* Mole & Harby, *supra* note 277, at 11-18.

312 Delcourt v. Belgium, ECtHR, Judgment of 17 January 1970, Series A, No. 11, paras. 25-26.

313 Botten v. Norway, ECtHR, Judgment of 19 February 1996, Reports 1996-I, at 145, para. 53.

found to be in violation of the right to a fair trial in the case of *Bricmont v. Belgium*.[314] The Court has held the object and purpose of Article 6(1) and 6(3)(c)-(e) presuppose that the accused must be present at trial hearings,[315] and a trial in absence may only be permitted when the authorities have acted diligently to notify the accused but to no avail, or in the interest of the administration of justice in some cases of illness.[316]

In order to have a credible and effective administration of justice, it is adamant that the judicial proceedings be started and completed within a reasonable time. The notion of *"a reasonable time"* has been defined by the Court in terms of "the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the *complexity of the case, the applicant's conduct and that of the competent authorities."*[317] The Court has also clarified the concepts of *the start* and *the end* of the process. The start of the period has been considered the day in which a person is either charged, arrested, or committed for trial;[318] whereas the end of this period is usually the day when the judgment becomes final,[319] *i.e.* when the proceedings have concluded at the highest possible instance. The Court has further held that it is a duty of the states to organize their legal systems in a proper way, so that the requirement of reasonableness can be met by their courts.[320] The Court has also noted that the Convention "does not require a person charged with a criminal

314 Bricmont v. Belgium, ECtHR, Judgment of 7 July 1989, Series A, No. 158, at 30-31, paras. 84-85.

315 Ekbatani v. Sweden, ECtHR, Judgment of 26 May 1988, Series A, No 134, para 25.

316 Mole & Harby, *supra* note 277, at 38.

317 *See* Kemmache v. France, ECtHR, Judgment of 27 November 1991, Series A, No. 218, at 20, para. 50 (criminal); and Martins Moreira v. Portugal, ECtHR, Judgment of 26 October 1988, Series A, No. 143, at 17, para. 45 (civil); *emphasis added*. The *complexity of the case* can include issues of fact or of law, such as the nature of the facts to be established, the number of accused persons and witnesses, international elements, the relation of the case to other cases, and the intervention of other persons in the proceedings. The *conduct of the applicant* has to do with the requirement to refrain from using delaying tactics, bringing the case in the wrong court, submit pleadings long after lodging an appeal etc. However, this does not mean that the defendant has to cooperate actively in expediting the proceedings. The conduct of the authorities has to do with the principle of the proper administration of justice which implies that the cases be handled expeditiously, so that problems, either administrative or judicial, be avoided. Such issues include transfer of cases between courts, hearing of cases with multiple defendants, communication of judgment, and the hearing of appeals. Sometimes, political, social and economic background of the state also plays a role in determining the reasonableness of proceedings. *See* Mole & Harby, *supra* note 277, at 23-27.

318 *See*, respectively, Kemmache v. France, *supra* note 317, at 27, para. 59 (date of charge), Yagci and Sargin v. Turkey, *supra* note 284, at 20, para. 58 (date of arrest), and Mansur v. Turkey, ECtHR, Judgment of 8 June 1995, Series A, No. 319-B, at 51, para. 60 (committal for trial).

319 *See* Yagci and Sargin v. Turkey, *supra* note 284, at 20, para 58.

320 Mansur v. Turkey, *supra* note 318, at 53, para. 68.

offense to cooperate actively with the judicial authorities,"[321] or be penalized for taking full advantage of domestic resources for his defense.[322] The applicant could not be blamed for such conduct, nor could such conduct be considered a reason for any delay, unless it was a deliberate obstructive behavior. However, the Court has not stipulated any temporal scale or an absolute time-limit of reasonableness,[323] rather than the guidelines mentioned above, and all its findings are relative and decided flexibly on a case by case basis.[324] Overly lengthy proceedings constitute a violation of this provision even in cases where the accused is not in state custody.[325]

The Court has also argued that Article 6(1) imposes a duty for the courts to give reasons for the judgment they render. This is not only an important ingredient of the right to a fair trial, but also a requirement of a proper administration of justice. According to the European Court, "judgments of courts and tribunals should *adequately state the reasons on which they are based*."[326] This is particularly important for lower courts.[327]

The wording of the right to a *public hearing* in ECHR is the same as that of the ICCPR, and the interpretation of this right and the exceptions[328] to it has been virtually the same. In determining this right, the proceedings should be considered as a whole. It is of interest to note, however, that the European Court has argued that if there has been a public trial in the first instance, proceedings in appeal involving only

321 Yagci and Sargin v. Turkey, *supra* note 284, at 21, para. 66.

322 *Ibid.*

323 So for example violation was found in the case of Iletmis v. Turkey, ECtHR, Application No. 29871/96, Judgment of 6 December 2005. The proceedings had lasted 15 years at one level of jurisdiction, and such excessive period had failed to satisfy the reasonableness requirement for the trial of Nazmi Iletmis.

324 *See* European Criminal Procedures, *supra* note 256, at 49, also noting that the Convention and the Strasbourg case-law "have certainly made the contracting states more conscious of the problem of delay, and stimulated its legislators to find ways to overcome it."

325 So, in a case where the accused was under house arrest, a period of six years and nine months total length of criminal proceedings was considered to have had exceeded the "reasonable time" requirement of Article 6 (1). *See* Simonavicius v. Lithuania, 37415/02 [2006] ECHR 653 (27 June 2006), para. 42, *available at* http://www.worldlii.org/eu/cases/ECHR/2006/653.html.

326 García Ruiz v. Spain, ECtHR, Judgment of 21 January 1999, Reports 1999-I, at 97, para. 26 (*emphasis added*). *See also* prior cases such as Georgiadis v. Greece (1997) 24 EHRR 606, para. 42, and Van de Hurk v. Netherlands (1994) 18 EHRR 481, para. 61.

327 A discussion of this issue can be found in Jacobs & White, *supra* note 307, at 125-126 (1996).

328 Both Article 14(1) of the ICCPR and Article 6(1) of the ECHR provide that the press and public "may be excluded from all or part of" a trial for certain specified reasons, namely, in the interest of morals, public order or national security in a democratic society, in the interest of the parties' private lives, or where the interest of justice otherwise so requires. Particularly the European Convention specifies "the interest of juveniles" as a ground for non-publicity of the trial.

questions of law, as opposed to questions of fact,[329] could be held *in camera*, without violating Article 6.[330] If the appeal has to determine guilt or innocence of the accused, then issues of both fact and law are to be raised. Consequently, there might be a need for an oral public hearing in appeal, too.[331] Article 6(1) also provides for public pronouncements of judgments, which is considered by the court as very important "to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial."[332] The Court has interpreted this to mean either oral pronouncement of judgments, and/or depositing the judgments in registry, where they can be accessible to the public.[333] Where this has not been the case, the Court found a violation of Article 6(1).[334] The public availability of judgments is important in building public confidence in the administration of justice. The Court has also held that there is a right of the defendant to waive his right to a public hearing in as far as the waiver is "made in an unequivocal manner" and that it does not "run counter to any important public interest."[335]

Article 6(1) also provides for a fair and public hearing by an *independent and impartial tribunal established by law.* This article not only relates to the separation of powers between the judiciary and the executive, but also to a necessary separation of the functions of investigating, prosecuting and judging within the criminal procedure.[336] This requirement is part and parcel of a fair hearing. There can be no independence of a court if some other authority will have the power to question the finality and the content of a court decision and decide on the execution or non-execution of a judgment: it is the court that must have the power to give binding

329 A violation was found in the case of *Weber v. Switzerland*, where there had been no public trial in the first instance, though subsequent proceedings in the Federal Court were public. The Court argued that the Federal Court "could only satisfy itself that there had been no arbitrariness" but was not competent to "determine all the disputed questions of fact and law." *See* Weber v. Switzerland, ECtHR, Judgment of 22 May 1990, Series A, No. 177, at 20, para. 39.

330 Bulut v. Austria, ECtHR, Judgment of 22 February 1996, Reports 1996-II, at 358, para. 41.

331 *See* Fredin v. Sweden (No. 2*)*, (20/1993/415/494), 23 February 1994, at 6-7.

332 Pretto and Others v. Italy, ECtHR, Judgment of 8 December 1983, Series A, No. 71, at 13, para. 27.

333 *Id.* at 12, paras. 25-26.

334 *See* Werner v. Austria, Application No. 21835/93 [1997] ECHR 92, ECtHR, Judgment of 24 November 1997, where there had been no public pronouncement of judgment; Szucz v. Austria, (Application No. 20602/92), ECtHR, Judgment of 24 November 1997, where there had been no public delivery of judgments in two sets of proceedings to claim compensation for detention.

335 Håkansson and Sturesson v. Sweden, Application No. 11855/85, ECtHR, Judgment of 21 February 1990, para. 66.

336 *See* European Criminal Procedures, *supra* note 256, at 48, referring to Borgers v. Belgium, (1991) 15 EHRR 92, Piersack v. Belgium, (1982) 5 EHRR 169, and De Cubber v. Belgium (1984), 7 EHRR 236.

decisions that cannot be altered by non-judicial authority.[337] Also, there is no fairness in a trial if the tribunal is biased.[338] Thus, the European Court in considering the term "independent tribunal" for the purposes of Article 6(1), has stated the importance of "the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence."[339] Reasoning about appointment of members of a tribunal, the Court has noted that establishing a tribunal motivated by the desire to influence the outcome is against Article 6; conversely, fixed terms for members of a court are a guarantee of independence.[340]

The notions of independence and impartiality are typically considered interrelated and the Court has made an attractive interpretation as to *impartiality*. The Court considers *impartiality* to contain a subjective element meaning that "no member of the tribunal should hold any personal prejudice or bias," and an objective element, which asks that the tribunal members also "be impartial from an objective viewpoint," in that "it must offer guarantees to exclude any legitimate doubt in this respect."[341] Regarding the objective test, the Court went on reasoning that it must be determined whether there are ascertainable facts which may raise doubts as to the impartiality of the judges. In the case of *Sander v. United Kingdom,*[342] the court held that the applicant's right to an impartial tribunal was violated because of allegations of racism on the part of the jurors, and the failure of the judge to take necessary action that would convince the applicant that he was not being tried based on his ethnicity. When it comes to independence and impartiality of the tribunal, the Court notes that "even appearances[343] may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and

337 *See* Findlay v. United Kingdom, Application No. 22107/93, ECtHR, Judgment of 25 February 1997, para. 77: "[T]he convening officer also acted as 'confirming officer'. Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit."

338 There is a presumption of personal impartiality (lack of bias) of a judge until evidence is brought to the contrary, and in practice it is very difficult to prove that. No such claims have ever been successful in the Court. However, the Court has held that cases of complaint about impartiality by the defendant must be investigated unless they are *manifestly devoid of merit*. Mole & Harby, *supra* note 277, at 29-30.

339 Incal v. Turkey, ECtHR, Judgment of 9 June 1998, Reports 1998-IV, p. 1571, para. 65, confirming earlier jurisprudence in the case of *Campbell and Fell v. United Kingdom*, Judgment of 28 June 1984, Series A, No. 80, para. 78.

340 For an overview of this provision and its interpretation, see Mole & Harby, *supra* note 277, at 28-34.

341 Daktaras v. Lithuania, Application No. 42095/98, ECtHR, Judgment of 10 October 2000, para. 30.

342 Sander v. United Kingdom, Application 34129/96, ECtHR, Judgment of 9 May 2000, ECHR 2000-V.

343 In the case of *Oberschlick*, the Court concluded that Article 6(1) had been violated for lack of impartiality because a judge who had taken part in a decision quashing an order dismissing criminal proceedings, sat later in the hearing of an appeal against the appli-

above all, as far as criminal proceedings are concerned, in the accused .... In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified."[344] This was the case in *Daktaras v. Lithuania,* where the Court found a violation, because the applicant's doubts as to the impartiality of the Lithuanian Supreme Court "may be said to have been objectively justified."[345] The same conclusion was reached in a most recent case against Turkey, where the defendants were arrested and taken into custody by the Anti-Terror branch of the İzmir Security Directorate on suspicion of aiding and abetting an illegal organization.[346] Importance is also attached to the establishment of procedures according to which judges could recuse themselves from the adjudication of cases they have some connection with.[347] First and foremost, the right to a fair trial demands of judges to be on the alert to respect the right, because they are the ones vulnerable to violating it.[348]

The presumption of innocence as an overall guarantee from suspicion to conviction or acquittal is a foundational principle provided for in Article 6(2). This provision is crucial in deciding upon the deprivation of liberty awaiting trial and the right to bail, in protecting the reputation of the accused until conviction or acquittal, as well as in order not to compromise the independence and impartiality of courts. The ECtHR has explained that this provision must be "practical and effective as opposed to theoretical and illusory."[349] The Court has found a violation in cases where the presumption of innocence has been compromised by comments of judges, courts[350]

cant's conviction. *See* Oberschlick v. Austria (1), ECtHR, Judgment of 23 May 1991, Series A, No. 204, at 13, para. 16 and at 15 para. 22.

344 *Incal v. Turkey, supra* note 339, at 1572-1573, para. 71.

345 *Daktaras v. Lithuania, supra* note 341, at para. 38.

346 *See* Kezer and Others v. Turkey, 58058/00 [2006] ECHR 69 (24 January 2006), *available at* http://www.worldlii.org/eu/cases/ECHR/2006/69.html. In paragraph 25, the Court noted that "it is understandable that the applicants – prosecuted in a State Security Court for offences relating to 'national security' – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service. On that account they could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. Consequently, the applicants' doubts about that court's independence and impartiality may be regarded as *objectively justified*"*(emphasis added).*

347 *See* Jacobs & White, *supra* note 307, at 139. Such connections could be a personal interest, no matter how scrupulously the case is handled, the involvement of a judge in pretrial stages, etc. *Ibid.*

348 Garrone, *supra* note 247.

349 Allenet de Ribemont v. France, ECtHR, Judgment of 10 February 1995, Series A, No. 308, at 16, para. 35.

350 Minelli v. Switzerland, ECtHR, Judgment of 25 March 1983, Series A, No. 62. On page 18, paragraph 38, the Court noted that "the Chamber of the Assize Court showed that it was satisfied of the guilt of the applicant, who "had not had the benefit of the guarantees

or other public authorities.[351] The influence of the Convention and the Strasbourg jurisprudence have been indispensable in bringing several municipal laws to lift the burden of proof of innocence from the defense,[352] in cases when pressure of public opinion has influenced the legislators to enact laws in which the accused would have to prove his innocence.[353]

Article 6(3)(a) provides the right of a person charged with a criminal offence "*to be informed promptly, in a language which he understands* and in detail, of the nature and cause of the accusation against him." The Court found a violation of the above provision in the case of *Brozicek v. Italy*,[354] where the accused was not given notification of the charges brought against him in his language, though he had informed the authorities of the difficulties he had in understanding the charges in the Italian language. The Court has also held that lack of written translation of the indictment might put an accused in a disadvantaged position, if he does not understand the language of the court.[355]

The right of the accused to have *adequate time and facilities for the preparation of his defense* is guaranteed in Article 6(3)(b), and it should be closely examined together with Article 6(3)(c), which guarantees the right of the accused "*to defend himself in person or through legal assistance of his own choosing* or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." There are a number of issues contained in these paragraphs that the Court has addressed in its jurisprudence. Thus, in the case of *Pelladoah v. the Netherlands*[356] the Court held that even if an accused refuses to appear in person, his right to be defended by a lawyer is retained, because "it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so."[357] Though the Convention does not expressly provide for a right to communicate with counsel

contained in" article 6(1) and (3); the Chamber's appraisals were thus "incompatible with respect for the presumption of innocence."

351 *Id.* at para. 36. The European Court found a violation of article 6(2) in this case, noting that "some of the highest-ranking officers in the French police referred to Mr. Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder". The Court saw this as "a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority." *Id.* at 17, para 41.

352 In the context of suspicion of terrorism-related acts and the burden of proof in the U.K., see Michael Arnheim, The Handbook of Human Rights Law: An Accessible Approach to the Issues and Principles 33-35 (2004).

353 *See* European Criminal Procedures, *supra* note 256, at 597.

354 Brozicek v. Italy, ECtHR, Judgment of 19 December 1989, Series A, No. 167.

355 *See* Kamasinski v. Austria, ECtHR, Judgment of 19 December 1989, Series A, No. 168.

356 Pelladoah v. the Netherlands, ECtHR, Judgment of 22 September 1994, Series A, No. 297-B, at 35, para. 40.

357 *Id.* at para. 41.

without hindrance, the Court has reasoned that as soon as he is imprisoned, the accused is entitled to legal counsel of his choice,[358] and to free legal aid when necessary. The Court, however, brings forth the notion of "restriction for good cause" to the right of assistance by a lawyer at the initial stages of police interrogation, always bearing in mind that, in its entirety, it should not deprive the accused of a fair hearing.[359] It is interesting to note the very narrow consideration of *good cause* by the Court in the case of *John Murray v. The United Kingdom*,[360] where the applicant was refused access to a lawyer for the first 48 hours of his detention, related to charges of acts of terrorism. The arrested was cautioned that if he chose to remain silent, inferences could be drawn as evidence against him. Under these circumstances, the Court reasoned that "to deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defense may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6."

Article 6(3)(c) also guarantees *free legal aid* if the accused does not have sufficient means to pay for legal assistance, in cases when the interests of justice so require. In clarifying the "interests of justice," the Court has established certain criteria that deal with the seriousness of the offence committed, the severity of the sentence to be expected for such an offence, and the complexity of the case.[361] The Court also observes that the legal aid available must be effective, and not merely nominated, as it was in the case of *Artico v. Italy*.[362]

The accused is also entitled "*to receive visits from his legal adviser* with a view to his defense and to prepare and hand to him, and to receive, *confidential* instructions. At his request he shall be given all necessary facilities for this purpose. In particular, he shall be given the *free assistance of an interpreter* for all essential contacts with the administration and for his defense. Interviews between the prisoner and his legal adviser may be within sight but *not within hearing*, either direct or indirect, of a police or institution official."[363] This need for confidentiality stems from the necessity to guarantee rights that are practical and effective, so that the right to access to legal aid is not rendered futile through surveillance by the authorities.[364] These trial guarantees are important in pre-trial stages, as they would ensure a subsequent fair

358 John Murray v. The United Kingdom, ECtHR, Judgment of 8 February 1996, Reports 1996-I. In this case the Court reasoned that "Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation." *Id*. at 54-55, para. 63.

359 *Ibid.*

360 *Ibid.*

361 Quaranta v. Switzerland, ECtHR, Judgment of 24 May 1991, Series A, No. 205 at 17, paras. 32-34.

362 Artico v. Italy, ECtHR, Judgment of 13 May 1980, Series A, No. 37, at 16, para. 33.

363 S. v. Switzerland, ECtHR, Judgment of 28 November 1991, Series A, No. 220, at 15, para. 48, *emphasis added*.

364 *Id.* at 16, para. 49.

trial, and any initial failure to comply with such guarantees would critically distort the fairness of the trial.[365]

The right to *"free assistance of an interpreter if he cannot speak the language used in court"* is provided for in Article 6(3)(e), and the Court has held that it is an important component of the right to a fair trial and it "signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial."[366]

Article 6(3)(d) ensures that the accused and the prosecution stand on an equal footing as regards the calling and examination of witnesses. It enshrines the principle of the equality of arms and the right of *adversarial questioning of witnesses.* In arguing the policy grounds of this provision the Court held that this right requires that "an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings…."[367] This interpretation challenged the French tradition of treating written statements of witnesses as evidence without bringing them to testify orally.[368] Accordingly, the Court found a violation of this provision where the defense had not been given the opportunity to challenge the credibility of the witnesses who had given their testimony at the stage of police investigation.[369] However, the Court has stated that the right to call witnesses is not without restriction. The qualification of this interpretation is that the testimony of a certain witness will help to establish the truth, otherwise the court can refuse to hear the statement if irrelevant to the truth.[370] The defendant's right to a fair trial and the principle of equality of arms is also denied when the case was decided on the basis of evidence of which the defense was unaware,[371] or when the prosecution had withheld material

365 Murray v. The United Kingdom, *supra* note 358, at 54, para. 62.

366 Luedicke, Belkacem and Koç, ECtHR, Judgment of 28 November 1978, Series A, No. 29, at 20, para. 48.

367 Delta v. France, ECtHR, Judgment of 19 December 1990, Series A, No. 191-A, at 16, para. 36.

368 For more on practical effects of the ECHR and the Strasbourg case-law on the criminal procedure of certain European countries, see European Criminal Procedures, *supra* note 256, at 46-50.

369 *See also* Unterpertinger v. Austria, ECtHR, Judgment of 24 November 1986, Series A, No. 110, where the Court found a violation of Article 6 (1) and (3) (d) because the applicant " had not had an opportunity at any stage in the earlier proceedings to question the persons whose statements [were] read out at the hearing." *Id.* at 14-15, para. 31.

370 *See* Jacobs & White, *supra* note 307, referring to Wiechert v. Federal Republic of Germany, 7 March 1964, (1964) 7 Yearbook 104, at 112.

371 *See* Brandstetter v. Austria, 11170/84; 12876/87; 13468/87 [1991] ECHR 39 (28 August 1991). In this case the prosecutor, in conformity with the Austrian law, had filed a "*croquis*" (the prosecutorial observations) with the trial court, without notifying the defendant, or providing him a copy. The judgments of the trial court and appellate court both relied upon

evidence from the defense and had not consulted the judge about this,[372] or when evidence is taken by the judge in the absence of the defendant,[373] aiming to avoid intimidation of the witness, but resulting in lack of opportunity on the part of the defendant to challenge the statement of such witness.

Relevant to pre-trial investigation guarantees is also paragraph (g) of Article 6(3), the right *"not to be compelled to testify against himself or to confess guilt,"* otherwise known as the right to remain silent, which prohibits any exertion of pressure on the suspected persons to force them to confess guilt. Extreme violations of such guarantees would be *incommunicado* detentions during which the suspected are ill-treated and tortured to have them confess guilt.[374] The Court was adamant in its reasoning regarding this issue when it stated that "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. ... By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6."[375]

Before analyzing the trial guarantees, it would be of significance to see how the Court has dealt with several issues related to the observance of certain human rights, which could be of interest within the scope of this study, during criminal investigations. Article 3 enshrines one of the most fundamental values of democratic societies. The Court has noted that "[e]ven in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."[376] In order to avoid rep-

this *ex parte* filing. Though it was legal under Austrian law to not serve the defendant with the pleading, it was improper under the ECHR, Art. 6 § 1 of which requires that the defendant formally know of any evidence and argument submitted to the court. *Id*. paras. 67-69.

372 Rowe and Davis v. United Kingdom, 28901/95 [2000] ECHR 91 (16 February 2000), para. 54. The Court noted "a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the …requirements of Article 6 § 1." *Id*. at para. 63.

373 *See* Asch v. Austria, Judgment of 26 April 1991, Series A, No. 203-A; 15 EHRR 597 (1993).

374 *See* Communication No. 139/1983, H. Conteris, Views adopted on 17 July 1985, UN Doc. GAOR, A/40/40, at 202, para. 10 read in conjunction with at 201, para. 9.2. *See also* Communication No. 159/1983, R. Cariboni v. Uruguay, Views adopted on 27 October 1987, UN Doc. GAOR, A/43/40, at 190, para. 10.

375 John Murray v. The United Kingdom, *supra* note 358, at 49, para. 45. The Court went on to reason that what was at stake was "whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as 'improper compulsion.'" *Id.* at para. 46.

376 Ramirez Sanchez v. France, 59450/00 [2006] ECHR 685 (4 July 2006), para. 115, *available at* http://www.worldlii.org/eu/cases/ECHR/2006/685.html.

etition, I will not deal at length with *prohibition of torture*, as a well-established *erga omnes* obligation on the part of the states.[377] However, it is important to note that the court has established certain principles regarding determinations on allegations of ill-treatment. So, any such allegations must be supported by appropriate evidence.[378] In assessing such evidence, the Court adopts the standard of proof "beyond a reasonable doubt," which means the burden of proof rests with the defendant. In cases dealing with persons in state's custody the Court notes that "strong presumptions of fact will arise in respect of injuries occurring during such detention,"[379] shifting the burden of proof to the authorities, which are required to provide an acceptable and persuasive explanation,[380] otherwise "strong presumptions of fact will arise in respect of injuries occurring during such detention."[381] In one of the most recent decisions, the Court noted that prolonged solitary confinement could potentially amount to inhuman treatment in cases related to persons placed under judicial investigation and then convicted in connection with a series of terrorist attacks. Finding no violation of Article 3 in the case of *Ramirez Sanchez v. France,*[382] where the solitary confinement was applied for eight years and two months, pre-trial and after, the Court reasoned that it "accepts that the applicant's detention posed serious problems for the French authorities. The applicant, who was implicated in various terrorist attacks that took place in the 1970s, was at the time considered one of the world's most dangerous terrorists. It is to be noted on this point that on the many occasions he has since had to state his views (in his book, newspaper articles and interviews) he has never disowned or expressed remorse for his acts. Accordingly, it is understandable that the authorities should have considered it necessary to combine his detention with extraordinary security measures."[383] The Court took into account the Government's

377 The jurisprudence of the Court is consistent on this issue. It has constantly reiterated that it is the obligation of government authorities not only to refrain from any form of inhuman treatment, but also to investigate any allegations of torture and inhuman, degrading treatment, as well as to account for any injuries caused to persons within their control in custody. *See* recently the case of Yavuz v. Turkey, 67137/01, 10 January 2006, [2006] ECHR 23, para. 38, *available at* http://www.worldlii.org/eu/cases/ ECHR/2006/23.html, reiterating *mutatis mutandis*, Berktay v. Turkey, No. 22493/93, 1 March 2001, para. 168, and Çolak and Filizer v. Turkey, Nos. 32578/96 and 32579/96, 8 January 2004, para. 168. *Id.* at para. 42.

378 *See* Klaas v. Germany, ECtHR, Judgment of 22 September 1993, Series A, No. 269, at 17-18, para. 30.

379 Mikheyev v. Russia, 77617/01 [2006] ECHR 78 (26 January 2006), para. 102, *available at* http://www.worldlii.org/eu/cases/ECHR/2006/78.html.

380 Salman v. Turkey [GC], No. 21986/93, § 100, ECHR 2000-VII. In the absence of such explanation, the Court can draw inferences which may be unfavorable for the respondent Government. *Mikheyev v. Russia*, *supra* note 379, para.102. *See also* Orhan v. Turkey, No. 25656/94, 18 June 2002, para. 274.

381 Mikheyev v. Russia, *supra* note 379, para. 102.

382 Ramirez Sanchez v. France, *supra* note 376.

383 *Id.* at para. 125. However, the Court condemned practices such as strip searches. *See* Sylla v. The Netherlands, 14683/03, 6 July 2006, [2006] ECHR 694, para. 61, the Court found

concerns that the defendant could use outside communications to re-establish contact with members of his terrorist cell, and inside communications to proselytize among other prisoners or to prepare an escape.

Wire tapping is the first issue to be dealt with in this paragraph, and the Court has held that telephone tapping amounts to "an interference by a public authority" with the applicant's right to respect for his or her correspondence and private life,[384] unless it is done "in accordance with the law", pursuing one or more of the legitimate aims and is necessary in a democratic society.[385] Of particular importance is the Court's reference to "the quality of the law, requiring it to be compatible with the rule of law,"[386] which would guard against arbitrary interferences and provide adequate legal safeguards against abuse. In the Court's view, in cases where the law bestows upon authorities a power of discretion, the law must also "indicate the scope of that discretion."[387] The Court has also cautioned against practices in which "a very large number of people are deprived of the protection of the law...[which] would in practice render the protective machinery largely devoid of substance,"[388] and that it is necessary in a democratic society that such interceptions of communications must be strictly interpreted in favor of the right to privacy.

The Court's jurisprudence sheds light on the issue of *interference with correspondence* in cases of individuals deprived of their liberty. In a case where two persons detained on remand exchanged letters which included "criticisms of prison conditions and in particular the behavior of certain prison officers," the Court found a violation of Article 8, considered that tampering with them was not justified and though "some of the expressions used were doubtless rather strong ones, ... they were part of a private letter which under the relevant legislation ... should have been read by [the addressee] and the investigating judge only."[389] Of even greater importance is corre-

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the practice of weekly routine strip-searches to amount to treatment contrary to Article 3. *Available at* http://www.worldlii.org/ eu/cases/ECHR/2006/694.html.

384 Article 8 of the ECHR states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

385 For a detailed analysis of the Court's jurisprudence regarding these limits, see Pati, *supra* note 249, at 250-257 (2005).

386 Huvig v. France, ECtHR, Judgment of 24 April 1990, Series A, No. 176-B, at 54, para. 29.

387 Malone v. United Kingdom, ECtHR, Judgment of 2 August 1984, Series A, No. 82, at 56, para. 34.

388 Lampert v. France, ECtHR, Judgment of 24 August 1998, Reports 1998-V, at 2241-2242, paras. 38-40.

389 Pfeifer and Plankl v. Austria, ECtHR, Judgment of 25 February 1992, Series A, No. 227, at 19, para. 47.

spondence between a lawyer and a person detained on remand. The Court found the state in violation of Article 8 because of the fact that the district prosecutor withheld the letter sent to the detained by his potential lawyer.[390]

The prohibition of retroactivity of criminal laws is guaranteed in Article 7(1).[391] Like the ICCPR, it refers to acts that did not constitute a criminal offence under *national or international law* at the time committed, and it is not susceptible to derogation under Article 15. This provision enshrines the principle of legality, *i.e.* that an offense must be clearly defined in law. The Court has interpreted this article to embody "the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), as well as the principle that the criminal law must not be extensively construed to an accused's detriment, for instance, by analogy,"[392] affecting thus both the legislature and the courts' interpretation of criminal law. It excludes any broad construction of criminal legislation.[393] The notion of *national or international law* complements the principle of legality, that penal consequences exist even if a conduct is not an offence prescribed in municipal law, but constitutes a crime under international law, as well as it potentially extends national courts' jurisdiction over crimes against international law. This notion is further elaborated in Article 7(2) by mention of general principles of law recognized by civilized nations.

Another vital principle in the administration of criminal justice is the *prohibition of double jeopardy.* This is guaranteed in Article 4[394] of Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms, which in paragraph 2 also states that there could be a re-opening of the case if there is evidence of new facts, or if there was a fundamental defect in previous proceedings. This provision is unique in the sense that in its paragraph 3 it states *expressis verbis* that the principle is

390 Schönenberg and Durmaz, ECtHR, Judgment of 20 June 1988, Series A, No. 137.

391 Article 7(1) of the ECHR states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

392 Kokkinakis v. Greece, ECtHR, Judgment of 25 May 1993, Series A, No. 260-A, at 22, para. 52.

393 For a detailed discussion of the interpretation of the criminal law, see Jacobs & White, supra note 307, at 164-166.

394 Article 4 of Protocol No. 7 to the ECHR, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/ 117.htm, states:

> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention.

non-derogable. In the case of *Oliveira v. Switzerland*,[395] the Court interestingly argues that Article 4 of Protocol No. 7 "prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concours idéal d'infractions*) one criminal act constitutes two separate offences."[396]

As to *punishments,* the Court has been adamant against judicial corporal punishment. It has argued against it in the following terms: "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalized violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. ... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity."[397]

c. Due Process in Appeal

No conviction acquires the status of *res judicata* until all appeals have been concluded, or until the time for appeal expires. The right to appeal is guaranteed in Article 2[398] of Protocol No. 7 to the Convention, though the Convention does not, *per se*, provide for it.[399] However, in paragraph 2 of the same provision there is a qualification which provides for exceptions to this right "in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried

395 Oliveira v. Switzerland, ECtHR, Judgment of 30 July 1998, Reports 1998-V.

396 *Id*., at 1998, para. 26.

397 Tyrer v. The United Kingdom, ECtHR, Judgment of 25 April 1978, Series A, No. 26, at 16, para. 33. In the same paragraph the Court went on arguing "Neither can it be excluded that the punishment may have had *adverse psychological effects*. The institutionalized character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender. Admittedly, the relevant legislation provides that in any event birching shall not take place later than six months after the passing of sentence. However, this does not alter the fact that there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Accordingly, in addition to the physical pain he experienced, Mr. Tyrer was *subjected to the mental anguish of anticipating the violence* he was to have inflicted on him" (*emphasis added*).

398 Article 2 of Protocol No. 7 to the ECHR provides that:

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

399 Tolstoy Miloslavsky v. United Kingdom, ECtHR, Judgment of 13 July 1995, Series A, No. 316-B, at 79, para. 59.

in first instance by the highest tribunal or was convicted following an appeal against acquittal." Nevertheless, the Court has constantly mandated that "a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees" of Article 6 and has clarified that "the manner of application of Article 6 to proceedings before such courts depends on the special features of the proceedings involved" and "account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein."[400] Actually, the guarantees of Article 6 apply equally to court proceedings as well as to procedures that precede and follow them.[401] The Court found a violation of this provision in cases when the prosecution was in a more advantaged position than the defense, by joining in the deliberation of judges when deciding on how to dispose of the appeal.[402]

3. The Inter-American Convention on Human Rights and the Jurisprudence of the Commission and the Court

a. Due Process before Trial

The American Convention on Human Rights deals with the right to personal liberty and security, also providing for guarantees against arbitrary arrest and detention in its Article 7.[403]

The Inter-American Court on Human Rights (IACtHR) has interpreted the issue of the legality of detention, both substantively and procedurally, in the case of *Gangaram Panday v. Suriname*,[404] and has held that paragraphs two and three of Article 7 guarantee that "no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the funda-

400 *Ibid*.

401 For several illustrations on guarantees of Article 6 *see* Mole & Harby, *supra* note 277.

402 The Court actually reconsidered its previous decision of Delcourt v. Belgium, *supra* note 312, that considered the general prosecutor as impartial, and noted the importance of "appearances" and "increased sensitivity of the public to the fair administration of justice." *See* Borgers v. Belgium, 12005/86 [1991] ECHR 46 (30 October 1991), para. 24.

403 Article 7 of the American Convention on Human Rights, *inter alia*, states:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

404 Gangaram Panday v. Suriname, IACtHR, Judgment of January 21, 1994, OAS Doc. OAS/Ser.L/V/III.31, Doc. 9, Annual Report of the Inter-American Court of Human Rights 1994, at 32.

mental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality."[405] In this reasoning, the Court emphasizes the need for not merely existence of a law, but for a certain quality of the law, which has to be appropriate, just, foreseeable and complying with due process of law. The Court has also found violations of Article 7(1), (2) and (3) in cases of arrest and detention without a written order issued by a judicial authority,[406] and in cases when detention, prosecution and conviction proceeded in defiance of a judicial order of release.[407] Within the realm of Article 7, the Inter-American Court of Human Rights has reasoned against *incommunicado* detention and forced disappearances. In the *Velásquez Rodríguez* Case,[408] the Court held that "[t]he kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of article 7 of the Convention."

The Inter-American Commission on Human Rights in interpreting the guarantees offered by Article 7(5)[409] has stated that if a court is not officially informed of a detention or is informed only after significant delay, the rights of a detainee are not protected. That would also lead to other types of abuses, erode respect for the courts and their effectiveness and institutionalize lawlessness.[410] The Commission has also stated that a detainee should be brought before a judge or other judicial authority "as soon as it is practicable to do so" and that "delay is unacceptable."[411] In its Seventh Report on the Situation of Human Rights in Cuba the Commission pointed out that in Cuba, "in theory, the law allows for a detainee to remain in prison for a week without appearing before a judge or court competent to hear his case. In the opinion of the Commission, this is an excessively prolonged period."[412]

405 *Id.* at para. 47.

406 Castillo Páez v. Peru, IACtHR, Judgment of November 3, 1997, OAS Doc. OAS/Ser.L/V/III.39, Doc. 5, Annual Report Inter-American Court of Human Rights 1997, at 263, para. 56.

407 Cesti Hurtado v. Peru, IACtHR, Judgment of September 29, 1999, OAS Doc. OEA/Ser. L/V/III.47, Doc. 6, Annual Report Inter-American Court of Human Rights 1999, at 445, paras. 141-143.

408 Velásquez Rodríguez v. Honduras, IACtHR, Judgment of July 29, 1988, Series C, No. 4, at 146-147, paras. 154-155.

409 Article 7(5) of the ACHR provides:

> Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

410 Inter-American Commission, Second Report on the Human Rights Situation in Suriname, OEA/Ser. L/V/II.66, Doc. 21 rev. 1, 1985, at 23.

411 Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc 10, rev.1 at 73, 24 April 1997.

412 Inter-American Commission, Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61, Doc.29, rev.1, at 41

The Inter-American Court of Human Rights (IACtHR) interprets Article 7(6)[413] jointly with Article 25,[414] which guarantees judicial protection. Like the HRC, the Inter-American Court places utmost importance on the existence of effective remedies to violations of rights, and the mere existence of remedies in the law is not enough. In the case of *Castillo Petruzzi et al. v. Peru,*[415] the Court argues that "the right to a simple and prompt recourse or any other effective remedy filed with the competent court that protects that person from acts that violate his basic rights is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention,"[416] and that such a right can not be derogated from or suspended under any circumstances.[417] In this case, the Court found a violation of both Article 7(6) and Article 25, because the victims had no possibility of recourse to judicial guarantees. The domestic law that regulated the crime of treason "denied persons suspected of terrorism or treason the right to bring actions seeking judicial guarantees," and another law amended the Habeas Corpus and Amparo Act to the effect that "the writ of *habeas corpus* was impermissible when *petitioner's case is in its examining phase or when petitioner is on trial for the very facts against which remedy is being sought*." The applicants were subsequently convicted of treason by a "faceless" military tribunal.

In the case of *Suárez Rosero v. Ecuador,* stressing that the remedies guaranteed in article 7(6) "must be effective, since their purpose… is to obtain without delay a decision *on the lawfulness of [his] arrest or detention*, and, should they be unlawful,

413 Article 7(6) of the ACHR provides:

> 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.

414 Article 25 of the ACHR states:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
> 2. The States Parties undertake:
> a. To ensure that any person claiming such remedy shall have his right determined by the competent authority provided for by the legal system of the State;
> b. To develop the possibilities of judicial remedy; and
> c. To ensure that the competent authorities shall enforce such remedies when granted.

415 Castillo Petruzzi et al. v. Peru, IACtHR, Judgment of May 30, 1999, OAS Doc. OEA/Ser. L/V/III.47, Doc. 6, Annual Report of the Inter-American Court of Human Rights 1999.

416 *Id.* at 276, para. 184.

417 *Id.* at 277, para. 186.

to obtain, also without delay, an order [for] his release,"[418] the Court also noted that "in order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him."[419] The Court has also found a violation in a case where the Peruvian military did not obey the decision of the Public Law Chamber of the Superior Court of Justice in Lima which upheld a petition for *habeas corpus*, and went on with the arrest.[420]

Access to legal counsel during pre-trial, though not expressly stated in the ACHR, is considered important by the Inter-American Commission, which has stated that the right to defend oneself requires that an accused person has access to legal assistance when first detained, and that a law which prohibits a detainee from access to counsel during detention and investigation could seriously encroach on the right to defense.[421]

b. Due Process during Trial

The most elaborate article providing for a fair trial in the American Convention is Article 8,[422] which, *inter alia*, states that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and

418 Suárez Rosero v. Ecuador, IACtHR, Judgment of November 12, 1997, OAS Doc. OAS/Ser. L/V/III.39, Doc. 5, Annual Report of the Inter-American Court of Human Rights 1997, at 298, para. 63.

419 *Ibid.*

420 Cesti Hurtado v. Peru, *supra* note 407, at 443, para. 133.

421 Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, 1986, at 154, El Salvador.

422 Article 8 of the ACHR states:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
   (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
   (b) prior notification in detail to the accused of the charges against him;
   (c) adequate time and means for the preparation of his defense;
   (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
   (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

impartial tribunal, previously established by law." Among these due guarantees, in the case of *Villagrán Morales et al. v. Guatemala*,[423] the Inter-American Court noted that "it is evident from article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation."[424]

Article 8(1) refers to a *competent, independent, and impartial tribunal, previously established by law,* and the Court has recommended that the member States of the OAS "take the steps necessary to protect the integrity and independence of members of the Judiciary in the performance of their judicial functions, and specifically in relation to the processing of human rights violations; in particular, judges must be free to decide matters before them without any influence, inducements, pressures, threats or interferences, direct or indirect, for any reason or from any quarter."[425] The Court has further elaborated that the independence of any judge is preconditioned by an adequate process of appointment ("*un adecuado proceso de nombramiento*"), for a period in the post ("*con una duración en el cargo*") and with guarantees against external pressures ("*con una garantía contra presiones externas*").[426]

The right of the accused to be assisted without charge by a translator or interpreter, guaranteed in Article 8(2)(a), has been interpreted by the Inter-American Commission to include the right to translation of documents, and it has been considered to be fundamental to due process.[427]

Within the pre-trial rights included in this provision is Article 8(2)(b), providing for "prior notification in detail to the accused of the charges against him." The Court found a violation of the above provision in a case, where the indictment was presented

(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(g) the right not to be compelled to be a witness against himself or to plead guilty;

(h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

423 Villagrán Morales et al. (The "Street Children" Case) v. Guatemala, IACtHR, Judgment of November 19, 1999, Series C, No. 63.

424 *Id.* at 195, para. 227.

425 OAS Doc. OEA/Ser.L/V/II.95, Doc. 7 rev., Annual Report of the Inter-American Commission on Human Rights 1996, at 761.

426 Constitutional Court Case (Aguirre Roca, Rey Terry and Revorado Marsano v. Peru), IACtHR, Judgment of 31 January 2001, para. 75 (*Spanish version*). *Available at* http://www.corteidh.or.cr/ serie_c/C_71_ESP.html.

427 *See* Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, Doc.10, rev. 3, 1983. *Available at* http://www1.umn.edu/humanrts/ iachr/country-reports/nicaragua1983.html .

only one day before judgment was rendered, so in the Court's view "the accused did not have sufficient advance notification, in detail, of the charges against them."[428] This of course violated also Article 8(2)(c), as it did not allow for *"adequate time and means for the preparation of [their] defense*." The Court went on reasoning that "the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as they did not have access to the case file until the day before the ruling of first instance was delivered." In the same case Article 8(2)(d), which provides, *inter alia,* for the right of the accused "to be assisted by legal counsel of his own choosing" was also violated when later they were assigned court-appointed lawyers, and not allowed legal counsel of their choice until one day before trial.[429] Paragraph 2(c) is closely related to Article 8(2)(c), which provides for "the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel." The phrase "*communicate freely and privately"* is of particular importance to note, as this is a characteristic only of the American Convention, and it protects the confidentiality of the client-lawyer relationship. The Court found a violation of Article 8(2)(c), (d) and (e) in a case where the victim had been held in incommunicado detention for 36 days, unable to consult any lawyer, and even when finally he was visited by the lawyer, he was "unable to communicate with him freely and privately," but only in the presence of police officers.[430]

Article 8(2)(f) provides for "the right of the defense to *examine witnesses* present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts." The Court found a violation of this article in a case where the applicable law "did not allow for the cross-examination of the witnesses whose testimony was the basis for the charges brought against the alleged victims."[431]

Article 8(2)(g) provides the right not to be compelled to be a witness against himself or to plead guilty and it is read jointly with Article 8(3) which states that "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind." The Court found no violation of this article in the case of *Castillo Petruzzi* because the trial records showed that the accused were only urged to tell the truth, but no punishments or any other legal consequences were threatened, if they refused to do so.[432]

The right to a *public hearing,* Article 8(5), in the ACHR is only guaranteed in criminal proceedings, which "shall be public, except insofar as may be necessary to protect the interests of justice," and the Inter-American Court has argued against trials held in secret, "out of the public eye."[433] In the *Castillo Petruzzi* case involving Peru, the Court noted that "the proceedings were conducted *on a military base off limits to the*

428 *Castillo Petruzzi et al. v. Peru*, *supra* note 415, at 202, paras. 141-142 read in conjunction with para. 138, at 201.

429 *Id.* at 202, para. 141.

430 Suárez Rosero v. Ecuador, *supra* note 418, at 301, para. 83; *see also* at 292, para. 34.g and h.

431 Castillo Petruzzi et al. v. Peru, *supra* note 415, at 205, paras. 153 and 156.

432 *Id.* at 210, paras. 167-168.

433 *Id*. at 211, paras. 172-173.

public,"[434] and that constituted a manifest violation of the right to a public hearing. The Inter-American Commission as well has expressed itself for the elimination of secret justice by "faceless judges" in Columbia,[435] and by military tribunal in Chile,[436] as it denies the defendants their due process of law.

Article 9[437] of the Convention provides for freedom from *ex post facto* laws, but in contrast from the ICCPR and ECHR that refer to national and international law, the American Convention notes only "the applicable law."

The principle of *ne bis in idem* is guaranteed in Article 8(4), which states that "an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause." The Court has explicated that unlike "the formula used by other international rights protection instruments, ... the American Convention uses the expression 'the same cause', which is a much broader term in the victim's favor."[438] In the case of *Loayza Tamayo*, the Court also held that the Decree Laws containing the crimes of "terrorism" and "treason" were in themselves contrary to article 8(4), since they referred "to actions not strictly defined" which could be "interpreted similarly within both crimes" as was done in that particular case, thus giving rise to unacceptable legal insecurity.[439]

c. Due Process in Appeal

Article 8(2)(h) of the American Convention on Human Rights specifies that in criminal proceedings "every person is entitled, with full equality [to] the right to appeal the judgment to a higher court." In interpreting this provision the Court has noted that the mere existence of "a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse" does not *per se* satisfy the requirements of Article 8(2)(h). In order to ensure a true review of the judgment "the higher court must have the jurisdictional authority to take up the particular case in question."[440] In finding a violation of this provision in the case of *Petruzzi et al. v. Peru*, the Court reasoned that the appeal available to victims was a superior court "part of the military structure and as such did not have the independence necessary

434 *Ibid.*

435 Inter-American Commission, Second Report on the Situation of Human Rights in Colombia, OEA/ Ser.L/V/II.84, Doc 39, 1993, at 249.

436 Case 9755, Chile, Inter-American Commission, 132, 137, OEA/Ser.L/V/I.74, Doc.10, rev. 1 (1988).

437 Article 9 of the ACHR states:

> No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

438 Loayza Tamayo v. Peru, IACtHR, Judgment of September 17, 1977, OAS Doc. OAS/Ser. L/V/III.39, Doc. 5, 1997 Annual Report I-A Court HR, at 213, para. 66.

439 *Id*. at 213, para. 68.

440 Castillo Petruzzi et al. v. Peru, *supra* note 415, at 208, para. 161.

to act as or be a tribunal previously established by law with jurisdiction to try civilians." In the Court's view, "there were no real guarantees that the case would be reconsidered by a higher court that combined the qualities of competence, impartiality and independence that the Convention requires."[441]

4. The African Charter on Human and Peoples' Rights and the Jurisprudence of the African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (hereinafter the African Charter) reflects in its name the importance of the collectivity by including, as bearers of rights, "peoples," and by mandating "duties" in addition to rights. As to the subject of our discussion, it deals rather inadequately with the right to a fair trial.[442] Spread over several articles, elements of fair trial guarantees are in many respects left to the creative interpretation of the African Commission on Human and Peoples' Rights (hereinafter the African Commission or ACHPR).[443] The African Court of Human Rights that came into being on January 25, 2004 is not yet fully operational.[444]

a. Due Process before Trial

Article 6[445] provides the right to liberty and to the security of a person and protects against arbitrary arrest. In the case of *World Organisation against Torture and Others v. Zaire,* the victims were detained indefinitely and the African Commission found a violation of Article 6 reasoning that the "indefinite detention of persons can be interpreted as arbitrary as the detainee does not know the extent of his punishment."[446]

441 *Ibid.*

442 For an analysis of this issue, see Christof Heyns, *Civil and Political Rights in the African Charter*, in The African Charter on Human and Peoples' Rights: the System in Practice, 1986-2000, 137 (Malcolm D. Evans & Rachel Murray eds., 2002). As to the concept of "peoples' rights" as well as the jurisprudence of the African Commission of Human Rights, see Frans Viljoen, International Human Rights Law in Africa 242-248 (2007).

443 Heyns, *supra* note 442, at 155.

444 The first eleven Judges of the African Court on Human and Peoples' Rights were elected on January 22, 2006 by the Eighth Ordinary Session of the Executive Council of the African Union, and they held their first meeting on July 2-5, 2006. The Court's seat is in Arusha, Tanzania, on the other side of the continent from The Gambia where the African Commission is located. For more on the Court, *see* www.aict-ctia.org.

445 Article 6 of the African Charter on Human and Peoples' Rights, *available at* http://www1.umn.edu/ humanrts/instree/z1afchar.htm (last visited on June 22, 2006) states:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

446 World Organisation against Torture and Others v. Zaire, Communications Nos. 25/89, 47/90, 56/91 and 100/93, ACHPR, Decision adopted during the 19th session, March 1996, para. 67; for the text see http://www.up.ac.za/chr/ (last visited on June 11, 2006.)

Arbitrary deprivation of liberty within the meaning of Article 6 is also found when a person is detained without charges and without the possibility of bail. In the case of *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria,*[447] the detainees were kept in such conditions for over three years. In the same case, a violation was also found on the fact that a decree prohibited the writ of *habeas corpus*.[448]

In expanding the interpretation of Article 6, the African Commission has held that the security agents of a State party should "scrupulously" comply with the requirement to submit grounds for arrest and to inform promptly the persons arrested of any charges against them.[449] The Commission has held that not only should arrests and detention be in accordance with known laws, but such laws "must be in accordance with the provisions of the Charter."[450] A *prima facie* violation of the right not to be arbitrarily arrested or detained was also found in a case where the courts had no power in considering the lawfulness of detention.[451] A violation of Article 6 was also found when the victim arrested in the interest of national security was never charged with any offence, nor had he stood trial.[452] The same happened in a case of arrest and detention without charge and without recourse to the courts for redress.[453] The Commission has also interpreted the phrase "previously laid down by the law" to imply a temporal as well as a substantive standard, meaning that any deprivation of freedom be consistent with the Charter.[454] Furthermore, the Commission has cautioned that the "competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or international human rights standards."[455]

447 Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Communication No. 102/93, ACHPR, Decision adopted on 31 October 1998, para. 55 of the text published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/102-93.html (last visited on June 11, 2006).

448 *Ibid*. at paras. 22-34.

449 Huri-Laws (on behalf of the Civil Liberties Organisation) v. Nigeria, Communication No. 225/98, ACHPR, Decision adopted during the 28th Ordinary Session, 23 October – 6 November 2000, paras. 43-44, *available at* http://www1.umn.edu/humanrts/africa/comcases/225-98.html (last visited on June 13, 2006).

450 *See* Kazeem Aminu v. Nigeria, Communication No. 205/97 (2000), ACHPR, para. 20, *available at* http://www1.umn.edu/humanrts/africa/comcases/205-97.html.

451 International PEN and Others v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, ACHPR, Decision adopted on 31 October 1998, para. 83, *available at* http://www1.umn.edu/ humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

452 Alhassan Abubakar v. Ghana, Communication No. 103/93, ACHPR, Decision adopted during the 20th session, October 1996, paras. 9-10, *available at* http://www1.umn.edu/humanrts/africa/comcases/103-93.html (last visited on June 13, 2006).

453 Kazeem Aminu v. Nigeria, *supra* note 450, para. 21.

454 Heyns, *supra* note 442, at 155, referring to the case of Sir Dawda K. Jawara v. The Gambia, Communications 147/95 and 149/96.

455 *See* Dawda Jawara v. The Gambia, Communications Nos. 147/95 and 149/96 (2000), ACHPR, para. 59. The Commission further added that a *previously laid law* has to be consistent with State party's obligations under the Charter, and it found the arrests and

b. Due Process during Trial

The African Charter does not provide a detailed provision on fair trial, like the ones provided by the ICCPR, the ECHR and the ACHR. However, in its interpretation of the trial guarantees provided for in Article 7[456] of the Charter, the Commission, based on Article 60,[457] is enabled to "draw inspiration" from other international instruments for the protection of human and peoples' rights, such as Article 14 of the ICCPR. Its case law, which abundantly deals with violations of detention and trial rights, shows that the Commission has constantly taken advantage of this empowerment, requiring that the trial should be fair as a whole, and interpreting the Charter to require elements like a public hearing, the right to an interpreter, the protection against self-incrimination, as well as the protection against double jeopardy, etc.[458] In the case of *Media Rights Agenda v. Nigeria*,[459] the Commission invoked[460] paragraph 6 of the General Comment No. 13 of the HRC reasoning in favor of a public hearing, and finding a violation of Article 7 because of the fact that the government had failed to specify the exact grounds for the non-publicity of the trial. The Commission stated that "[t]he exceptional circumstances under the International Covenant on Civil and

incommunicado detention of the concerned persons to be inconsistent with Gambia's obligations under the Charter. *Ibid.*

456 Article 7 of the ACHPR states:

1. Every individual shall have the right to have his cause heard. This comprises:
   (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
   (c) the right to defense, including the right to be defended by counsel of his choice;
   (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

457 Article 60 of the ACHPR states:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

458 Heyns, *supra* note 442, at 155-156.

459 Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Communication No. 224/98, ACHPR, Decision adopted during the 28th session, 23 October – 6 November 2000, *available at* http://www1.umn.edu/humanrts/africa/comcases/224-98.html (last visited on June 22, 2006).

460 *Id.* at para. 51.

Political Rights, which the … [HRC] monitors are for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The Commission notes that these circumstances are exhaustive, as indicated by the use of the phrase 'apart from such exceptional circumstances.'"[461]

Though the African Charter does not specifically guarantee *the right to be promptly brought before a judge or other judicial officer,* the African Commission has interpreted Article 7(1)(a)'s "right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force," to include a right for the victims "to challenge the arrest and detention before a court of law."[462] It has also held that detaining victims "for weeks and months…without any charges being brought against them," failing in this way to bring them before a judge or other judicial officer for trial, violated Article 7(1)(a) of the Charter.[463] A violation was also found when detainees who were considered illegal aliens were denied the opportunity to appeal to national courts.[464]

Article 7(1) also provides in paragraph (b) for "*a competent court or tribunal*," and in (d) provides for "an impartial court or tribunal." In addition, Article 26 of the Charter imposes upon the States parties "the duty to guarantee the independence of the Courts." So, though it is worded differently and spread out over several provisions, the right to a competent, independent, impartial tribunal is guaranteed in the African system of human rights protection. The Commission has placed great importance on this issue. It considered courts the bastion of protection of human rights when explaining the relationship between Articles 7 and 26,[465] and it deemed ousting of the courts' jurisdiction to constitute an "attack of incalculable proportions on Article 7."[466] Moreover, in the view of the African Commission Article 7 must be considered

461 *Id.* at para.52.

462 International PEN and Others v. Nigeria, *supra* note 451, paras. 83-84.

463 Huri-Laws (on behalf of Civil Liberties Organisation) v. Nigeria, *supra* note 449, para. 45-46, *available at:* http://www1.umn.edu/humanrts/africa/comcases/225-98.html. *See also* Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi (64/92, 68/92, 78/92 respectively), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I, where the African Commission held that failure to allow a prominent political figure detained for 12 years without charge or trial to challenge the violation of his right to liberty before a court violated Article 7(1)(a) of the African Charter.

464 Rencontre Africaine pour la défense de droits de l'homme v. Zambia, (71/92), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th.

465 In the case of *Civil Liberties Organization v. Nigeria*, Communication 129/94 (1995), *available at* http://www1.umn.edu/humanrts/africa/comcases/129-94.html, the Commission explains: "While Article 7 focuses on individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right." *Id.* at para. 15.

466 *Id*. at para. 14.

as *non-derogable* since it provides "minimum protection to citizens."[467] In this respect, in the case of *Constitutional Rights Project v. Nigeria*, the Commission found the Civil Disturbances (Special Tribunal) Act incompatible with Article 7(1)(d) of the African Charter. This special criminal tribunal ousted the power of regular courts to "inquire" into the actions of the tribunal.[468] Also, under the terms of the Act, the tribunal should consist of one judge and four members of the armed forces. According to the Commission, the tribunal was as such "composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbance Act."[469] The Commission went on stating that "regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality,"[470] reasoning thus in the same way as the European Court of Human Rights, that even appearance of partiality is enough to constitute a violation of the provision.[471]

The presumption of innocence, as part of the right to have one's cause heard, is guaranteed in Article 7(1)(b), which states that every individual has "the right to be presumed innocent until proved guilty by a competent court or tribunal." The Commission has also found a violation in cases where leading government representatives had pronounced the accused persons guilty of crimes during various press conferences as well as before the United Nations.[472] A violation of the right to be presumed innocent was also found in the case of *Annette Pagnoulle v. Cameroon,* where the person was detained two more years after serving his prison term on grounds that he "may cause problems."[473] In a case against Mauritania, the Commission found a breach of this provision on the basis that "the presiding judge [had] declared that the refusal of the accused persons to defend themselves was tantamount to an admission of guilt."[474] Later, the tribunal had based its verdict "on the statements made by the

467 Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, Communication No. 218/98, ACHPR, Decision adopted during the 29th Ordinary session, 23 April – 7 May 2001, para. 27. *Available at* http://www1.umn.edu/humanrts/africa/comcases/218-98.html.

468 Heyns, *supra* note 442, at 157.

469 Constitutional Rights Project (on behalf of Zamani Lakwot and six others) v. Nigeria, Communication No. 87/93, ACHPR, para. 13, *available at* http://www1.umn.edu/humanrts/africa/comcases/87-93.html.

470 *Id.* at para. 14.

471 Oberschlick, s*upra* note 343.

472 International PEN and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisations) v. Nigeria, ACHPR, Communications Nos. 137/94, 139/94, 154/96 and 161/97, Decision adopted on 31 October 1998, paras. 94-96, *available at* http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

473 *See* Heyns, *supra* note 442, at 158.

474 Malawi African Association and Others v. Mauritania, Communications Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), ACHPR, para. 95, *available at* http://www1.umn.edu/humanrts/ africa/comcases/54-91.html.

accused during their detention in police cells, which statements were obtained from them by force."

Article 7(1)(c) guarantees *"the right to defense, including the right to be defended by counsel of his choice."* The Commission found a violation of this provision in a case where the accused, though allowed access to a lawyer, was not represented by a lawyer of his own choice.[475] While interpreting this right, the African Commission also paid due respect to the confidentiality of communication between the accused and the counsel of his choice, thus providing not only the right to have his preparation of defense assisted by a competent counsel but also respecting the guarantees that are not clearly provided for in the provisions of the Charter.[476] As stated above, in such cases the Commission draws from various international instruments, general principles of law recognized by the African States, customs generally accepted as law, as well as legal precedents and doctrine.[477] The Commission has constantly considered the right to legal counsel as a fundamental component of the right to a fair trial, noting that the interests of justice in critical contentions/conflicts particularly mandate the benefit of the assistance of a lawyer for the accused at each stage of the case. Consequently, the Court found a violation of this provision in the case of *Avocats Sans Frontières v. Burundi*.[478] Insufficient time for the lawyer to prepare the defense for their clients was considered to be in violation of the right to defense.[479] A breach was also found in a case where trial and judgment has continued though the defense counsel was intimidated to such extent, that he was forced to withdraw from the case.[480] This provision has been interpreted to include the right of access to a lawyer even when detained without trial.[481] The Commission interpreted the right

475 Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Communication No. 224/98, ACHPR, Decision adopted during the 28th session, 23 October – 6 November 2000, paras. 55-56 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/224-98.html. However, the right to be defended by counsel of one's own choice has been considered to be problematic, if counsel would mean "a fully qualified and admitted lawyer." Such an interpretation has been avoided favoring the term to mean "a legal representative." *See* Heyns, *supra* note 442, at 158.

476 ACHPR /Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial (1992), para. 2 (e/i) states that in determination of charges against him the individual is entitled to "[h]ave adequate time and facilities for the preparation of their defense and to communicate in confidence with counsel of their choice. *Available at* http://www.achpr.org/english/resolutions/resolution09_en.html .

477 Media Rights Agenda v. Nigeria, *supra* note 475, para. 51.

478 Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi, Communication No. 231/99, ACHPR, Decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 30, *available at* http://www1.umn.edu/humanrts/africa/comcases/231-99.html.

479 Malawi African Association and Others v. Mauritania, *supra* note 474, para. 96.

480 Constitutional Rights Project (on behalf of Zamani Lekwot and six others) v. Nigeria, *supra* note 469, para. 29.

481 Media Rights Agenda and Others v. Nigeria, Communications Nos. 105/93, 128/94, 130/94 and 152/96, ACHPR, Decision adopted on 31 October 1998, *available at* http://

to defense to also include the right to understand the charges, so indirectly providing for a right to an interpreter.[482] Moreover, the Commission, through general resolution, is translating internationally accepted principles into the substance of the fair trial provisions of the Charter.[483]

Trial within reasonable time is provided for in Article 7(1)(d), and the Commission has interpreted this provision in a number of cases. In the case of *Krischna Achuthan and Amnesty International v. Malawi*,[484] the Commission found a violation of this provision on the basis of the victim's being detained indefinitely without trial. An interesting interpretation is found in the case of *Dawda Jawara v. The Gambia,* [485]

www1.umn.edu/humanrts/africa/ comcases/105-93_128-94_130-4_152_96.html.

482 Malawi African Association and Others v. Mauritania, *supra* note 474. In paragraph 97, the Commission notes that "[i]n the trial on the September Manifesto … only 3 of the 21 accused persons spoke Arabic fluently, and this was the language used during the trial. This means that the 18 others did not have the right to defend themselves; this also constitutes a violation of article 7(1)(c)."

483 The Commission, largely drawing from international jurisprudence on human rights, has taken up the issue of fair trial in its 1992 Resolution on the Right to Recourse Procedure and Fair Trial, (ACHPR Res.4(XI)92), *available at* http://www.achpr.org/english/resolutions /resolution09_en.html, stating, *inter alia,* in para. 2-3, that:

"the right to fair trial includes, among other things, the following:

a) All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations;

b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;

c) Persons arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released;

d) Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court;

e) In the determination of charges against individuals, the individual shall be entitled in particular to:

i) Have adequate time and facilities for the preparation of their defense and to communicate in confidence with counsel of their choice;

ii) Be tried within a reasonable time;

iii) Examine or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

iv) Have the free assistance of an interpreter if they cannot speak the language used in court.

3.Persons convicted of an offence shall have the right of appeal to a higher court."

484 Krischna Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi, Communications Nos. 64/92, 68/92, and 78/92 (1995), ACHPR, para. 9, *available at* http://www1.umn.edu/humanrts/africa/comcases/64-92b.html.

485 Dawda Jawara v. The Gambia, *supra* note 455.

where the Minister of Interior was empowered to detain anyone without trial for up to six months, with the possibility to extend the period *ad infinitum*. The Commission found such powers to be analogous to those of a court, and according to the Commission "with all intents and purposes, [the Minister] is more likely to use his discretion to the detriment of the detainees, who are already in a disadvantaged position. The victims will be at the mercy of the Minister who, in this case, will render a favor rather than vindicating a right. This power granted to the Minister renders valueless the provision enshrined in Article 7(1)(d) of the Charter."[486] Considering the impartiality of courts in this provision, the Commission focused on the necessity for courts to have "personnel qualified to ensure that they operate impartially," and it found a violation of the right of individuals to have their case heard by such impartial tribunals in a case where the government acted against the judiciary by dismissing over one hundred judges.[487] In the context of this study, it is of interest to observe that the African Commission has found fault with military tribunals as regards principles of impartiality and independence, stating that "their very existence constitutes a violation" of such principles. Furthermore, while requesting that Military Courts and Special Tribunals respect fair trial standards in determining offences of a pure military nature, the Commission cautions that "[t]hey should in no circumstances whatsoever have jurisdiction over civilians…[neither should] Special Tribunals …try offences which fall within the jurisdiction of regular courts."[488]

The prohibition on retroactivity of criminal law, guaranteed by Article 7(2), was interpreted by the Commission in the case of *Media Rights Agenda and Others v. Nigeria*.[489] The Commission reasoned that this provision prohibits "not only condemnation and infliction of punishment for acts which did not constitute crimes at the time they were committed, but retroactivity itself." It went on commenting that the rule of law would be undermined, the potential prosecution was a serious threat, and "a terrible uncertainty" would occur for a law-abiding citizen, if laws were to be changed with retroactive effect.[490]

486 *Id*. at para. 61.

487 Amnesty International and Others v. Sudan, Communications No. 48/90, 50/91, 52/91, 89/93 (1999), ACHPR, para. 69, *available at* http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html.

488 Dakar Declaration and Recommendations, adopted by the African Commission on Human and Peoples' Rights ("the Commission") in collaboration with the African Society of International and Comparative Law and Interrights, in Dakar, Senegal, on 11 September 1999, para. 3 of the text *available at* http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr2.doc. It is important to note the Commission has referred to this paragraph of the declaration in its case law. *Cf.* Forum of Conscience v. Sierra Leone, Communication No. 223/98 (2000), ACHPR, para. 16, *available at* http://www1.umn.edu/humanrts/ africa/comcases/223-98.html.

489 Media Rights Agenda and Others v. Nigeria, *supra* note 481.

490 *Id.* at paras. 58-59.

c. Due Process in Appeal

Article 7(1)(a) provides for "the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force." The Commission found a violation of this provision in the case of *Constitutional Rights Project*,[491] because the Civil Disturbances Act, passed by the Nigerian Government, excluded any review by any court of law of the "validity of any decision, sentence, judgment ... or order given or made, ... or any other thing whatsoever done under this Act."[492] The Commission went on arguing that "to foreclose any avenue of appeal to 'competent national organs' in criminal cases bearing [capital] penalties clearly violates" Article 7(1)(a) of the Charter, "and increases the risk that even severe violations may go unredressed."[493] In line with other regional systems of human rights protection, the African Commission did not consider a "genuine appeal procedure" and found a violation of this provision, in a case where the "Court of Appeal simply confirmed sentences without considering all the elements of fact and law"[494] and reasoned that this is not an effective appeal. A violation was also found when no appeal was allowed after a conviction by a military court, as this "falls short of the requirement of the respect for fair trial standards expected of such courts."[495]

B. Customary International Law and General Principles of Law

Having discussed treaty law as one of the sources of due process guarantees in international law, this study will now turn to the other two sources as listed in Article 38[496] of the Statute of the International Court of Justice,[497] *i.e.* customary international law and general principles of law.

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491 Constitutional Rights Project, s*upra* note 447.

492 *Id*. at paras. 26-27.

493 *Id*. at para. 28.

494 Malawi African Association and Others v. Mauritania, *supra* note 474, para. 94.

495 The Commission found "the execution of the twenty four soldiers without the right of appeal" to be in violation of article 7(1)(a) of the Charter. *See* Forum of Conscience v. Sierra Leone, *supra* note 488, para. 17.

496 Article 38(1) of the ICJ Statute reads as follows:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b) international custom, as evidence of a general practice accepted as law;
>
> c) the general principles of law recognized by civilized nations;
>
> d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

497 June 26, 1945, 59 Stat. 1055, U.N.T.S. No. 993.

1. Due Process in Customary International Human Rights Law

Does the right to a fair trial, in full or in part, constitute a norm of customary international law? In analyzing this issue it is important to see the historical evolution of this right in its legal context. Many a time a norm enshrined in a treaty may have already been part of customary international law, or it might develop into a rule of customary international law.[498] In order for a norm to rise into the status of customary international law it must enjoy very widespread and representative support, both in normative statements and practice, from amongst the states of the international community (*consuetudo*), and this must occur out of sense of legal obligation (*opinio juris*).[499] The right to a fair trial, in its entirety seems to run squarely within these boundaries, as it is laid down in many national constitutions and international human rights instruments.

The focal point of the customary human rights law argument has always been the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. As one uniting document, acceptable to all the world's divisions, on a comfortable level of generality and simplicity, harnessing idealism, it may provide the text rallying state and peoples' support more effectively than the hard and detailed law chiseling the scope and limits of each right as hammered out in the compromise texts of human rights treaties, in particular, the two UN human rights covenants of 1966.

a. The Universal Declaration on Human Rights

The Universal Declaration on Human Rights[500] (hereinafter UDHR), referred to by Eleanor Roosevelt as "a Magna Carta for all mankind,"[501] is modeled after the civil law tradition as it constitutes a code aiming to be comprehensive. It includes a preamble followed by thirty articles, and it represents the first consensus declaration of the international community of nation-states regarding specific rights and freedoms of all human beings. Although technically it does not have the binding power of a treaty, the great majority of its provisions, generated from a cross-section of provisions from existing bills of rights and constitutional documents, have been followed sufficiently widely in state practice, even found their way into constitutions, often of newly-independent states, that they can be considered to have been maturing into

498 Eckart Klein, *A Comment on the Issue of Reservations, supra* note 143, at 62.

499 Criteria for the formation of new customary law have been detailed in the *North Sea Continental Shelf* Case (F.R.G. v. Den. /F.R.G. v. Neth.) 1969 I.C.J. 3, 41-44.

500 Adopted by U.N. General Assembly Resolution 217A (III), December 10, 1948. Its articles are for the most part considered declarative of customary international law and are vitally important in cases when a state has not ratified or acceded to the ICCPR or other significant human rights instruments.

501 Eleanor Roosevelt's speech before the General Assembly as she submitted the Declaration for review. *Available at* http://www.udhr.org/history/Biographies/bioer.htm (last visited on June 10, 2006).

state obligations under customary international law.[502] This has also been confirmed, in the case of one right at least that is at issue in this study, by the high authority of the International Court of Justice in its *dictum* in the case concerning United States diplomats and staff held hostages in Tehran,[503] where the ICJ stated that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself *incompatible* with the principles of the Charter of the United Nations, as well as *with the fundamental principles enunciated in the Universal Declaration of Human Rights*,"[504] thus arguably confirming the legally binding nature of such "fundamental principles."

The most recent affirmation of the legal status of the UDHR is its inclusion as a basis for the review of states' practices in the Universal Periodic Review Mechanism of the United Nations Human Rights Council, side by side with the UN Charter and the human rights treaties which a state has ratified.[505] So, within the institutionalized community of nations, the UDHR is already considered to be a standard of some normative power in evaluating states' behavior regarding human rights.

Also, the Restatement (Third) of U.S. Foreign Relations Law of 1987 mentions that "[i]t has been argued that customary international law is already more comprehensive than here indicated and forbids violation of any of the rights set forth in the Universal Declaration."[506] This argument would, however, be overstating the case, since it cannot be maintained that, for example, the "right to change one's nationality" as listed in Article 15(2) of the Declaration would be recognized by any presently existing state as a human right of any individual to opt into its nationality. Still, most of the rights listed in the Declaration do have both sufficient state support, both in practice and *opinio juris*, that they have become part and parcel of customary law.

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502 For scholarly contributions on the formation of customary international law, see generally David Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 German Y.B. Int'l L. 198 (1996); Ralph Gaebler, *Conducting Research in Customary International Law*, in Contemporary Practice of Public International Law 77 (E. Schaffer & R. Snyder eds., 1997); Suzanne Thorpe, *A Guide to International Bibliography*, in Contemporary Practice of Public International Law 17, 38 (E. Schaffer & R. Snyder eds., 1997); Shabtai Rosenne, *Customary International Law*, in Practice and Methods of International Law 55 (1984); For the U.S. Perspective on Customs and Principles, see Restatement (Third) of Foreign Relations Law, § 102; § 702; § 701 (1987).

503 United States of America v. Iran, 1980 I.C.J. 42, para. 91.

504 *Ibid.* Emphasis added.

505 *See* Human Rights Council, Annex to Resolution 5/1 of 18 June 2007—United Nations Human Rights Council: Institution Building (Universal Periodic Review Mechanism), *available at* http://ap.ohchr.org/ documents/E/HRC/resolutions/A_HRC_RES_5_1.doc.

506 Restatement (Third) of Foreign Relations Law of the United States, § 702, Reporter's note 1 (1987). *See* Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, Human Rights and World Public Order 273-74, 325-27 (1980); Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention,* in The European Convention on Human Rights 15 (1963) (British Inst. Int'l & Comp. L., Int'l L. Ser. No. 11).

This means that the UDHR reflects, in many of its provisions, obligations of all states owed to each other – *erga omnes* – and benefiting human beings within their jurisdiction[507] whether they have or have not endorsed the Declaration – for as long as they have not been a persistent objectors to a particular such obligation.[508] Indeed the UDHR has surpassed the aspiration of the General Assembly which in Article 13 of the UDHR encouraged back in 1948 "the progressive development of international law and its codification." Its influence is tangible in the constitutions[509] and national legislation of many newly independent states, which are inspired by the UDHR, and enshrine in their laws the spirit of democracy and rule of law promoted by the UDHR (*see, e.g.* article 21 of the Universal Declaration of Human Rights). Its materialization is also obvious at a universal and regional level, having inspired more than sixty

507 The 1968 International Conference on Human Rights proclaimed that the UDHR "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community." Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 (1968), at 3, para. 2.

508 "Although customary law may be built by the acquiescence as well as by the actions of states ... and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures." Restatement (Third), Foreign Relations Law of the United States 24, 25-26 (1987). *Cf.* David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 Wash. L. Rev. 957, 969 (1986). *See also* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am. J. Int'l L. 413, 433-34 (1983) (calling the persistent objector doctrine the "acid test of custom's voluntarist nature"). This traditional concept has been attacked, not only from the angle of peremptory norms of international law (*jus cogens*). *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit. Y.b. Int'l L. 1-24 (1986); id., *Universal International Law*, 87 Am. J. Int'l L. 529, 538-542 (1993).

509 *See*, for example, the constitution of South Africa after the collapse of the Apartheid regime. It was strongly influenced by international human rights standards and its Chapter 2 is a detailed Bill of Rights, including rights like the right to equality, the right to freedom and security of the person, the freedoms of expression, assembly and association, political rights, environmental rights, the right to property, the right of access to adequate housing, the right to health care services, sufficient food and water, social security, the rights of the child, the right to basic education, the right of access to courts and the rights of arrested, detained and accused persons. *Available at* http://www.info.gov.za/documents/constitution/1996/96 cons2.htm (last visited on June 10, 2006). However, some scholars are cautious when talking about UDHR as customary law, as regards the evidentiary power of national constitutions. Since evidence of state practice is required to support the claims that certain rights have become part of customary international law, Oscar Schachter notes in his book, International Law in Theory and Practice (1981), at 336: "Constitutions with human rights provisions that are little more than window-dressing can hardly be cited as significant evidence of practice." Then he concludes that although some important human rights included in the declaration have become customary law, neither governments nor courts have accepted the Universal Declaration of Human Rights "as an instrument with obligatory force." *Id.* at 337.

human rights instruments,[510] which constitute today a commonly accepted international standard of human rights, as well as countless declarations and resolutions. A number of such treaty and non-treaty instruments explicitly refer to the UDHR, sometimes employing the very same language (*see* article 19 of UDHR and article 19 of ICCPR). Another fact that goes to show that various articles in the UDHR have now become part of the body of customary law is that many national courts refer to the UDHR as a source of standards for judicial decisions.[511] But, what rights have actually achieved the status of customary law? The list is not necessarily complete, and it is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future. It is beyond the scope of this study to enumerate all customary law UDHR rights, thus, it will only focus on the ones related to the topic under discussion.

A number of UDHR articles relate directly to issues of due process by establishing safeguards against unlawful deprivations of liberty in connection with the prosecution of a criminal offence. Its Article 3 proclaims that "[e]veryone has the right to life, liberty and security of a person," prohibiting governmental transgression of these rights through arbitrary detention or forced disappearances; Article 9 expressed in a prohibition clause that "[n]o one shall be subjected to arbitrary arrest, detention or exile," requiring from states that any curtailment of liberty has to be on grounds and pursuing procedures established by law; Article 10[512] contains a general right to an equal, fair, and public hearing, as a primary institutional guarantee that no decisions will be made by political institutions, and that the accused will be tried in court, by a independent and impartial tribunal, in a manner open to the public administration of justice. Article 11,[513] in two paragraphs, delineates the principle of presumption of innocence, which applies to treatment before trial and during trial and which means that the burden of proof lies with the prosecution; it provides guarantees necessary for the defense of the accused, as an important aspect of the fundamental principle of "equality of arms," as well as the principle *nulla poena sine lege*, protection from ret-

510 *Available at* http://www.tiger-tail.org/human_rights_mechanisms_and_international_law.htm (last visited on June 10, 2006).

511 Restatement (Third), Foreign Relations Law of the United States § 701, Reporter's Note 7, at 158 (1987). *Cf., e.g.*, Zemel v. Rusk, 381 U.S. 1. 14 n. 13 (1963); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n. 16 (1965).

512 Article 10 reads:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

513 Article 11 states:

> (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
>
> (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

rospective application of laws in criminal proceedings, at the same time imposing an obligation on states to define precisely all criminal offences and respective sanctions in their penal laws. Its reference to international law means that a person committing an offence under international law (such as genocide, other crimes against humanity, war crimes, slavery, torture etc.) can still be prosecuted, even if such a crime did not constitute an offence in the national law at the time it was committed.

It is necessary to mention in this context three more articles of the UDHR. Article 5,[514] the prohibition of torture, is instrumental to the right to a fair trial, which cannot be realized if detention will interfere with the faculties and the capabilities of the accused through torture or ill treatment. Article 6 enshrines the right to recognition *everywhere* before the law, guaranteeing the individual to have all protection offered by a legal system, no matter whether he is a citizen or not. Article 7,[515] the right to equality before the law, in the context of a fair trial, prohibits discriminatory laws as regards access to courts and treatment by the courts. The significance of the UDHR as it relates to issues of due process in criminal proceedings is paramount, as it legally binds, in this context via customary international law, all governments of the world, whatever their particular view may be, since national constitutions and criminal procedure laws widely include these fair trial[516] provisions and no state has persistently objected generally, and, especially, to the UDHR's due process rights, Articles 9 through 11. It would thus be safe to say that the rights enumerated above reflect customary international law.

b. General Principles of Law Recognized by the Community of Nations

Listed third as a source of international law in Article 38 of the Statute of the International Court of Justice, the general principles of law recognized by the community of nations serve to ascertain cases in which international treaties and customary law might not provide sufficient source for the Court to make a decision. They reflect principles analogous to those found in the major legal systems of the world, and historically may derive from them or from a more remote common origin.[517] A general

514 Article 5 reads:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

515 Article 7 states:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

516 It may indicate the high rank and core nature of due process rights in the human rights catalogue that the HRC has noted that there cannot be a general reservation to the right to a fair trial under Article 14 [of the ICCPR], even though this article is not listed in Article 4 as non-derogable. *See* General Comment 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6 (1994), para. 8. *Available at* http://www1.umn.edu/humanrts/gencomm/hrcom24.htm .

517 Restatement (Third), *supra* note 506, at § 102 (1987).

principle of international human rights law is a fundamental legal norm or principle of human rights character that is found in all major legal systems throughout the world there has to be enough evidence showing that States, in their domestic law,[518] adhere to this legal principle. In this case such a principle would be legally binding as a source of international law under Article 38(1)(c) of the ICJ statute. Domestic courts in their reasoning when rendering judgment would look to other legal systems to determine whether a particular human rights standard has been accepted enough to be considered such a general principle of law.

In the field of due process guarantees, the Restatement of U.S. Foreign Relations Law (Third) states that "rules that have been drawn from general principles include rules relating to the administration of justice, such as the rule that no one may be judge in his own cause; *res judicata*; and rules of fair procedure generally. General principles may also provide 'rules of reason' of a general character, such as … the principle that rights must not be abused, and the obligation to repair a wrong. International practice may sometimes convert such a principle into a rule of customary law." The same document also notes that there is substantial international law on human rights that makes it "plausible to conclude that a rule against torture is part of international law, since such a principle is common to all major legal systems."[519]

Bin Cheng's seminal book titled General Principles of Law as Applied by International Courts and Tribunals, upon thorough analysis, articulated a number of general principles of law that constitute part of due process guarantees. To begin with, the principle of *nemo debet judex in propria sua causa,* a universally accepted doctrine, adopted by all systems of law, provides a basic and vital guarantee of impartiality in the administration of justice, though its "application extends beyond purely judicial proceedings."[520] Its *raison d'être* remains "justice is impartial,"[521] and it disqualifies both parties in the dispute, that by definition are *partial*, to serve as judges, which must be impartial. In addition, "[j]ustice…must not only be just, but appear so. A judge must not only be impartial, but there must be no possibility of suspecting his impartiality."[522]

Audiatur et altera pars. The juridical equality of parties as litigants is prejudiced if one of the parties is not present. The absence of the defendant destroys the equilibrium of

518 A recent good example of an excellent collection of national case law in determining the current state of international criminal law is the book by Antonio Cassese, International Criminal Law (2003). Thus, for instance, through such analysis of domestic cases as well as the practice of *ad hoc* international tribunals, he shows us how a rule of international criminal law actually develops, for instance chapter 4 on crimes against humanity, chapter 13.1 on superior orders etc.

519 Restatement (Third), *supra* note 506, at § 702 (d); § 701 (1987).

520 Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 279 (1987, repr. 1994).

521 Commissioner Gore in *The Betsy Case* (1797) in Cheng, at 284.

522 Report of the Advisory Committee for the establishment of the Permanent Court, in Cheng, *supra* note 520, at 289.

a suit at law and constitutes a defective judicial procedure, which in its routine would have both parties be heard. However, the process is not rendered defective if a party is not heard because it refuses to appear before a court after it had been duly notified, or because it fails to present its case,[523] if there is no *vis major* for such a failure.[524] Thus the maxim *audiatur et altera pars* expresses exactly the requirement of equality between the parties in judicial proceedings, and in international proceedings there has never been a refusal to hear one of the parties.[525] Rules of procedure make sure that the judge hears the statements of both sides on the issue at dispute and also on the statements of the opponent, which allows for control on errors, omissions, misstatements.[526] In addition, this provides an opportunity for furnishing enough data to enable the judge to make the right decision, because while the judge knows the law, the parties, as a rule, prove the facts of the case.

Jura novit curia, a well-known principle of municipal law, is also applicable in international law. The court ascertains the law which it administers, *i.e.* it has to comply with the terms of the instrument that establishes it and confers jurisdiction upon it.[527] It is not bound by the arguments of the parties in determining the meaning and the effect of the applicable law. The principle implies that the court has to examine questions of law *proprio motu*,[528] while the parties raise questions of fact.

The last argument leads to another general principle of international law, that in judicial proceedings it is "accepted by the law of all countries that it is for the claimant to make the proof of his claim."[529] *Mutatis mutandis,* any party who asserts a violation of international law which brings about international accountability has the burden of proving its allegation.[530]

The principle of *res judicata* linked to *ne bis in idem* ascertains the terms of a definitive and obligatory final judgment of a competent tribunal. The execution of such judgment cannot be submitted to any conditions other then what the judgment sanctions. Its understanding in international law of human rights has been dealt with in the above sections.

523 Such was considered to be the case in the *Corfu Channel Case* (1949) before the International Court of Justice. Albania omitted to file its submissions, thus failed to defend its case, and the ICJ proceeded without the participation of Albania. Consequently, finding the damages claimed by the United Kingdom as justified, the ICJ allowed the claim. Corfu Channel Case (Compensation), 1949 I.C.J. 244, 248.

524 Cheng, *supra* note 520, at 296.

525 *Id.* at 291.

526 *Id.* at 293-294.

527 *Id.* at 300.

528 PCIJ, International Commission of the River Oder Case (1929), A. 23, at 18-19, in Cheng, at 299, n. 2.

529 The Queen Case (1872), in Cheng, *supra* note 520, at 327, n. 11.

530 Cheng, at 306, referring to *Portugo-German Arbitration* (1919) and to *Claims for Losses Suffered in Belgium* (1930), n. 17.

Finally, acts, resolutions and declarations of a non-binding nature promulgated by intergovernmental organizations[531] and their expert organs[532] may provide evidence of general principles. Such policy statements and principles that the representatives of states consent to, mostly without a vote, may also be observed in their domestic action.

Such binding and non-binding instruments and the corresponding state practice served as sources in a recent study of customary international humanitarian law undertaken by the International Committee of the Red Cross. It concluded that many elements of the due process constitute now general principles of law[533] – which shows that there is a somewhat fluid line between customary international law and general principles of law. This research, since it was developed in the ambit of the laws of war, will be developed further in the next chapter on international law and due process in times of emergency.

c. *Déni de justice:* International Minimum Standard of Diplomatic Protection

Civis Romanus Sum[534]

Diplomatic protection, a legal institution with origins far back in feudal times as an obligation of protection owed subjects by their feudal lord in exchange for their

531 Such examples would constitute the U.N. General Assembly, U.N. Security Council, U.N. Human Rights Commission (now the U.N. Human Rights Council), the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of American States, the African Union, etc.

532 For instance, the U.N. Human Rights Commission and the U.N. Sub-Commission on Promotion and Protection of Human Rights and its working groups as well as its thematic and country special rapporteurs, their fact-finding missions, etc. are a good example of lots of studies made in the field. Under the newly-established U.N. Human Rights Council, such expert bodies have variously been continued or are being established; a universal periodic review is being undertaken. *Cf.* http://www2.ohchr.org/english/ bodies/hrcouncil/7session/index.htm (last visited on February 17, 2008).

533 *See* Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1 (ICRC, 2005), as well as discussion on fundamental rights in armed conflicts in its chapter on emergency situations.

534 Latin for "I am a Roman Citizen." This phrase was invoked by Lord Palmerston, the British Foreign Secretary, when he addressed the House of Commons regarding the case of *Don Pacifico*, a British subject whose house in Greece had been burned down by an anti-Semitic mob and whose legal claim arising from these facts had not been acknowledged by the Greek Government. He stated:

> As the Roman, in days of old, held himself free from indignity when he could say 'Civis Romanus Sum,' so also a British subject in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong.

Parl.Deb., vol. 62, ser. 3, col. 380, 25 June 1850, quoted in Jan Paulsson, Denial of Justice in International Law 15-16 (2005). *See also* Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 Am. J. Int'l L. 517, 522 (1910). For more on this case, *see* International Protection of Human Rights 40-58 (Louis Sohn & Thomas Buergenthal eds., 1973).

perpetual allegiance,[535] has changed in the era of the modern nation-state into the right of the state to protect its citizens in cases of violations of their rights under international law, be they customary or treaty-based, by another state. In post-feudal times, the notion was based on Vattel's maxim that an injury to an alien is an injury to his state.[536] Denial of justice, better known, due to its time-honored origin, in the language of the old *lingua franca* of international law, as *déni de justice*, has been a key element of the customary international minimum standard of the rights of aliens giving rise to legitimate claims of home state protection since the very beginnings of modern international law. *Déni de justice* has its distinct history[537] and, over the years, has assumed different meanings. Vattel defined it the following way:

> Now, justice may be refused in several ways:
> (1) By an outright denial of justice or by a refusal to hear the complaints of a State or of its subjects or to allow the subjects to assert their rights before the ordinary tribunals.
> (2) By pretended delays, for which no good reason can be given; delays equivalent to a refusal or even more injurious than one.
> (3) By a decision manifestly unjust and one-sided.[538]

The Institut de Droit International, at Lausanne in 1927, provided the following definition:

> Art. 5. The State is responsible on the score of denial of justice:
> (1) When the tribunals necessary to assure protection to foreigners do not exist or do not function.
> (2) When the tribunals are not accessible to foreigners.
> (3) When the tribunals do not offer the guarantees which are indispensable to the proper administration of justice.[539]

535 As Coke formulated it, "*protectio trahit subjectionem et subjectio protectionem*." 7 Rep., 5a, quoted in the British treason case of *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347, 364 et seq. (H.L.).

536 Emmerich de Vattel, The Law of Nations 161-171 (6th American ed. 1844).

537 For a brief description on the history of the notion from the time when merchants and other individuals from one place or nation were badly treated in another and were denied justice, *see* Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico*, at 3, *available at* http://www.ili.org/images/books/Wallace-DenialofJustice-ILI.pdf (last visited on March 10, 2007).

538 Le droit des gens (1758), Book II, ch. 18, para. 350, quoted in Stephan Verosta, *Denial of Justice*, 1 Encyclopedia of Public International Law 1007, 1008 (Rudolf Bernhardt ed., 1992).

539 Institut de Droit International, Session de Lausanne 1927, Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers, 1 September 1927, Art. 5, *available at* http://www.idi-iil.org/idiF/resolutionsF/1927_lau_05_fr.pdf (in French).

Verosta comments that denial of justice may take "highly various" forms, including "any abuse of the practice of a court in each phase of a legal procedure, *e.g.* the misuse of a declaration of the inadmissibility of some legal avenue, the determination that a tribunal is not comprised to hear the issue, the transfer of an issue to another court, the irregular establishment of a court, or the unusual and inexcusable protraction of proceedings (*justicia protracta*)."[540] While "simple miscarriage of justice (*mal jugé simple, défaut de justesse*)" only "rarely" qualifies, "serious and intentional perversion of justice as a result of malicious and false evaluation of the evidence or determination of the law" does.[541] Also the denial or delay in bad faith of the enforcement of judgments may constitute a denial of justice.[542] Verosta also notes that in "criminal proceedings, both judicial and administrative," "any discrimination against individual aliens or groups in favor of resident nationals where the prosecution or [*sic*] criminal offences or the enforcement of criminal penalties are concerned" may qualify. This applies particularly to "arbitrary arrest, the protraction of investigations and increased penalties against aliens" as well as the "insufficient prosecution of criminal acts carried out by the State's own nationals against aliens," including the protraction of investigations, mild penalties, the non-enforcement of penalties ordered against guilty resident nationals or abetting the escape of nationals from pre-trial detention, remand or ordinary imprisonment."[543]

Denial of justice thus first and foremost encompasses the denial of judicial justice,[544] that is "improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions."[545] Such a judicial failure, defined by Borchard as "misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law,"[546] makes the state accountable in customary international law

540 Verosta, *supra* note 538, at 1008.

541 *Id.* "This view applies particularly when the court's bad faith is manifestly directed against the alien, for instance where legal forms are used purely as a cloak for arbitrary acts (exorbitant injustice, *absence totale de justice*). *Ibid.*

542 *Id.*

543 *Id.*

544 Don Wallace, Jr., *supra* note 644, at 3. Referring to John R. Dugard, Wallace goes on noting that "*stricto sensu*, responsibility for injuries to aliens is more accurately responsibility for injuries to nationals of other states, for whom traditionally diplomatic protection may be exercised by that other state." *See* Report, *Art. 1 and the Commentary in First Report on Diplomatic Protection,* by John R. Dugard, Special Rapporteur, International Law Commission, A/CN.4/506 (2000), *available at* http://ods-ddsny.un.org/doc/UNDOC/GEN/N00/330/76/PDF/N0033076.pdf?OpenElement. *Id*. at note 11.

545 A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 Can.Y. B. Int'l L. 72, 91 (1976).

546 Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad 330 (2003, reprint of 1919 ed.).

as it violates this law regarding proper administration of justice, and it constitutes a "wrong perpetrated by the abuse of judicial process."[547]

The most recent monographic treatment of this issue, Jan Paulsson's Denial of Justice in International Law,[548] innovative in drawing on recent decisions mostly in the human rights and investment law field, concludes that misapplication of national law "cannot, by itself, be an international denial of justice."[549] This is true, in his opinion, also for misapplications by domestic courts of international law.[550] Beyond that, he concludes that "in modern international law there is no place for substantive denial of justice. … If a judgment is *grossly* unjust, it is because the victim has not been afforded fair treatment. … Extreme cases should thus be dealt with on the footing that they are so unjustifiable that they could have been only the product of bias or some other violation of the right of *due process*."[551] Limiting the concept thus to situations of fundamental procedural unfairness,[552] he gives examples:

> Some denials of justice may be readily recognized: refusal of access to court to defend legal rights, refusal to decide, unconscionable delay, manifest discrimination, corruption, or subservience to executive pressure.
>
> Unfairness in the hearing of a case is a more difficult matter. … One might say that denial of justice arises when *proceedings are so faulty as to exclude all reasonable expectation of a fair decision*, but the choice of words is infinite. What they all have in common is that they lead to a debate to be resolved by appeals to experience, not to the dictionary. …
>
> Recurring instances [of denials of justice] are unreasonable delay, politically dictated judgments, corruption, intimidation, fundamental breaches of due process, and decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence. …
>
> [S]ome acts or omissions by governmental authorities are sufficiently closely related to the administration of justice that they must also be deemed capable of generating international delinquency under the heading of denial of justice: failures of enforcement, the implementation of sanctions against persons or property without trial, failure of investigation or indictment, lengthy imprisonment without trial, arbitrarily lenient or harsh punishment.[553]

This concludes the analysis of customary international law and general principles of law, as pertaining to criminal due process guarantees. The discussion proceeds with the procedural law and practice of international criminal tribunals.

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547 *Ibid.*

548 Jan Paulsson, Denial of Justice in International Law (2005).

549 *Id.* at 81.

550 *Id.* at 84-87.

551 *Id.* at 82.

552 *Id.* at 98 ("Denial of justice is always procedural.").

553 *Id.* at 205-206.

C. Due Process in Proceedings before International Criminal Tribunals

The last century has seen the establishment of criminal courts beyond national jurisdictions, tribunals designed to address its most heinous crimes. In the context of this study, it is of great interest to see whether, and to what degree, these courts' structures and procedures adhere to the due process guarantees developed in the various universal and regional human rights systems discussed above. This section starts with an analysis of the International Military Tribunals at Nuremberg and Tokyo, followed by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and ending with the permanent International Criminal Court.

The procedure of the nascent system of international criminal courts is only slowly developing. In the beginning, focused on the specialized contexts of the conflicts areas for which they were constituted, their procedure was written on a virtually clean slate. The Nuremberg and Tokyo Courts, comparatively speaking, were constituted rather speedily, as speedily as they delivered justice. Their essential procedural features demonstrating their underlying idea of a fair trial will be analyzed first. The second wave of international adjudication of individual criminal liability started with the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, followed by the International Criminal Tribunal for Rwanda a year later. Both bodies were constituted by the UN Security Council; both developed extensive rules of procedure and evidence. As in Nuremberg, they were the shocked response of the international community to atrocities of unspeakable magnitude. In contrast to Nuremberg, their structure and procedure could build upon the human rights revolution post-World War II and benefit from a growing international jurisprudence, both regional and universal, outlining the *minima* of a fair trial, albeit directed to domestic courts. The last accomplishment in international criminal accountability is the International Criminal Court, established by international agreement via the Statute of Rome of 1998. It was designed to transcend the limitations of time and space afflicting the prior *ad hoc* tribunals and be the fallback court of last resort, when individual states did not have the power or the will to address acts that shock the conscience of humankind, *i.e.* international crimes, technically called genocide, crimes against humanity, war crimes, and, possibly, aggression.

The way these international bodies dealt with the issue of providing fairness to persons accused of most heinous atrocities may be instructive for the purposes of our study. Still, the *ad hoc* international tribunals mentioned above, by and large, could complete their tasks when the atrocities that gave rise to their creation had come to an end (with the exception of the 1999-2000 events in Kosovo); and they were located in relative peace either outside the country of the commission of these acts (The Hague, Arusha) or inside a country defeated by war (Germany, Japan).

Part 1 of this Chapter will address the procedural guarantees for defendants set up within the Charter and the Rules of the International Military Tribunals in Nuremberg and Tokyo; Part 2 will introduce the guarantees afforded the accused before the International Criminal Tribunals for the former Yugoslavia and for Rwanda; and Part 3 will outline the rights of defendants and persons suspected of crimes before the International Criminal Court.

1. The International Military Tribunals in Nuremberg and Tokyo

a. The IMT at Nuremberg

The "International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European axis" (hereinafter IMT) was established on August 8, 1945 via inter-Allied agreement after the end of World War II and the German Reich's unconditional surrender. This institution was the first of its kind.[554]

It had not come about without a fight. Particularly, the British, the French, and the Soviets, as well as some significant sectors of the American political elite, did not immediately sign on to the granting of legal process to defendants who stood accused of not only having attacked other countries without provocation and committed grave violations of the laws and customs of war, but also of wholesale and systematic eradication of entire ethnic groups with unprecedented precision and on an unprecedented scale. They rather would have preferred the firing squad.[555] Robert H. Jackson, former U.S. Attorney General, since 1941 U.S. Supreme Court Justice, and famed U.S. Chief Prosecutor at Nuremberg, was one of the most influential voices for a judicial, not a political, body dealing with the issue of how to properly react to the individual guilt *vel non* of those accused of responsibility for the Nazi atrocities.

Since Nuremberg, controversies have raged whether the IMT was an impartial tribunal or whether it constituted simple "victor's justice," whether the crimes the defendants were accused of were established after their commission of the acts (*ex post facto*), and whether other fair trial guarantees were sufficiently observed. In this brief overview, the Nuremberg law and procedure will first be presented as written

554 A prior plan to put Kaiser Wilhelm II of Germany on trial, "for a supreme offence against international morality and the sanctity of treaties," articulated in Article 227 of the Versailles Peace Treaty, never came to fruition as the former German emperor spent the rest of his days in exile in the Netherlands, which as a neutral country, refused his extradition. William A. Schabas, The UN International Criminal Tribunals 9 (2006).

555 For details on the struggle between the Allies and within the U.S., see the account by one of the participants of the Nuremberg trials, Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (1992). As papers from the British War Cabinet released only on January 1, 2006 show, British Prime Minister Winston Churchill, in 1942, had advocated a policy of summary execution of leading Nazis. John Crossland, *Churchill: execute Hitler without trial*, The Sunday Times, Jan. 1, 2006, available at http://www.timesonline.co.uk/article/0..2097-1965607.00html. At the 1943 Tehran Conference, Stalin proposed executing 50,000 to 1000,000 German staff officers. Churchill there opposed the "cold blooded execution of soldiers who fought for their country" as well as executions "for political purposes," but suggested trials of war criminals where their crimes had been committed. Originally supportive of U.S. Treasury Secretary Henry Morgenthau, Jr.'s Plan of severe economic sanctioning of post-War Germany, similar to the measures taken after World War I, Churchill and U.S. President Roosevelt abandoned that plan in 1944. Also, the Soviet Union at that time, "announced a preference for a judicial process." The plan for a trial of European axis war criminals was drafted by U.S. Secretary of War Henry L. Stimson. Upon President Roosevelt's death in April 1945, President Truman gave strong support to the judicial process. *Nuremberg Trials*, at http://en.wikipedia.org (last accessed December 31, 2006).

and, second, as applied; lastly, it will be looked at from the angle of the extent of its fair trial guarantees.

The Law on the Books

In pursuance of the August 8, 1945 agreement between the four Allied powers an "International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis" – the so-called London Charter – was established.[556] Its permanent seat was to be in Berlin, with the first trial to be held in Nuremberg, Germany.[557] The Tribunal consisted of four members, one from each of the four Signatories.[558] Decisions by the Tribunal were made by majority vote, with the President breaking a tie.[559]

The jurisdiction of the IMT encompassed individual responsibility for the following acts: (a) crimes against peace; (b) war crimes; and (c) crimes against humanity.[560] Detailed definitions were given of these crimes, including, *e.g.* for "crimes against peace," *inter alia*, the "planning, preparation, initiation or waging of a war of aggression … or participation in a common plan or conspiracy for the accomplishment of the foregoing," and, as to "crimes against humanity," *inter alia*, "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war…"[561] Heads of State or other officials of the government were not immune from such individual responsibility;[562] neither were those who acted pursuant to orders from their superiors.[563] The IMT could also declare a group or organization of which an indicted individual was a member of a "criminal organization."[564] This declaration was to form the basis for later trials for membership in such organizations before national, military or occupation courts, in which "the criminal nature of the group or organization" was to be "considered proved and shall not be questioned."[565] Trials in absentia were allowed broadly if the person charged "has not been found or if the Tribunal, for any reason, finds it necessary in the interests of justice, to conduct the hearing in his absence."[566]

Each Signatory appointed a Chief Prosecutor for the investigation and prosecution of major war criminals, but all four Chief Prosecutors, as a committee acting by majority vote, had to agree upon a plan of work of each Chief Prosecutor and his

556 Charter of the International Military Tribunal, art. 1.

557 *Id.* art. 22.

558 *Id.* art. 2. The signatories included the U.S., the U.S.S.R., U.K. and France.

559 *Id.* art. 4(3).

560 *Id.* art. 6.

561 *Id.*

562 *Id.* art. 7.

563 *Id.* art. 8. Such superior orders could, however, be considered in mitigation of punishment. *Ibid.*

564 *Id.* art. 9.

565 *Id.* art. 10.

566 *Id.* art. 12.

staff, settle the final designation of the major war criminals to be tried, approve the indictments and lodge them with the IMT, as well as draft the Tribunal's rules of procedure.[567] Each individual Chief Prosecutor and his staff investigated, gathered and produced all necessary evidence, prepared the indictment, and acted as prosecutor at the trial in the cases assigned to him.[568]

One article of the Charter of the IMT was entitled "Fair Trial for Defendants." This Article 16 included the following guarantees for the defendants:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at reasonable time before the Trial;
(b) During any preliminary examination or Trial of a Defendant he will have the right to give any explanation relevant to the charges made against him;
(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
(d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.
(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution. [569]

The Tribunal had the power to summon witnesses to the trial and put questions to them; to interrogate any Defendant; and require the production of evidence.[570] It was to "confine the Trial strictly to an expeditious hearing of the cases raised by the charges," "take strict measures to prevent any action which will cause reasonable delay [sic], and rule out irrelevant issues and statements of any kind whatsoever," and "deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings…"[571]

Importantly, "[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value."[572] Also, it "may require to be informed of the nature of any evidence before it is entered so that it may rule upon the relevance thereof."[573] It "shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, includ-

567 *Id.* art. 14.
568 *Id.* art. 15.
569 *Id.* art. 16.
570 *Id.* art. 17.
571 *Id.* art. 18.
572 *Id.* art. 19.
573 *Id*. art. 20.

ing the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of recordings and findings of military or other Tribunals of any of the United Nations."[574]

The trial commenced with the indictment being read in court, then proceeding with the Defendant being asked whether he pleads "guilty" or "not guilty," the prosecution making an opening statement, the Tribunal ruling on the admissibility of evidence submitted by the prosecution and the defense, an examination of the witnesses for the prosecution and the defense with possible rebuttal evidence by either, questioning by the Tribunal and interrogation and cross-examination by prosecution and defense, respectively, the defense and prosecution addressing the court, the defendant making a final statement, and the Tribunal delivering the judgment and pronouncing the sentence.[575] The decision was final; there was no appeal.[576]

The Rules of Procedure adopted by the IMT on October 29, 1945 detailed some of the protections outlined in the Charter. In Rule 2, for example, it stated that each defendant shall receive, within 30 days before trial, a copy of the indictment, the Charter, and any other documents lodged with the indictment as well as a statement of his right to the assistance of counsel, together with a list of counsel, and a copy of the rules of procedure.[577] Defendants not in custody were to be notified of the indictment "in such form and manner as the Tribunal may prescribe,"[578] as were members of groups and organizations the Tribunal had indicated its intention to declare a "criminal organization."[579] Each defendant had the right to conduct his own defense or to apply for particular counsel with the General Secretary of the IMT; if requested counsel was not to be found or available within ten days, the Tribunal would designate counsel.[580] The defense could apply in writing to the Tribunal for the production of witnesses or documents, indicating facts proposed to be proved by such testimony or document and the reasons why such facts are relevant to the defense.[581] The Tribunal, acting through its President during trial and most of the time also before trial, ruled on any motions, applications and other requests, including issues as to the admissibility of evidence.[582]

574 *Id.* art. 21.

575 *Id.* art. 24.

576 *Id.* art. 26.

577 International Military Court, Rules of Procedure, 29 October 1945, Rule 2(a).

578 *Id.* Rule 2(b).

579 *Id.* Rule 2(c).

580 *Id.* Rule 2(d).

581 *Id.* Rule 4(a).

582 *Id.* Rule 7.

The Law in Action

The trial of 24 prominent leaders of Nazi Germany, selected to represent the "major war criminals of the European axis,"[583] took place from November 20, 1945 to October 1, 1946 at the Nuremberg Palace of Justice.[584] It was the first, and the last, such trial, as the beginning Cold War put an end to such common inter-Allied endeavors. Trials of "lesser" war criminals proceeded subsequently until 1949 under Allied Control Council Law No. 10 before courts called the U.S. Nuremberg Military Tribunals. Overall, some 200 German war crimes defendants were tried there, in addition to 1600 adjudicated through traditional channels of military justice.[585]

The IMT opened its proceedings on October 18, 1945 in Berlin under the presidency of the Soviet judge Nikitchenko. Indictments were entered against 24 individuals listed as "major war criminals" and several groups or organizations to be declared "criminal organizations": the Leadership Corps of the Nazi Party, the NSDAP; the Schutzstaffel (SS); the Sicherheitsdienst (SD); the Secret State Police (Gestapo); the Sturmabteilung (SA); the Third Reich's Cabinet, and the General Staff and High Command of the German Armed Forces (OKW).[586]

The trial itself was conducted in Nuremberg. It resulted in the convictions of nineteen defendants on October 1, 1946. The convictions ranged from participation in a common plan or conspiracy for the accomplishment of a crime against peace, to planning, initiating and waging wars of aggression and other crimes against peace, to war crimes and crimes against humanity. The sentences for those convicted ranged from death (Göring, Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sauckel, Jodel, Seyß-Inquart and, *in absentia,* Bormann) to life imprisonment (Heß, Funk and Raeder), to twenty years (von Schirach and Speer), fifteen years (von Neurath) and ten years of imprisonment (Dönitz); three defendants were acquitted (Schacht, von Papen and Fritzsche).[587] The death sentences were carried out

583 Actually, the trial started with only 21 defendants present. Robert Ley had committed suicide on October 25, 1945; Gustav Krupp von Bohlen und Halbach's trial had been postponed indefinitely due to a serious health condition; and Martin Bormann was tried *in absentia*, only to be officially declared dead as of May 1 or 2, 1945 by a German court ten years later. Herbert R. Reginbogin & Christoph J.M. Safferling, *Introduction – Lessons of Nuremberg: Returning to Courtroom 600 on the 60th Anniversary of the Nuremberg Trial against the major German War Criminals*, in The Nuremberg Trials: International Criminal Law Since 1945 11 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006) (hereinafter The Nuremberg Trials).

584 While Berlin had been favored by the Soviet Union, Nuremberg was designated as the place of the first trial (Art. 22), due to its location in the U.S. zone of Germany, its large, and largely undamaged, Palace of Justice and adjacent prison, and its immediate past history as host of impressive Nazi party rallies.

585 *Nuremberg Trials*, in www.wikipedia.com.

586 International Military Tribunal (Nuremberg), Judgment, Oct. 1, 1946, 41 Am. J. Int'l 172, 252 (1946).

587 Judgment, 41 Am. J. Int'l 172, 331-332 (1946); *France et al. v. Göring et al.*, 22 IMT 203 (1946), 13 ILR 203; Süddeutsche Zeitung, Oct. 1, 1946, Special Edition, at 1. For further details, see http://www. justiz.bayern.de/gericht/olg/n/imt/.

by hanging – as the British and Soviet judges opposed a French proposal to use the firing squad, standard for court-martial procedures, arguing that the military officers convicted had violated their military code and were thus not worthy of its rites.[588]

The Leadership Corps of the NSDAP, the SS, the SD, and the Gestapo were declared "criminal organizations," while the Reich Cabinet, the OKW, the SA and the Reiter-SS were not.[589]

b. The IMT at Tokyo

The Charter of the International Military Tribunal for the Far East of January 19, 1946, established the IMT at Tokyo. The Rules of Procedure of this court were promulgated on April 25, 1946. Similar to Germany, the unconditional surrender had not been declared by the Government of the Empire of Japan, but the Japanese Armed Forces.

The Law on the Books

The Charter of the Tokyo Tribunal closely parallels the Charter of the IMT at Nuremberg. The eleven judges presiding over the Tribunal were representing eleven Allied powers winning the war over Japan.[590] Unlike in Nuremberg, however, the prosecutors did not operate by committee; while each country, as with the judges, provided one prosecutor, the prosecutorial team was led, and represented, by one Chief Prosecutor – former U.S. Assistant Attorney General Joseph B. Keenan.

The IMT at Tokyo was set up to try the leaders of the Empire of Japan for virtually the same types of crimes committed during the war as stated and defined in the London Charter: Class A: crimes against peace; Class B: war crimes; and Class C: crimes against humanity. Procedurally, the Tokyo Tribunal operated very similarly to the Nuremberg Tribunal.[591]

The Law in Action

The IMT for the Far East commenced its proceedings on May 3, 1946, and was adjourned on November 12, 1948. It was presided over by Sir William Webb, Justice of the High Court of Australia. While Emperor Hirohito and Prince Asaka were not prosecuted, 28 defendants were originally tried. Two of them died of natural causes during the trial, and another one was removed following a nervous breakdown.

Seven defendants, mostly military leaders, but also a foreign minister and a war minister, were convicted of crimes against peace, war crimes and crimes against humanity. They were sentenced to death and hung on December 23, 1948. Sixteen more defendants were sentenced to life imprisonment. Three died in prison, while the other thirteen were paroled in 1955. Another defendant was sentenced to 20 years and

588 *Second World War: Events: Nuremberg Defendants*, at http://www.worldwar-two.net/acontecimentos/ 85/ (last visited on February 17, 2008).

589 Judgment, 41 Am. J. Int'l L. 172, 252-272 (1946).

590 Those powers included the U.S., the U.S.S.R., the U.K., France, the Republic of China, the Netherlands, Canada, Australia, New Zealand, British India, and the Philippines.

591 Robert Cryer, An Introduction to International Criminal Law and Procedure 96-100 (2007).

died in prison. The last defendant, another former foreign minister, was sentenced to 7 years in jail, but was paroled in 1950 and went on to serve as foreign minister again. [592]

There was one dissenting opinion. The Indian judge, representing then British India, at the Tokyo Tribunal, Radhabinod Pal, made the point of unequal justice: "If Japan is judged, the Allies should also be judged equally." [593]

Criticisms of victor's justice[594] and *ex post facto* concerns were raised against the IMT for the Far East as well. Also, an "American bias" was alleged, since the Chief Prosecutor was an American.[595]

c. Appraisal of both Tribunals

Strictly reviewed under the focus of this inquiry, the guarantees of a fair trial, the International Military Tribunals at Nuremberg and Tokyo elicit the following comments:

It has been charged that these trials lacked legitimacy, because they constituted "victor's justice,"[596] *i.e.* they imposed a court, consisting of representatives of states who won a war, a court whose composition could not be challenged by the defendants, on the leaders of the defeated nation without their consent, using standards and procedures not used by the winning nations themselves to judge the conduct of their citizens. As to these "macro"-arguments, they merit some disentangling before we address procedural points.

First, as to the issue whether the IMT constituted one-sided "victor's justice," a significant counter-argument, one that has been advanced in the context of Nurem-

592 For details on this history, see Arnold C. Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial (1987) and Timothy P. Maga, Judgment at Tokyo: The Japanese War Crimes Trials (2001). In addition to these high-profile defendants, 300,000 nationals of Japan were charged with Class B and C crimes, mostly on account of prisoner abuse.

593 Cryer, *supra* note 591, at 98, with further assessment.

594 Richard H. Minear, Victor's Justice: The Tokyo War Crimes Trial (1971).

595 Solis Horowitz, *The Tokyo Trial,* Int'l Conciliation 473-584 (Nov. 1950). Interestingly, though, the Tokyo Tribunal was seen as receiving far less support by the U.S. Government than the Nuremberg tribunal, as the American Chef Prosecutor Joseph Keenan held a much lower position than Robert H. Jackson, Chief U.S. Prosecutor at Nuremberg.

596 U.S. Senator Robert Taft argued that "[t]he trial of the vanquished by the victors cannot be impartial, no matter how it is hedged about with the forms of justice." Cited in Raymond M. Brown, *The American Perspective on Nuremberg: A Case of Cascading Ironies*, in The Nuremberg Trials, *supra* note 583, at 21, 24. Even more strongly, the Chief Justice of the U.S. Supreme Court, Harlan Fiske Stone, objected to the IMT's Chief Prosecutor's actions: "Jackson is away conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas." *Ibid*., citing Graeme A. Barry, *"The Gifted Judge": An Analysis of the Judicial Career of Robert H. Jackson*, 38 Alberta L. Rev. 880, 883 (2000).

berg, is that the political authority over Germany had been transferred after its unconditional surrender to the Allied Powers and their Control Council.[597] The Allies were thus entitled to punish violations of the laws of war through special tribunals, including the international ones here created. Justice also was not one-sided as the Allies themselves punished, through courts-martial and similar domestic military justice systems, violations of the laws of war by their own troops. Without institutions such as the Nuremberg tribunals, violations of the laws of war by the Germans would have been left unpunished. This argument well addresses the jurisdiction of the courts regarding war crimes; it may, however, provide less of an answer for the argument against the IMT's jurisdiction over crimes against peace and crimes against humanity. Crimes against humanity, in particular, could have been committed under London Charter Article 6(c) "before or during the war," expressly cutting the linkage to crimes limited to the situation of war.[598] Still, such "new" crimes were arguably not committed by the winners of the war,[599] and thus needed no prosecution, domestically or internationally. In addition, they were so horrendous that substantive justice itself demanded the overriding of the purely theoretical imbalance argument.

The next argument presented is that the tribunals were not impartial since their members could not be challenged by the defendants.[600] This point, however, has been countered, quite effectively, with the observation that, even in ordinary criminal law, "a burglar cannot complain that he is being tried by a jury of honest citizens."[601]

The next issue is whether the crimes the defendants were accused of were established after their commission of the acts in violation of a general principle of criminal law which prohibits *ex post facto*,[602] *i.e.* retroactive criminalization of previously legal conduct. The main argument was that international law of the time did not include

597 The counter-argument is, however, that only the German armed forces, not its government, surrendered unconditionally.

598 Even though empowered by the Charter to address crimes against humanity before the war, the IMT limited itself in its judgment to such crimes committed during the war.

599 The hesitation with which one could approach this issue stems, *e.g.*, from the invasion by the Soviet Union, in concert with Germany, of the Baltic States committed under the Ribbentrop-Molotov Non-Aggression Pact of August 23, 1939 (George Ginsburgs, Moscow's Road to Nuremberg 129, 142 (1996)), which also had "left Hitler free to move against Poland" (Bradley F. Smith, Reaching Judgment at Nuremberg 105 (1977)). Michael J. Bazyler, *The Role of the Soviet Union in the International Military Tribunal at Nuremberg*, in The Nuremberg Trials, *supra* note 583, at 45, 49. *See also* Brown, *supra* note 596, at 27.

600 This argument receives some support from the fact that Soviet Judge Nikitchenko had presided over some of the most notorious of Stalin's show trials of 1936-38. Bazyler, *supra* note 599, at 45.

601 A.L. Goodhart, *The Legality of the Nuremberg Trials*, 58 Juridical Rev. 1 (April 1946), cited in Bazyler, *supra* note 599, at 47.

602 William O. Douglas, U.S. Supreme Court Justice, has been quoted this way: "I thought at the time and still think that the Nuremberg trials were unprincipled. … Law was created ex post facto to suit the passion and clamor of the time." H.K. Thompson, Jr. & Henry Strutz, Dönitz at Nuremberg.: A Reappraisal (1983).

an international crime other than piracy. The only reference to a "crime against humanity" in state practice prior to the London Charter occurred in 1915 when Britain, France and Russia issued a statement accusing Turkey of such offense in the Armenian genocide, without, however, attributing any specific meaning to it,[603] not to speak of defining any element of this crime. The prevailing counter-argument to the *ex post facto* point with respect to Nuremberg appears to be that German law of the time itself had prohibited the acts described as crimes against humanity or war crimes,[604] and that, in any event, the acts the defendants were accused of were so shocking to the conscience of every human being that their criminality had to be established on the basis of natural justice, transcending the positive justice system of any offending nation.[605] This is particularly true for the charge most susceptible to the *ex post facto* argument, the crime against peace.[606] As the British Chief Prosecutor in Nuremberg

603 *Nuremberg Trials*, in www.wikipedia.com.

604 Albin Eser, *Das International Militärtribunal von Nürnberg aus deutscher Perspektive*, in The Nuremberg Trials, *supra* note 583, at 53, 55, referring to his predecessor (as Director of the Freiburg Max Planck Institute of Foreign and International Penal Law) Professor Hans-Heinrich Jescheck's argument that these crimes were nothing but regular crimes under domestic criminal codes which had been politically motivated and carried out systematically.

605 *Cf., e.g.,* Carl Schmitt's characterization of these crimes as "extraordinary." *Ibid.*

606 One of Chief Prosecutor Jackson's assistants at Nuremberg, Professor Bernard Meltzer, analyzed this point later this way: "The international formulations relied on by Justice Jackson were silent about individual responsibility for aggressive war. Indeed, such responsibility was disclaimed during the confirmation discussions in the United States Senate of the Kellogg-Briand Pact, a pact on which Jackson heavily relied. Thus, Senator Borah, the chairman of the Senate Foreign Relations Committee, had declared that the pact was an appeal solely to the conscience of the world and that its breach was not to lead to any punitive consequences." Cited in Brown, *supra* note 599, at 26. Even another assistant, Telford Taylor, concluded: "Arguments in support of punishing individuals *ex post facto* for violation of the crime against peace can be made, but, if conducted on a plane devoid of political and emotional factors will be won by the defense. But in 1945 those very factors were overwhelming. Peoples whose nations had been attacked and dismembered without warning wanted legal retribution whether or not this was a 'first time.' The inclusion of the crime against peace vastly enhanced the world's interest in and support to the trials at Nuremberg." Telford Taylor, The Anatomy of the Nuremberg Trials, *supra* note 555, at 629. *See also* David Cesarani, *The International Military Tribunal at Nuremberg: British Perspectives*, in The Nuremberg Trials, *supra* note 583, at 31, 37, citing The Rt Hon Lord Hankey, Politics, Trials and Errors 10-27, 50-65, 125-30 (1950). "To Lord Hankey, a minister in Churchill's war cabinet in 1940-1, the IMT was a travesty of justice. War, he maintained, is an instrument of policy and not a crime. If it was a crime, then the countries sitting in judgment were equally guilty of aggressive war at one time or another over the previous six years. In this respect, alone, the participation of the USSR made a mockery of the proceedings and gave them every appearance of 'victor's justice.'" Interestingly, although the IMT convicted twelve defendants of the crime against peace, only defendants convicted of war crimes and crimes against humanity were executed, with the noted exception of Julius Streicher. Brown, *supra* note 596, at 25, 26. The somewhat questionable nature of the international "crime

argued: "If this be an innovation, it is an innovation long overdue – a desirable and beneficent innovation fully consistent with common sense and with the abiding purposes of the law of nations."[607] Also, the crime of conspiracy and individual criminal responsibility for membership in criminal organizations led to criticism, particularly from judges and scholars trained in the civil law tradition.[608]

The positive elements of the Nuremberg and Tokyo Charter and Rules included the fair notice given to the defendants of the charges and supporting evidence, as well as their right to present witnesses and other evidence of their own – subject to the approval of the Tribunal regarding their relevancy – as well as the defendants' right to cross-examine witnesses for the prosecution. The other praiseworthy feature included the right to the assistance of counsel, albeit from a list composed by the Tribunal.

What is to be noted is the absence, in either Charter or Rules, of any provision limiting pre-trial investigations and arrests, explained partly by the fact that the defendants were already either in custody or still on the loose, never to be found (*e.g.* Martin Bormann), partly by the fact of the fog of war. Trials *in absentia* were very loosely allowed.

The conduct of the trial itself resembled very much a continental, German proceeding – with the Tribunal interrogating witnesses and the counsels for prosecution and defense performing additional questioning. The Charter dedicated itself to an "expeditious" procedure, recalling, at least in form, the right to a speedy and public trial of time-honored criminal justice systems.

Where the most problematic features came in was in the treatment of the evidence by the Tribunal:

– First, the Tribunal was to admit "any evidence it deems to be of probative value," and was "not bound by technical rules of evidence" (Article 19). This mandate can be seen as ignoring the fact that the "technical" rules of evidence are meant to rule out notoriously unreliable testimony such as hearsay, or sanction illegal and abusive conduct and techniques by the authorities in obtaining evidence (through the exclusionary rule or the fruit of the poisonous tree doctrine).
– Second, the Charter mandated, as evidence immunized from any questioning by the Tribunal or the parties, "official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of recordings

against peace" may also be seen as reflected in the impossibility, to date, to find agreement to define "aggression" according to Article 5(2) of the Rome Statute of the International Criminal Court.

607 Cited by Eser, *supra* note 604, at 56.

608 During the trial's deliberations, the French judge, Henri Donnedieu de Vabres, expressed his opinion that the charge of conspiracy was *ex post facto*, and might be hurtful to the acceptance of the Tribunal's findings. Bradley F. Smith, Reaching Judgment at Nuremberg 122 (1977), cited in Brown, *supra* note 596, at 25 (mentioning also Soviet concerns during the Charter negotiations). For a broader statement of these concerns, see Hervé Ascensio, *The French Perspective*, in The Nuremberg Trials, *supra* note 583, at 39, 40-42.

and findings of military or other Tribunals of any of the United Nations" (Article 21). The validity of any statements of fact contained in any such documents therefore could not be tested in open court.

– Lastly, the Charter did not demand the presumption of innocence. There was no provision of a right to appeal, and no habeas corpus or any similar relief.

The general soundness of the judgment itself, the enormity of the crimes adjudicated, and the bold innovativeness of the institution and its mandate have left Nuremberg as the first beachhead of international criminal justice. Its precedents have been classified as "canonical"[609] – dwarfing the procedural shortcomings we may perceive looking back. As we move along the line of time, those shortcomings were addressed in much more satisfying ways in the *ad hoc* international criminal tribunals of the 1990s and in the Statute of Rome.

b. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

Horrors of unprecedented magnitude in the Balkans, during the disintegration of the former Yugoslavia, and the African postcolonial state of Rwanda, both motivated by ethnic conflict, led to cries for individual international criminal accountability for those responsible. The UN Security Council responded, with the creation, on May 25, 1993, of the International Criminal Tribunal for the former Yugoslavia (ICTY),[610] and, on November 8, 1994, of the International Criminal Tribunal for Rwanda (ICTR).[611] Due to their creation by decision of the Security Council, they may be called the first truly international criminal tribunals.[612]

609 Particularly for international criminal courts of our day. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Calif. L. Rev. 75, 118 (2005).

610 UN Security Council Res. 827, adopted without vote by general agreement. The full name of the tribunal is "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." For details on its origins, see Kelly Dawn Askin, *The ICTY: An Introduction to its Origins, Rules and Jurisprudence*, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald 13 (Richard May et al. eds., 2001) (hereinafter Essays on ICTY Procedure).

611 UN Security Council Res. 955, with Rwanda opposed and China abstaining. The full name of the Tribunal is "The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994."

612 William A. Schabas, The UN International Criminal Tribunals 8 (2006), with reference to Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 Am. J. Int'l L. 78, 79 (1994). B.V.A. Röling, a Dutch judge on the Tokyo IMT, had called the Nuremberg and Tokyo IMTs "multinational," since the powers establishing them could have exercised jurisdiction individually – they had "done together

The decision to create those tribunals has been challenged as *ultra vires* the Security Council, as such a measure is not one of those expressly mentioned in Article 41 or other provisions of Chapter VII of the UN Charter. But the International Court of Justice had previously issued an opinion that confirmed the power of UN organs to delegate their powers to subsidiary powers, including tribunals,[613] and the International Court of Justice, in the *Lockerbie* case,[614] has refused to review the exercise of the Security Council's powers under Chapter VII since, under Article 25 of the UN Charter, the Security Council has the "primary responsibility" regarding issues of international peace and security.

Security Council Resolution 827, in its annex, promulgated the Statute of the ICTY; similarly, Security Council Resolution 955, in its annex, promulgated the Statute of the ICTR. Both statutes exhibit broad similarities in structure, content and procedure. In particular, the definition of the crimes under their jurisdiction is very similar. The ICTY has jurisdiction over grave breaches of the 1949 Geneva Conventions,[615] violations of the laws and customs of war,[616] genocide,[617] and crimes against humanity[618] – the ICTR over genocide,[619] crimes against humanity,[620] and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[621] Even though the ICTY and the ICTR have concurrent jurisdiction with national courts over those crimes, the international tribunals have primacy over national courts.[622] This determination allows the international tribunal at any stage of the proceeding to ask national courts to defer to the competence of the ICTY/ICTR.[623] Both the ICTY and the ICTR have chambers (or judges), an office of the registry, and an office of the prosecutor. In the beginning, they even shared the same prosecutor[624]

what any one of them might have done singly." B.V.A. Röling, *The Law of War and the National Jurisdiction since 1945*, in Recueil des Cours 1960-II, at 356.

613 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunals (Advisory Opinion)*, 1954 I.C.J. 47, 21 ILR 310, 312 (taking into account Article 28 of the UN Charter).

614 *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.K.; Libya v. U.S.), Provisional Measures, 1992 I.C.J. 3, 114 (Orders of April 14).

615 ICTY Statute, art. 2.

616 *Id*. art. 3.

617 *Id*. art. 4.

618 *Id*. art. 5.

619 ICTR Statute, art. 2.

620 *Id*. art. 3.

621 *Id.* art. 4.

622 ICTY Statute, art. 9; ICTR Statute, art. 8.

623 *Ibid.*

624 Subsequently, the Security Council changed this arrangement to provide for separate prosecutors. UN Doc. S/RES/1503 (2003), para. 8.

and appeals body.[625] Today, the ICTY consists of three Trial Chambers and one Appeals Chamber, the Prosecutor, and a Registry serving both the Chambers and the Prosecutor.[626] The ICTY Chambers are composed of sixteen permanent and up to nine *ad litem* judges[627] elected by the General Assembly from a list submitted by the Security Council.[628] The ICTR also consists of three Trial Chambers and one Appeals Chamber as well as the Prosecutor and the Registry.[629]

The Statutes of both the ICTY and the ICTR are rather sparse on rules of procedure and evidence. The Statutes direct the Trial Chambers to make sure that trials are "fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[630] The Statutes leave elaboration of those rules to the judges of the Tribunal; they "shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."[631]

By necessity, because of the diverse professional backgrounds of the judges and lawyers involved, the Tribunals' procedure had to strike a compromise between the main legal traditions around the globe, *i.e.* those of the common law and the civil law. In the field of criminal law, the main difference was thus between the common law's adversarial process, where justice ideally emerges through the struggle between prosecution and defense, and the civil law's inquisitorial model, where the judge has the ultimate responsibility to search for the truth. Due to the prevalence of American lawyers on the ground,[632] and an early draft submitted by the American Bar Associa-

625 More precisely, there were two separate Appeals Chambers, but they had the same membership. Compare ICTR Statute, art. 12(2). The reasons for this were economies of scale and the desire for consistency in appellate decisions. Schabas, *supra* note 612, at 593. More recently, the Security Council created a more autonomous Appeals Chamber for the ICTR. UN Doc. S/RES/1329 (2000), paras. 2-3. For details, *see* Schabas, at 594.

626 ICTY Statute, art. 11.

627 *Id.* art 12.

628 *Id*. art.14.

629 ICTR Statute, art. 11.

630 ICTY Statute, art. 20; ICTR Statute, art. 19.

631 ICTY Statute, art. 15; ICTR Statute, art. 14.

632 "The International Criminal Tribunal for the former Yugoslavia was originally staffed by twenty-five US attorneys who donated their time for a couple of years. Many European countries were outraged by the large number of Americans and felt that the United States had basically hijacked the institution culturally. And it had, to a large extent. It was a common-law jurisdiction, and the way of doing business was very North American because the Americans were there from day one." Louise Arbour, *Crimes against Women under International Law*, 21 Berkeley J. Int'l L. 196, 209 (2003).

tion,[633] fervently promoted by the Judge from the U.S., Gabrielle Kirk McDonald,[634] the Rules of Procedure and Evidence as published first in 1994[635] had a distinctly American, *i.e.* adversarial flavor. It is more of a hybrid now. Thus, the adversarial process was instituted as the starting point; still, there are inquisitorial features, *e.g.* the judges retained their right to interrogate witnesses, and to even call their own witnesses or ask for documents.[636] They cannot issue subpoenas to States[637] or international organizations,[638] but they can make binding orders to States to produce certain pieces of evidence,[639] who then, internally, can subpoena those witnesses or documents or other evidence. Also, although direct evidence, particularly live testi-

633 Schabas, *supra* note 612, at 410.

634 Judge McDonald later told an American journalist: "I guess I was playing the typical American role – we know it all, we control it all." *Judging Tadić*, The American Lawyer, Sept. 1995, at 63, cited in Schabas, *supra* note 612, at 85. That attitude must have changed, since Judge McDonald was later elected President of the ICTY and her friends and colleagues at the Tribunal edited a book titled Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald, *supra* note 610. Her predecessor as President, Judge Antonio Cassese, said of her: "She has shown great competence, integrity and impartiality. She has demonstrated admirable equanimity and a deep sense of humanity. … Judge McDonald represents to me the best that America can offer: she is straightforward, she is direct, she is intelligent and unstintingly hardworking." Cited in Richard May, *Gabrielle Kirk McDonald: A Biographical Note*, in Essays on ICTY Procedure 3, 6-7.

635 International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.38 (2006), *entered into force* 14 March 1994, *last amended* 30 May 2006 (hereinafter ICTY RPE). The ICTR's Rules of Procedures and Evidence, *entered into force* 29 June 1995, *last amended* 10 November 2006 (hereinafter ICTR RPE) initially copied the ICTY's, but now they differ in significant respects. Schabas, *supra* note 612, at 85.

636 ICTY RPE Rule 98: "A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance." Virtually identical: ICTR RPE Rule 98.

637 *Blaškić* (IT-95-14-AR108*bis*), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 25.

638 *Kovačević* (IT-97-24-PT), Decision Refusing Defence Motion for Subpoena, 23 June 1998.

639 ICTY Statute, art. 29(2); ICTR Statute, art. 28(2): States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest and detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal.

mony, in trial is preferred,[640] alternative evidence such as hearsay is not excluded,[641] although its weight in the decision-making process is diminished.[642]

This procedure and the exact delineation of powers between the judge and the lawyers remain still subject to constant struggles between the bench and, mostly the defense, which lead to lengthy delays in trials. These struggles are exacerbated when judges from the civil law tradition clash with defense counsel from the common law tradition. Both are convinced of the rightness of their positions, since they have been socialized in their profession in their domestic legal contexts.[643] Only when international criminal law practice becomes a significant practice field of its own will the rules be clear, as a new code of procedure derived from a *sui generis* amalgamation of features of both common law and civil law, with a dose of innovations due to the international nature of the process. Many of these rules and their refinements will have been formulated by the ICTY and the ICTR when they complete their trials, as envisioned by 2010.[644]

It is the responsibility of the Prosecutor to *ex officio* and independently investigate and prosecute persons responsible for offenses under the jurisdiction of the ICTY.[645] Upon a "determination that a *prima facie* case exists," he or she "shall prepare an indictment containing a concise statement of the facts and the crime or crimes with

640 Richard May & Marieke Wierda, *Evidence before the ICTY*, in Essays on ICTY Procedure, *supra* note 610, at 250, 253. Significantly, though, original Rule 90(1) ("Witnesses shall, in principle, be heard directly by the Chambers."), which May and Wierda refer to in their statement, is no longer part of the ICTY RPE of 2006.

641 May & Wierda, *id.*, at 257. *See generally* Gideon Boas, *Admissibility of Evidence under the Rules of Procedure and Evidence of the ICTY: Development of the "Flexibility Principle,"* in Essays on ICTY Procedure, *supra* note 610, at 263.

642 The Appeals Chamber clarified in 1999: "It is well settled in the practice of the Tribunal that hearsay evidence is admissible. … The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence." *Aleksovski,* (IT-95-14/1-AR73), Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15. Compare Boas, *id.*, at 271 ("the Chambers of the Tribunal will admit hearsay evidence on the basis that the weight to be attributed to it would obviously be less than the weight attributed to direct testimony of events witnessed first-hand"); Almiro Rodrigues & Cécile Tournaye, *Hearsay Evidence*, in Essays on ICTY Procedure, *supra* note 610, at 291 ("a hearsay statement should never be given such a weight as to be the only evidence relied upon to convict an accused").

643 The tribunals have thus been called a "virtual laboratory of comparative criminal law." Schabas, *supra* note 612, at 410.

644 The sunset provisions imposed by the Security Council may endanger an orderly and complete fulfillment of the ICTY's task. For details on the "completion strategy," *see* Schabas, *supra* note 612, at 40-43.

645 ICTY Statute, art. 16; ICTR Statute, art. 15.

which the accused is charged under the Statute."[646] This indictment is then reviewed by a judge of the competent Trial Chamber.[647] Upon his or her confirmation of the indictment, the judge may, "at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial."[648] Plea bargains, a staple of the common law, but alien to most civil law jurisdictions, are now formally available,[649] and account for more than one third of all convictions before the ICTY.[650] Still, they remain highly contested.[651] Obligations of the Prosecutor and the Defense to disclose evidence to each other before and during trial, either mutually or unilaterally, are of a high intensity and degree.[652]

The right to defense counsel,[653] assigned to an accused without sufficient means to pay, is assured throughout all phases of the proceedings. This is particularly relevant in the pre-trial stage.[654] In fact, where the ICTY and the ICTR have gone even beyond international human rights law it is with respect to the treatment of suspects. Inter-

646 ICTY Statute, art. 18(4); ICTR Statute, art. 17(4). On the complex legal requirements for issuing a proper indictment, see Michael J. Keegan & Daryl A. Mundis, *Legal Requirements for Indictments*, in Essays on ICTY Procedure, *supra* note 610, at 123.

647 ICTY Statute, art. 19(1); ICTR Statute, art. 18(1). Compare David Hunt, *The Meaning of a "*prima facie *Case" for the Purposes of Confirmation*, in Essays on ICTY Procedure, *supra* note 610, at 137.

648 ICTY Statute, art. 19(2); ICTR Statute, art. 18(2).

649 ICTY RPE Rule 62*bis*, added on November 12, 1997, and Rule 62*ter*, adopted on December 13, 2001.

650 Ralph Henham & Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia*, 16 Crim. L.F. 49 (2005), in Schabas, *supra* note 612, at 426. At the ICTR, plea bargaining was much less successful, cf. Schabas, *ibid.*

651 For a special pleading against their use, see Michael Bohlander, *Plea-Bargaining before the ICTY*, in Essays on ICTY Procedure, *supra* note 610, at 151. *See also* Claude Jorda & Jérôme de Hemptinne, *Un Nouveau Statut pour l'Accusé dans la Procédure du Tribunal Pénal International pour l'ex-Yougoslavie*, in Essays on ICTY Procedure, *supra* note 610, at 215.

652 ICTY RPE Rules 66-68; ICTR RPE Rules 66-68. For details, *see* Schabas, *supra* note 612, at 398-403; Renee Pruitt, *Discovery: Mutual Disclosure, Unilateral Disclosure and Non-Disclosure under the Rules of Procedure and Evidence*, in Essays on ICTY Procedure, *supra* note 610, at 305; Mark B. Harmon & Magdalini Karagiannakis, *The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules*, in Essays on ICTY Procedure, *supra* note 610, at 315.

653 For details, see John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in Essays on ICTY Procedure, *supra* note 610, at 168; Michael Greaves, *The Right to Counsel before the ICTY and the ICTR for Indigent Suspects: An Unfettered Right?*, in Essays on ICTY Procedure, *supra* note 610, at 177; Toma Fila, *The ICTY from the Perspective of Defence Counsel from the Former Yugoslavia: My Point of View*, in Essays on ICTY Procedure, *supra* note 610, at 187.

654 ICTY Statute, art. 18(3); ICTR Statute, art. 17(3). For implementation, see ICTY RPE Rules 42, 44 and 45 as well as ICTR RPE Rules 42, 44 and 45.

national human rights law would prohibit certain forms of ill-treatment in detention, but remain relatively silent on procedural pre-trial rights. The Rules of Procedure and Evidence for both the ICTY and the ICTR formulate substantially broader rights. Rule 42 of the ICTY RPE[655] accords this catalog of rights during investigation:

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:
>
> (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;
>
> (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and
>
> (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.
>
> (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

As far as the trial is concerned, the Statute not only mandates that trials be "fair and expeditious,"[656] but that they respect the fundamental rights of the accused. The right of the accused to an expeditious trial has faced many difficulties in its implementation, due to the complexity of the cases, both substantively and procedurally, as well as the conduct of the accused and the authorities. [657] The fundamental rights of the accused are catalogued in ICTY Statute Article 21[658]:

> 1. All persons shall be equal before the International Tribunal.
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

655 ICTY RPE Rule 42; ICTR RPE Rule 42 is virtually identical.

656 ICTY Statute, art. 20; ICTR Statute, art. 19.

657 Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial*, in Essays on ICTY Procedure, *supra* note 610, at 197.

658 ICTY Statute, art. 21; ICTR Statute, art. 20.

(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

This listing is a slightly modified rendition of Article 14 of the ICCPR, a provision that has been called the "gold standard" of the right to a fair trial in international human rights law.[659] What is lacking in Article 21 of the Statute of the ICTY is Article 14 ICCPR's guarantee of a trial before "a competent, independent and impartial tribunal established by law." Obviously, an *ad hoc* tribunal cannot fulfill all of these requirements. Still, the ICTY Statute requires that the judges "shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices."[660] The Rules of Procedure and Evidence also require disqualification in cases of judicial lack of impartiality,[661] *i.e.* actual bias or unacceptable appearance of bias.[662]

659 Schabas, *supra* note 612, at 501-02. While these guarantees are tailored after the ICCPR, the ICTY Trial Chamber had grappled with the issue of how much weight the ICTY should accord the interpretation of the fair trial guarantees by judicial and quasi-judicial human rights bodies. The Trial Chamber found the interpretation of the other international judicial bodies to be of "limited relevance" since such interpretations were based on different considerations: regarding the issue at hand, neither the ICCPR nor the ECHR had as primary considerations the protection of victims and witnesses in their cases involving fair trial guarantees. *See* Roza Pati, *Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization?*, in ICTY: Towards a Fair Trial? 147 (Thomas Kruessmann ed., 2008).

660 ICTY Statute, art. 13(1). According to this provision, in filling these positions the experience of the judges in "criminal law, international law, including international humanitarian law and human rights law" is to be taken into account. Interestingly, in the practice of the ICTY the judges with specifically criminal law background tend to be viewed, at least by defense counsel, as being more demanding in the circumscription of the elements of a crime, *i.e.* "strict constructionist," thus, in effect, more pro-defendant, while judges with human rights background tend to be perceived as having a broader approach to accountability and thus less of a focus on the narrow definition of a crime, resulting, generally, in an outcome less favorable to the defendant.

661 ICTY RPE Rule 15(A); ICTR RPE, Rule 15(A).

662 *Furundžija* (IT-95-17/1-A), Judgment, 21 July 2000, para. 189.

It has been stated that the ICTY in practice has not always been "exemplary" in living up to the gold standard of a fair trial: in one of its first rulings, one possibly "unavoidable under the circumstances," two judges of a Trial Chamber, dealing with the issue of authorizing anonymous testimony, stated that "[t]he International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process."[663] But, generally, the ICTY has abided by the rights granted under the Statute, *i.e.* the right to equality before the law, the right to a fair and public hearing, the presumption of innocence, the right to be informed of the charge, the right to a trial without undue delay, the right to be present at trial, the right to counsel, the right to call and examine witnesses, the right to an interpreter, the right to remain silent and the right to appeal.[664]

Rule 73(D) also allows for preliminary motions by the accused based on *"abuse of process,"* defined by the ICTR Appeals Chamber in reliance on the English House of Lords' jurisprudence as a discretionary doctrine "by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."[665] None of the defendants invoking this doctrine proved to be, however, ultimately successful.[666]

The Tribunals have added to those rights under the Statute and Rules the right to *equality of arms* between Prosecution and Defense, arguing that "under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."[667] The ICTY Appeals Chamber affirmed that minimally "a fair trial must entitle the accused to adequate time and facilities for his or her defence" under conditions that do not place him or her at a

663 *Tadić* (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 28, cited in Schabas, *supra* note 612, at 503.

664 For details on pertinent ICTY jurisprudence, *see* Schabas, *supra* note 612, at 511-535.

665 *Barayagwiza*, (ICTR-97-19-AR72), Decision, 3 November 1999, para. 74

666 *Barayagwiza*, (ICTR-97-19-AR72), Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000; *Milošević* (IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, para. 48; *Dragan Nikolić* (IT-94-2-AR73), Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, paras. 30-32; *see also* discussion in Schabas, *supra* note 612, at 539-542.

667 *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 52. This principle does not necessarily mean, however, that Prosecution and Defense are assured material equality in the sense of possessing the same financial and/or personal resources. *Kayishema et al.* (ICTR-95-1-A), Judgment (Reasons), 1 June 2001, paras. 63-71; *Milutinović et al.* (IT-99-37-AR73.2), Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003; Schabas, *supra* note 612, at 514.

substantial disadvantage in relation to his or her opponent.[668] Also, "the concept of equality of arms could be exemplified having regard to the right to call witnesses as between the prosecution and the defence, as well as the duty of the Prosecution to disclose relevant material to the Defence."[669]

The right to *habeas corpus* as a remedy for challenging the legality of detention is nowhere expressly mentioned in the Statute or the Rules. Still, in line with many human rights instruments, including Article 9(4) of the ICCPR, the ICTR Appeals Chamber has stated that "the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms."[670]

It can be safely concluded that the *ad hoc* tribunals created by the UN Security Council have contributed immensely, in their statutory mandate, their rules and their case law, to the development and legal entrenchment of transnational concepts of due process through all phases of a criminal proceeding. Limited, in their authority to decide, to their particular universe of adjudicable facts, they have fashioned, and prescriptively fleshed out, a model regime for what many thought would never come to pass: an International Criminal Court principally unfettered by jurisdictional boundaries of time and space.

c. The International Criminal Court

The idea of a permanent international criminal court arose practically alongside the establishment of the International Military Tribunals of Nuremberg and Tokyo. It seemed to be the perfect answer to the claim that those Tribunals constituted nothing but "victor's justice." The international community of states was, however, reluctant to buy into such revolutionary restriction on its sovereign leaders, as intellectually and morally compelling as it appeared. The 1948 Genocide Convention included a reference to a prospective international criminal court,[671] but a cautious world community proceeded with finalizing the Convention without establishing and implementing

668 *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 47; *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, para. 175. For a general discussion of the impact of the ICTY's case law on procedural issues, see Roza Pati, *Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization?*, *supra* note 659.

669 *Brdjanin and Talić* (IT-99-36-PT), Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002. *See also Krajisnik and Plavsić* (IT-00-39 and 40-PT), Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65*ter*, 66(B) and 67(C), 1 August 2001.

670 *Barayagwiza*, (ICTR-97-19-AR72), Decision, 3 November 1999, para. 88; *cf. Milošević* (IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, para. 38.

671 Convention on the Prevention and Punishment of the Crime of Genocide, UN GA Res. 260(III)A, 9 December 1948, 78 U.N.T.S. 277, art. VI: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, *or by such international penal tribunal as may have jurisdiction* with respect to those Contracting Parties which shall have accepted its jurisdiction." (*emphasis added*).

this sanctioning mechanism, leaving States parties with the duty to either extradite or adjudicate alleged offenders (*aut dedere aut judicare*; Articles VI and VII) and a duty to prevent such conduct (Article I) as well as not to commit genocide themselves, as clarified by the ICJ in its *Genocide* decision of February 26, 2007.[672] Still, the item on how to define and combat offenses against the peace and security of humankind lingered on the agenda of the UN International Law Commission (ILC) since the late 1940s[673] – to be frozen for the many years of the Cold War which worked to seemingly end the dreams of a just world order of the immediate postwar period. After the end of the Cold War, however, like Phoenix from the Ashes, the idea of a permanent international criminal court war reemerged on the international legislative agenda – strangely enough, through an initiative of Trinidad and Tobago, a state who was concerned about combating drug trafficking as an international offense.[674] In 1994, the International Law Commission submitted its final draft statute for an international criminal court to the General Assembly,[675] and added its final draft code of crimes against the peace and security of mankind in 1996.[676] Over the next two years, a Preparatory Committee composed of representatives of states, international organizations and NGOs substantially reworked these drafts,[677] and on the basis of its own final draft,[678] in the summer of 1998, a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was convened in Rome. After long and protracted discussions, the "Statute of Rome Establishing an International Criminal Court"[679] was adopted on July 17, 1998, by a vote of 120 in favor, 21 absten-

672 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, 2007 I.C.J. 58-67, paras. 155-179.

673 Besides the General Assembly mandate pursuant to Article VI of the Genocide Convention (G.A. Res. 216 B (III): Study by the International Law Commission of the Question of an International Criminal Jurisdiction), the ILC was charged to elaborate a "Code of Crimes Against the Peace and Security of Mankind," a draft of which was actually presented in 1954. D.H.N. Johnson, *Draft Code of Offenses Against the Peace and Security of Mankind*, 4 Int'l & Comp. L.Q. 445 (1955). Asked by the General Assembly in 1981 to revive its work on the code, a substantially revised version of the 1954 draft code was provisionally adopted by the ILC in 1991. William A. Schabas, An Introduction to the International Criminal Court 9-10 (2d ed. 2004) (hereinafter Schabas, ICC).

674 In 1989, Trinidad and Tobago initiated General Assembly Resolution 44/89 which directed the ILC to consider the subject of an international criminal court within the context of its work on the draft code of crimes. Schabas, ICC, *supra* note 673, at 9.

675 James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 Am. J. Int'l L. 140 (1994); James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 Am. J. Int'l L. 404 (1995).

676 Schabas, ICC, *supra* note 673, at 10.

677 M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, 25 Denver J. Int'l L. & Pol'y 397 (1997).

678 U.N. Doc. A/CONF.183/2/Add.1.

679 U.N. Doc. A/CONF.183/9, 17 July 1998 (hereinafter ICC Statute).

tions and 7 votes against (including the U.S., Israel and China).[680] The Final Act of the Conference[681] also provided for the establishment of a Preparatory Commission by the General Assembly, which was to draft the ICC's Rules of Procedure and Evidence as well as the Elements of Crimes.

Surprisingly fast, the ICC Statute entered into force on July 1, 2002, the first day of the month after the 60th day following the deposit of the 60th instrument of ratification, acceptance, approval or accession as foreseen in its Article 126.[682] The Assembly of States Parties was convened in September 2002 formally approved the 2000 drafts of the Preparatory Commission's Elements of Crimes[683] and the Rules of Procedure and Evidence.[684] The election of judges was completed by February 2003.[685] Philippe Kirsch, who had presided over the Rome Conference and chaired the sessions of the Preparatory Commission, was elected President of the Court, and the judges took office on March 11, 2003.[686] The first Chief Prosecutor of the ICC, Luis Moreno Ocampo was elected in April 2003.[687] The Court was ready to start its work.

Structurally, the ICC is an independent international organization, formally separate from the UN, and composed of four organs: the Presidency, the Divisions (Pre-Trial Division, Trial Division and Appeals Division), the Office of the Prosecutor and the Registry.[688] There are eighteen judges, who need to be of "high moral character, impartiality and integrity," eligible for appointment to the highest judicial offices in their home countries. They must be experts in either criminal law or international law, particularly international humanitarian and human rights law.[689] They are elected for staggered terms of nine years, and they are generally not eligible for reelection.[690]

The Statute of the International Criminal Court institutes a permanent court in order to bring to trial persons accused for the most serious international crimes, such as genocide, crimes against humanity and war crimes, in cases when a national legal system has failed to do so. These crimes delimit its subject-matter jurisdiction, as outlined in Articles 5-8 of the Statute. Details about the "elements" of the crimes were added as mentioned above, in order to bring more specificity to the crimes listed in the Statute. In reaction to the sometimes liberal construction of crimes in the

680 Schabas, ICC, *supra* note 673, at 18.

681 U.N. Doc. A/CONF.183/10.

682 In fact, the United Nations organized a ceremony of depositing the instruments of ratification for ten states the same day, April 11, 2002, in order for all of them to reach the sixty states mark for entry into force of the Statute simultaneously. Schabas, ICC, *supra* note 673, at 20.

683 Text in Schabas, ICC, *supra* note 673, at 279 *et seq.*

684 Text in Schabas, ICC, *supra* note 673, at 322 *et seq.*

685 Schabas, ICC, *supra* note 673, at 20-21.

686 *Id.* at 178.

687 *Id.* at 21.

688 ICC Statute, art. 34.

689 *Id.* art. 36(3).

690 *Id.* art. 36(9).

ICTY, Article 22(2) of the ICC Statute mandates that the "definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[691]

The three international crimes fully defined in the body of the Rome Statute also reflect a consensus on their content as being part of customary international law. What was excluded, in the early drafting processes, were so-called "treaty crimes," i.e. crimes solely defined by various conventions, *i.e.* drug trafficking, attacks against UN personnel and other internationally protected persons, and terrorism.[692] This does not exclude that certain particular manifestations of, say, terrorism, could be considered as international crimes under the jurisdiction of the ICC.[693]

691 This resolves an issue debated particularly between ICTY/ICTR judges with a criminal law background and those with a public international law background in favor of the former. The question remains open, however as to whether the provisions of the ICC Statute other than those defining crimes should be interpreted in the more contextual and purposive way the Vienna Convention on the Law of Treaties (Articles 31 and 32) suggests or in the strict constructionist manner prevalent in the field of criminal law. *Cf.* Schabas, ICC, *supra* note 673, at 93-95.

692 While these treaty crimes – including various anti-terrorism conventions, the anti-hostage taking treaty, the convention on crimes against internationally protected persons, the convention against illicit traffic in narcotic drugs and psychotropic substances, etc. – were still part of the 1994 ILC Draft Statute for an International Criminal Court (Art. 20), they were excluded in 1996 by the Preparatory Committee. "The main argument was that not all the treaties that provided the basis for these 'treaty crimes' have yet found universal acceptance. Thus, their prosecution would have been restricted to the contracting parties to them, thereby weakening the automatic jurisdiction of the court. Moreover, these treaties do not foresee universal jurisdiction, but only a subsidiary form, i.e. the *aut dedere aut iudicare* principle. … Instead, the drafters of the ICC wanted to limit the ICC's jurisdiction over customary law crimes which are already subject to universal jurisdiction in every potential member state. A final argument was that the introduction of a crime lacking a universally accepted definition could have politicized the court and jeopardized its coming into existence." Roberta Arnold, The ICC as a New Instrument for Repressing Terrorism 54-56 (2004).

693 For details, see Roberta Arnold, *supra* note 692. In particular, the author concludes: "[O]nly a restricted category of terrorist acts can be prosecuted pursuant to Article 8 ICC Statute. These are usually state-sponsored attacks conducted by regular governmental armed forces or individuals linked to them, within the framework of an already ongoing conflict, and primarily aimed at civilians. … Article 7 ICC Statute … proves to be the ideal provision to prosecute acts of terrorism. Its content evokes the customary definition of crimes against humanity and requires that an act be committed as part of a widespread or systematic attack, against a civilian population and in furtherance of a policy, be this of a state or an international organization. A nexus with the war is not required and everyone can be a perpetrator. Although acts of terrorism as such are not encompassed, these often fulfill the criteria of crimes against humanity such as murder, torture, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance, and, more generally, inhumane acts." *Id.* at 139-140.

A fourth crime designated "aggression" was mentioned in Article 5 of the Statute. Due to controversies about its definition, however, its conceptual delimitation was left to a review conference to be convened seven years after the entry into force of the Statute, *i.e.* 2009 at the earliest. It comes as no surprise that particularly the German and Japanese delegations to the Rome Conference voiced their displeasure about this decision, as in the Nuremberg Charter and the Judgment at Nuremberg the "crime against peace" of waging aggressive war had been considered the principal offense.[694]

Interestingly, also, for the purposes of this study, Article 7(2)(e) of the Rome Statute defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." This definition is broader than the one offered in the Convention Against Torture,[695] as it includes even acts which are committed by private individuals for private motives. The Statute further gives jurisdiction to the ICC for a war crime of "torture or inhuman treatment" under Article 8 (2)(a)(ii), evidently criminalizing in this way also certain abusive interrogation methods. However, in Article 31 (1)(d) the ICC Statute provides for criminal law defenses of necessity and duress, and such an offense could be invoked by someone charged with a violation of Article 8 (2)(a)(ii). Although it has not yet been put to the test, this challenge is obviously present, particularly if we consider, in the context of this study, that we might have to deal with an abusive interrogation method used by an official on someone detained and interrogated on terrorist charges.[696]

In contrast to the *ad hoc* tribunals as well, and in order to be palatable to all states, the principle of *nullum crimen sine lege* was meticulously followed with respect to the jurisdiction *ratione temporae* of this Court. Only offenses committed after the entry into force of the Statute, *i.e.* July 1, 2002, will be adjudicated by the ICC.[697] It will thus not punish with retroactive effect. As far as jurisdiction *ratione personae* is

694 Schabas, ICC, *supra* note 673, at 32.

695 The definition of and protection against torture as elaborated in Art 1(1) of the 1984 Convention Against Torture reads: "… the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

696 An interesting examination of potential such conflicts and needs for balancing prevention of international crimes such as terrorism, and protection of human rights is found in Geert-Jan Alexander Knoops, *International Criminal Law Liability for Interrogation Methods by Military Personnel under Customary International Law and the ICC Statute*, 4 Int'l Crim. L. Rev. 211 (2004).

697 ICC Statute, art. 11.

concerned, apart from a situation referred to it by the Security Council, acting under Chapter VII of the UN Charter, the ICC limits itself to offenses committed on the territory of, or by citizens of, states parties to its Statute or states which have accepted the jurisdiction of the Court with respect to the particular crime in question.[698]

Originally, in the ILC draft, the ICC was designed to have primacy over national courts, just as the *ad hoc* tribunals for Yugoslavia and Rwanda. Due to heavy political opposition, this concept was replaced by that of "complementarity."[699] The ICC will only be allowed to exercise its jurisdiction if the state with competing jurisdictional claims is "unable or unwilling" to prosecute the offender (Article 17). Only in this latter situation will the ICC's claim to prosecute and adjudicate be "admissible."

For any trial, in particular, an international criminal trial to retain its legitimacy it is imperative to apply a fair procedure. As discussed above, both the Nuremberg and Tokyo trials suffered from a degree of unfairness to the accused, consequently drawing substantial criticism, particularly in light of later developing human rights guarantees. The ICC Statute places at the top of its agenda the fair trial and human rights guarantees. They are supplemented and implemented by the Rules of Procedure and Evidence, as adopted by at least a two-thirds majority of the members of the Assembly of States Parties.[700]

As in the case of the ICTY and ICTR, the procedure of this Court is decidedly mixed: a hybrid between common law and civil law criminal procedure, with a starting point being the adversarial system, but not abandoning the search for truth as an important goal to be safeguarded, *inter alia*, by traditional inquisitorial rights of the bench.[701] As with the ICTY/ICTR, the detailed final tableau of the process before the ICC is still left to be developed in the practice of the Court.

Proceedings before the ICC can be started by the Prosecutor, acting *proprio motu*[702] or upon referral of a certain "situation" in which one or more crimes under the jurisdiction of the Court "appear to have been committed" by the Security Council, acting under Chapter VII.[703] Any state party may also refer a pertinent "situation" to the Court.[704] If the Prosecutor decides to investigate *proprio motu*, his or her investigation first has to be authorized by the Pre-Trial Chamber.[705]

The Prosecutor considers the following factors in deciding whether to initiate an investigation: "(a) [t]he information available to the Prosecutor provides a reasonable

698 *Id.* art. 13.

699 Schabas, ICC, *supra* note 673, at 13-14.

700 ICC Statute, art. 51.

701 For details, *see* Schabas, ICC, *supra* note 673, at 143 ("Although much of the procedure of the Court is a hybrid of different judicial systems, it seems clear that there is a definite tilt towards the common law approach of an adversarial trial hearing. However, the exact colouring that the Court may take will ultimately be determined by its judges"). *See also* the comparable situation before the ICTY/ICTR, *supra*, at notes 643-644.

702 ICC Statute, art. 13(c), 15(1).

703 *Id.* art. 13(b).

704 *Id*. art. 13(a), 14

705 *Id.* art. 15(3) and (4).

basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) [t]he case is or would be admissible under Article 17; and, (c) [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[706] Thus, a case may not be prosecuted unless a state which has jurisdiction over it is "unwilling or unable genuinely to carry out the investigation or prosecution" (the above-mentioned principle of complementarity).[707] Also, the Security Council may request the Prosecutor to defer an investigation or prosecution for a (renewable) period of 12 months.[708] These limitations appear to address the specter of a prosecutor run amok, but still leave him or her with a great deal of power as to whether to initiate a proceeding in the first place.

If he or she decides to investigate, the investigation has to cover all relevant facts, in particular, "investigate incriminating and exonerating circumstances equally" – a duty which analogizes him more to the prosecutors or *juges d'instruction* of civil law systems than the adversarial prosecuting attorneys of the common law[709] –, and "[f]ully respect the rights of persons arising under this Statute."[710]

Article 55 of the Statute lists those rights during investigation:

1. In respect of an investigation under this Statute, a person:
   (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
   (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
   (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
   (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
   (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
   (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

706 *Id.* art 53(1).

707 *Id.* art. 17.

708 *Id.* art. 16.

709 Schabas, ICC Statute, *supra* note 673, at 126.

710 ICC Statute, art. 54(1)(a) and (c).

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

In addition to the rights of the suspect listed by the ICTY and ICTR,[711] this catalog includes the important rights not to be arbitrarily arrested or detained; to be deprived of one's liberty only in conformity with this Statute; and not to be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.

Upon investigation and application by the Prosecutor, the Pre-Trial Chamber may issue a warrant of arrest of a person if it is satisfied that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[712] Upon application by the Prosecutor, it may alternatively issue a summons for the person to appear.[713] States parties are under a general obligation to cooperate with the Court in its investigation of crimes. Details of this obligation, the observance of which is key to the success of the ICC, are laid down in Part 9 of the Statute.[714] This includes compliance with a Court request for arrest and surrender of the wanted person to the Court.[715]

Upon the wanted person's surrender or voluntary appearance before the Court, the Prosecutor submits formal charges, and, within a reasonable time after such surrender or voluntary appearance, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial.[716] On the basis of this hearing, the Pre-Trial Chamber determines whether there is sufficient evidence to establish "substantial" grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall confirm those charges in relation to which it has determined that there is sufficient evidence – and only those, if any –, and commit the person to a Trial Chamber for trial on the charges as confirmed.[717]

Article 66 specifies that the accused is presumed innocent, and can be convicted only if the Court is convinced of his or her guilt beyond reasonable doubt.

Article 67 lists the rights of the accused in trial:

711 *Supra* note 655.
712 ICC Statute, art. 58(1).
713 *Id.* art. 58.
714 *Id.* art. 86 *et seq.*
715 *Id.* art. 89.
716 *Id.* art. 61(1).
717 *Id.* art. 61(7).

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
   (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
   (c) To be tried without undue delay;
   (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
   (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
   (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
   (h) To make an unsworn oral or written statement in his or her defence; and
   (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

This list includes all of the rights guaranteed in the ICTY/ICTR's catalog. It incorporates many lessons learnt from the wealth of experience of the ICTY and ICTR. That works towards a fairer procedure which in the work of international tribunals has continuously progressed to strengthen due process and human rights generally.[718] This list specifically emphasizes defendant's rights such as the right to communicate freely and in confidence with his legal representative; the right to remain silent without any implication of guilt or innocence; the right to make an un-sworn oral or written statement in his or her own defense; and the right not to have imposed

718 For an analysis and a comparative study of the procedure governing the *ad hoc* tribunals and the ICC, and their respective case law, see Salvatore Zappalà, Human Rights in International Criminal Proceedings (2003).

on him or her any reversal of the Prosecutor's burden of proof or onus of rebuttal. Importantly, there is also a right to a counsel of one's choosing. Further safeguards in the use of confession evidence are provided by Article 65.[719] Plea bargaining is severely limited.[720] However, with the prosecution, but not the defense, being an organ of the Court, the experience of the ICTY involving judges in the pre-trial and trial phases even in orders to produce evidence or to ensure the appearance of witnesses proves to be an important guarantee in securing the equality of arms between the prosecution and the defense. The right to a "fair hearing," in particular, may allow for the development of a vigorous "equality of arms" jurisprudence similar to the one developed in the ICTY and ICTR.[721]

U.S. critics of the ICC procedure have pointed to various perceived insufficiencies of the Statute. In particular, it has been stated by a Texas Assistant District Attorney:

> The ICC Statute is silent about numerous basic guarantees that are taken for granted in the United States' criminal justice system. There is no reference to the concept of a right to privacy. There is no protection from witness tampering. There is no hearsay rule. The discovery guarantees are vague. There is no reference to the concept of a chain of custody necessary for evidence collected. There is no right to review of allegations of prosecutorial misconduct. There is no definition of effective counsel. There is no requirement that a conviction be based on more than a co-actor's testimony. There is no basis for determining whether a confession was properly obtained. There is no requirement of evidence to corroborate a confession. There is no concept of offense nullification.[722]

The ICC Statute is charged to be "unclear about how much notice of charges pending against an accused person is necessary."[723] The Rules of Procedure and Evidence as adopted by the Assembly of States Parties which could fill in some of those perceived gaps are considered insufficiently legitimate: "Any law that comes from the Assembly of States Parties, or from the justices of the court, may too easily be changed and takes the treaty-making power away from sovereign countries and gives it to an un-

719 For further detail, particularly as it concerns plea bargaining and its (non)impact on sentencing by the Court, as well as a comparison with such procedure in ICTY and ICTR see Ralph Henham, *Procedural Justice and Human Rights in International Sentencing*, 4 Int'l Crim. L. Rev. 185, 192-204 (2004).

720 ICC Statute, art. 65((5): "Any discussions between the Prosecutor and the defense regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."

721 Schabas, ICC, *supra* note 673, at 99. *See also* the discussion regarding ICTY procedure, *supra* at notes 667-669.

722 Andrew J. Walker, *When A Good Idea Is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. Va. L. Rev. 245, 279-280 (2004).

723 *Id.* at 280.

checked international body."[724] With respect to the crimes other than genocide, the author charges:

> There are many possible interpretations of the words chosen to define the other crimes and several possible interpretations of appropriate mens reas applicable to them. The statute permits the justices of the court to fill in the undefined gaps in the law, including definitions of the crimes.[725]

Obviously, the author points out, there is no trial by jury, "one of most fundamental tenants [*sic*] of the American justice system."[726] He concludes:

> Like the United States Constitution, the ICC Statute must be meticulously designed to protect individual rights and to protect the reasonable use of preventative force. The statute, in its current form, reads like a European vision of a world without American power, without American constitutional guarantees, and without a basis in the lessons learned from victories in the Cold War and the [S]econd World War.[727]

A U.S. supporter of the ICC has made the following arguments, though:

> Under the Rome Statute and the Rules of Procedure, defendants before the court enjoy a host of protections. Consider, for example, the right to counsel, the presumption of innocence, and the privilege against self-incrimination. All ICC defendants "shall be entitled … to have legal assistance assigned by the court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it." Regarding the presumption of innocence, the Rome Statute provides that every person "shall be presumed to be innocent until proven guilty before the Court." The presumption of innocence is given substance by requiring that the Pre-Trial Chamber approve a prosecutor-initiated investigation, at which time the accused may object, challenge the evidence, or present her own evidence. Moreover, persons suspected of committing a crime under ICC jurisdiction have the right to remain silent "without such silence being a consideration in the determination of guilt or innocence." Indeed, early in an investigation or prosecution the Rome Statute provides even more of a privilege than the vaunted *Miranda* rule, which requires warnings only when a suspect is in police custody. In contrast, the Rome Statute requires a warning whenever the prosecution has grounds to believe that the person being questioned has committed a crime. In other areas, the court also provides guarantees that are roughly comparable to American rules. [provides examples.] … With respect to unreasonable searches and seizures, the ICC is required to apply an exclusionary rule rejecting any evidence tainted by violations of "internationally recognized human rights." See Rome Statute, art. 69(7). The right to privacy is often considered one such right. … Some differences obvi-

724 *Id.*

725 *Id.* at 287-288.

726 *Id.* at 288-289.

727 *Id.* at 304.

> ously exist between the law affecting an American criminal proceeding and a proceeding before the ICC. In part as a reflection of the civil law precepts of many ICC supporters, the Rome Statute does not provide for a trial by jury. A panel of judges tries cases. But neither do American servicemembers possess a right to trial by a civil jury. Courts martial do not guarantee trial by jury, yet military personnel are still considered to be protected by the U.S. Constitution. Moreover, if a member of the military commits a crime in another country, the Status of Forces Agreement between that country and the United States affects where the individual shall be tried. …
>
> The procedural critique seems even more peculiar when placed in the larger context of "constitutional rights variation" practiced for a host of defendants and detainees of the U.S. Government in different settings. Not everyone enjoys the same package of rights, which is what might allow, for example, a military commission to try charges of a violation of the laws of war instead of an Article III court. … Turning to more recent developments, U.S. citizens and noncitizens treated as enemy combatants are in what is best described as some sort of a legal limbo. … Given the gap between the elaborate rights the ICC guarantees a U.S. national on paper and the more inconsistent protections someone might have inside the United States, it would seem at best as though the procedural due process critique underexplains U.S. rejection of the ICC.[728]

Whatever the truth is about the particular features of the ICC and the U.S. procedural regimes, it is clear that the ICC Statute is not, and was not intended to be, an exact replica of the U.S. system of criminal procedure and the due process guarantees developed within this framework. There is, in particular, not a trial by jury to which other elements of the system such as the adversarial nature of the process and broad exclusionary rules respond. Criticisms regarding the absence in the ICC procedural regime of certain features germane to the U.S. legal system reveal the unwillingness of the author to countenance any departure in global adjudicative fora from the American system of criminal justice as administered to American citizens in peacetime. The author's insistence upon the regulation of all procedural elements in the Statute itself also overlooks that the Assembly of States Parties, which adopts the Rules of Procedure and Evidence, leaves the sovereign states in charge of determining the exact contours of the ICC's version of due process. Even more importantly, in the U.S., the exact contours of due process were not delineated by the Constitution itself, or by the various legislative bodies, but by the judges, ultimately the nine Justices of the U.S. Supreme Court. And they are not etched in stone, as the various meanderings of rulings on *Miranda* and the exclusionary rule demonstrate. The ICC judges will, by the nature of their function, have the power to finetune procedure, but they will have to do it not only within the framework of an open-ended constitutional provision mandating "due process" or one forbidding "unreasonable searches or seizures,"

728 Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse,* 55 Stan. L. Rev. 1597, 1608-1612 (2003). For more on the comparison between due process guarantees under the ICC and the U.S. Constitution, *see* Audrey I. Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?,* 37 Stan. J. Int'l L. 75 (2001).

but within the normative strictures of the ICC Statute and its Rules of Procedure and Evidence. The real question is whether the ICC will, not only in form, but in substance, not only in its rules, but in its practice, reach the goal of effectively ending impunity for the perpetrators of the most heinous offenses against humankind while still maintaining the rights of the defendants a modern human rights system, as promoted historically, and prominently, by the United States.

The practice since the establishment of the Court in 2003[729] gives reason to hope that this goal still can be achieved.

There are presently four "situations" on the docket of the prosecutor. Three of them are brought by states parties to the Office of the Prosecutor, one of them by the Security Council.

(1) The first situation was referred to the ICC by the Government of the Democratic Republic of Congo (DRC) on March 3, 2004. On June 23, 2004, the Prosecutor announced his decision to open an investigation in the situation in the DRC.[730]

On January 12, 2006, the Prosecutor submitted an application to the Chamber for the issuance of a warrant of arrest against Mr Thomas Lubanga Dyilo. Thomas Lubanga Dyilo, a national of the DRC, is the alleged founder of the Union des Patriotes Congolais (UPC) and the Forces patriotiques pour la libération du Congo (FPLC), the alleged former Commander-in-Chief of the FPLC and the alleged President of the UPC.[731]

The warrant of arrest against Mr. Lubanga was issued under seal on 10 February, 2006 and unsealed on 17 March, 2006, the same day as he was arrested in Kinshasa and transferred to the Court in The Hague. According to the arrest warrant, "there are reasonable grounds to believe that from July 2002 to December 2003 members of the FPLC carried out repeated acts of conscription into the FPLC of children under the age of fifteen who were trained in the FPLC training camps of Bule, Centrale, Mandro, Rwampara, Bogoro, Sota and Irumu"; and that "there are reasonable grounds to believe that, during the relevant period, members of the FPLC repeatedly used children under the age of fifteen to participate actively in hostilities in Libi and Mbau in October 2002, in Largu at the beginning of 2003, in Lipri and Bogoro in February and March 2003, in Bunia in May 2003 and Djugu and Mongwalu in June 2003."[732]

On March 20, 2006, there was the initial appearance of Mr. Thomas Lubanga Dyilo before Pre-Trial Chamber I in public hearing.

On August 28, 2006, the Pre-Trial Chamber I received documents containing the charges and list of evidence against Mr Thomas Lubanga Dyilo.

In the confirmation hearing on these charges before the Pre-Trial Chamber, all participants to the proceedings had a chance to be heard: the Prosecutor, the Defence

729 For all the relevant documents, see the ICC website at http://www.icc-cpi.int.

730 ICC Newsletter #10, November 2006, *available at* http://www.icc-cpi.int/library/about/newsletter/ 10/index.html.

731 *Id.*

732 *Id.*

and the victims. It is the first time in the history of international criminal law that victims were able to assert their rights through their legal representatives.[733]

Regarding this case, Chief Prosecutor Luis Moreno-Ocampo has stated:

> Thomas Lubanga Dyilo, alleged leader of one of Ituri's most dangerous militias, is alleged to have been involved in the commission of war crimes. The charges presented by my Office are enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. He is currently detained in the ICC Detention Centre.
>
> It is my hope that, beyond bringing Mr. Lubanga Dyilo to justice, this case will help to draw the attention of the world to this illegal practice and stimulate co-operation to stop it. The lives and futures of thousands of children and their communities are being destroyed by these practices each year. The abuse of these children worldwide has gone largely unrecognised and unpunished for too long.[734]

On January 29, 2007, Pre-Trial Chamber I, according to Article 61(7) of the Statute, confirmed, "on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003" as well as "for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003."[735] It committed Thomas Lubanga Dyilo to a Trial Chamber for trial, the first such proceeding before the ICC.

The prosecution, however, hit a significant roadblock when, on June 13, 2008, Trial Chamber I stayed the trial of Mr. Lubanga *sine die*, since the Prosecutor's Office had, in the eyes of the Chamber, incorrectly blocked the release of exculpatory materials in its possession to the defense and the Chamber by entering into improper confidentiality agreements with information providers, in particular, the UN.[736] The Chamber stated that the "disclosure of exculpatory evidence in the possession of the prosecu-

733 *Id.*

734 *Id.*

735 Pre-Trial Chamber I, Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, at 156-157, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf.

736 Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, The Hague, 13 June 2008, ICC Doc. No. ICC-01/04-01-06/1401, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf.

tion is a fundamental aspect of the accused's right to a fair trial."[737] On July 2, 2008, the Trial Chamber ordered the release of the defendant[738] – a decision suspended, in its effect, by the Appeals Chamber during its consideration of the appeal filed by the Prosecution.[739]

(2) On December 16, 2003, the Government of Uganda, a state who had ratified the ICC Statute on June 14, 2002, referred the situation concerning Northern Uganda to the Prosecutor of the ICC.[740] It concerns mostly atrocities allegedly committed by the so-called "Lord's Resistance Army (LRA)" involving, *inter alia,* the abduction of children and their use as soldiers of the LRA.

After thorough analysis of available information, on July 28, 2004, the Chief Prosecutor opened an investigation into the situation concerning Uganda. On May 6, 2005, the Prosecutor filed an application for warrants of arrest for crimes against humanity and war crimes against five senior commanders of the LRA: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. On July 8, 2005, ICC Pre-Trial Chamber II issued arrest warrants under seal. Upon application by the Prosecutor, Pre-Trial Chamber II unsealed these arrest warrants on October 13, 2005.

(3) On May 22, 2007, the Prosecutor announced the opening of an investigation in the Central African Republic in accordance with Article 53 of the ICC Statute. The Government of the Central African Republic, a state party to the ICC having ratified its Statute on October 3, 2001, referred the situation to the Office of the Prosecutor on 22 December 2004.[741] The Central African authorities provided information in relation to the allegations of crimes and to proceedings held by the national judiciary. The Prosecutor has also received significant pertinent communications from non-governmental organizations and international organizations.

According to the Prosecutor, his investigation will "focus on the most serious crimes; those were mainly committed during a peak of violence in 2002-03. There are

737 *Id.* para. 92.

738 Decision on the release of Thomas Lubanga Dyilo, The Hague, 2 July 2008, ICC Doc. No. ICC-01/04-01-06/1418, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1418-ENG.pdf.

739 Decision on the request of the Prosecutor for suspensive effect of his appeal against the "Decision on the release of Thomas Lubanga Dyilo," The Hague, 7 July 2008, ICC Doc. No. ICC-01/04-01-06/1423, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1423-ENG.pdf (a decision based on Article 82(3) of the Statute). *See also* Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the "Decision on the release of Thomas Lubanga Dyilo," The Hague, 22 July 2008, ICC Doc. No. ICC-01/04-01-06/1444, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1444-ENG.pdf.

740 Facts and Procedure Regarding the Situation in Uganda, ICC Doc. No. ICC20051410.056.1-E, The Hague, 14 October 2005.

741 ICC Office of the Prosecutor, Background, Situation in the Central African Republic, The Hague, 22 May 2007, ICC Doc. ICC-OTP-BN-20070522-220-A_EN.

in particular many allegations of rapes and other acts of sexual violence perpetrated against hundreds of reported victims. In parallel, the OTP will continue to monitor closely allegations of crimes committed since the end of 2005. … Some of the worst allegations relating to killing, looting and rape, occurred during intense fighting in October - November 2002 and in February - March 2003. Attacks against civilians followed a failed coup attempt; there emerged a pattern of massive rapes and other acts of sexual violence perpetrated by armed individuals. Sexual violence appears to have been a central feature of the conflict. … Credible reports indicate that rape has been committed against civilians, including instances of rape of elderly women, young girls and men. There were often aggravating aspects of cruelty such as rapes committed by multiple perpetrators, in front of third persons, with sometimes relatives forced to participate. The social impact appears devastating, with many victims stigmatized and, reportedly for a number of them, infected with the HIV virus."[742]

The Prosecutor determined that, according to all the information available to him, the alleged crimes, notably killings and large-scale sexual crimes, were "of sufficient gravity to warrant an investigation." With respect to admissibility under Article 17 of the Statute, he noted that the *Cour de Cassation* of the Central African Republic in April 2006 had indicated that "in relation to the alleged crimes the national authorities were unable to carry out the necessary criminal proceedings, in particular to collect evidence and obtain the accused." As part of the evaluation of the interests of justice, victims were heard who confirmed clearly that they "were awaiting the involvement of the ICC in order to see justice done and to recover their dignity."[743]

(4) The United Nations Security Council addressed the situation in Darfur, which had been characterized by U.S. Administration officials as "genocide."[744] After an International Commission of Inquiry on Darfur was established by UN Secretary-General Kofi Annan in October 2004, the Commission reported to the UN in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur and recommended that the situation be referred to

742 *Id.*

743 *Id.*

744 On July 22, 2004, both chambers of the U.S. Congress adopted concurrent resolutions "condemning the continuing atrocities in the Darfur region of western Sudan as 'genocide' and asking the international community to join with the United States to help bring an end to the humanitarian catastrophe that is under way there. The U.S. House of Representatives passed its version (House Concurrent Resolution 467) in a vote of 422-0, with the U. S. Senate approving its version (Senate Concurrent Resolution 133) by voice vote." *Available at* http://usinfo.state.gov/is/Archive/2004/Jul/26-233176.html. Both President Bush and the State Department have also "used the term 'genocide' to describe the situation in western Sudan." Recently, however, United States Special Envoy to Sudan, Andrew Natsios, claimed the crisis in Darfur no longer constitutes genocide. On February 7, 2007, he stated at Georgetown University, "The term genocide is counter to the facts of what is really occurring in Darfur," Aaron Glantz, *US Slammed for Backing off 'Genocide' Charge,* February 16, 2007, *available at* http://www.commondreams.org/headlines07/0216-07.htm.

the ICC.[745] In its 176-page report, the Commission concluded that the government of Sudan had not pursued a policy of genocide; rather, it described it to be "counter-insurgency warfare." According to the Commission, there was no proof that government's policy evinced "a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."[746] The Commission nevertheless stated that "in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis." Certain acts committed by the government forces and militias were seen as potentially amounting to crimes against humanity, and also war crimes.[747]

On March 31, 2005, acting under Chapter VII of the UN Charter, and Article 13(b) of the Rome Statute, the Security Council referred the situation in Darfur since July 1, 2002 to the Prosecutor of the International Criminal Court.[748] The resolution required Sudan and all other parties to the conflict in Darfur to cooperate with the Court. It was adopted by a vote of 11 in favour with 4 abstentions (Algeria, Brazil, China,United States).[749]

After reviewing the document archive of the International Commission of Inquiry on Darfur, requesting and reviewing information from a variety of sources, leading to the collection of thousands of documents, and interviewing over 50 independent experts, the Chief Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, on June 6, 2005, concluded that the statutory requirements under Article 53 of the ICC Statute for initiating an investigation were satisfied, and he decided to open an investigation into the situation in Darfur, Sudan.[750]

On February 27, 2007, the Office of the Prosecutor presented to the ICC Pre-Trial Chamber evidence according to which Ahmad Harun and Ali Kushayb joined together to systematically pursue and attack innocent civilians. Ahmad Harun is the Sudanese Minister responsible for providing humanitarian assistance to more than four million people in Darfur. "In his former position as Minister of State for the Interior and head of the Darfur security desk, Ahmad Harun organised a system through which he recruited, funded and armed Militia/Janjaweed to supplement the Sudanese Armed Forces and then incited them to commit murder, rape, and other

745 Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, UN Doc. S/2005/60.

746 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, at 4. *Available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

747 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, at 3-4.

748 UN Security Council Res. 1593 (2005).

749 UN Security Council, 5158th Meeting (Night), Press Release SC/8351, 31 March 2005.

750 *The Prosecutor of the ICC opens investigation in Darfur*, The Hague, 6 June 2005, ICC Doc. ICC-OTP-0606-104-En.

massive crimes against the civilian population. He was well-suited for the task, having mobilised and recruited Militia in Kordofan, South Sudan, for a counterinsurgency campaign in the 1990s. Militia/Janjaweed leader Ali Kushayb played a key role in Harun's system, personally delivering arms and leading attacks against villages. Together, Ahmad Harun and Ali Kushayb are allegedly responsible for 51 counts of war crimes and crimes against humanity."[751] On April 27, 2007, a panel of three pretrial judges at the International Criminal Court issued warrants for their arrest.[752]

On June 7, 2007, the ICC Chief Prosecutor appealed to the United Nations Security Council that the two accused Darfur international criminals must be arrested: "The Security Council and regional organizations must take the lead in calling on the Sudan as the territorial State to arrest the two individuals and ensure their appearance in Court. And we count on every state to execute an arrest should either of these individuals enter their territory."[753] As to Ahmad Harun, the prosecutor stated, "This is the same man who, in 2003, at a public meeting, declared that in being appointed to the Darfur security desk, he had been 'given all the power and authority to kill or forgive whoever in Darfur for the sake of peace and security.'"[754]

The cooperation by the Government of Sudan was less than forthcoming.

Then, in a surprise action, on July 14, 2008, Luis Moreno-Ocampo, the Prosecutor for the ICC, applied to the Court's Pre-Trial Chamber III for the issuance of an arrest warrant against the President of Sudan, Omar Hassan Ahmad al Bashir, based on ten counts of international crimes ranging from genocide, to crimes against humanity, and to war crimes.[755] In his application, the Prosecutor noted that, in Darfur, "genocide is ongoing." Claiming that al Bashir was the mastermind behind the atrocities in this benighted region, the Prosecutor added that the crimes were perpetrated by forces under al Bashir's "absolute control."[756]

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751 *Prosecutor briefs UN Security Council, calls for the arrest of Ahmed Harun and Ali Kushayb for crimes in Darfur*, The Hague, 7 June 2007, ICC Doc. ICC-OTP-PR-20070607-222_EN. *Cf.* The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC Doc. ICC-02/05-01/07.

752 *Id.*

753 *Id*.

754 *Id.*

755 Details in Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR, The Hague, July 14, 2008, *available at* http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080714-ENG.pdf. For the official summary of the application of the Prosecutor to the Pre-Trial Chamber III regarding the situation in Darfur, the Sudan, see Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, *available at* http://www.icc-cpi.int/library/organs/otp/ICC-OTP-Summary-20081704-ENG.pdf. For background on the conflict in Darfur, see Amnesty International: Eyes on Darfur, *available at* http://www.eyesondarfur.org/conflict.html.

756 Summary of Prosecutor's Application under Article 58, The Hague, 14 July 2008, ICC Doc. No. ICC-02/05, http://www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf, para. 40.

There appears to be no issue with the complementarity principle of ICC jurisdiction,[757] since no national proceedings whatsoever on these crimes have been initiated in Sudan. The Sudanese government has constantly refused to investigate allegations of such crimes committed by its high-ranking officials.

As stated above, in order for the Pre-Trial Chamber to issue an arrest warrant against a person, the Prosecutor only needs to convince the PTC that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[758]

Though the charges brought up in Prosecutor's application are not definitive, as they could be changed in the course of further Court proceedings until the accused is brought to trial,[759] the Prosecutor is still required to indicate them in detail. According to the Prosecutor, al Bashir bears criminal responsibility for:

- *genocide* under Article 6 (a), killing members of the Fur, Masalit and Zaghawa ethnic groups, (b) causing serious mental harm, and (c) deliberately inflicting conditions of life calculated to bring about their physical destruction in part;
- *crimes against humanity* under Article 7(1), including acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture and (g) rapes; and
- *war crimes* under Article 8(2)(e) for intentionally directing attacks against the civilian population(i) and pillaging(v).[760]

757 As stated *supra,* at note 806, the ICC will only be allowed to exercise its jurisdiction if the state with competing jurisdictional claims is "unable or unwilling" to prosecute the offender (Article 17). A good discussion on the principle of complementarity can be found in John T. Holmes, *Complementarity: National Courts* versus *the ICC*, in The Rome Statute of the International Criminal Court: A Commentary 667 (Antonio Cassese, Paola Gaeta & John Jones eds., 2002). Article 17 of the Rome Statute is based on the content of paragraph 10 of the Rome Statute's Preamble which emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions," as well as Article 1 which states the same.

758 ICC Statute, art. 58(1)(a). Upon surrender of the person to the Court, the PTC will hold a hearing to determine whether there is "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged," and if this question is answered in the affirmative, "confirm" these charges and "commit the person to a Trial Chamber for trial on the charges as confirmed." *Id.* art. 61(7).

759 Until the trial starts, the Prosecutor may amend those charges with permission of the PTC and after notice to the accused. *Id.* art. 61(9). If charges are added, a further confirmation hearing is required. *Id. See also* Marko Milanovic, *ICC Prosecutor charges the President of Sudan with genocide, crimes against humanity and war crimes in Darfur*, 12 ASIL Insight, Issue 15, July 28, 2008, *available at* http://www.asil.org/insights/2008/07/insights080728.html.

760 Summary of Prosecutor's Application under Article 58, The Hague, 14 July 2008, ICC Doc. No. ICC-02/05, http://www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf, para. 62.

The Prosecutor gave detailed reasons for his charges. In his charge of genocide, he was, in effect, challenging the January 2005 Report of the United Nations Commission of Inquiry which had concluded that the government's policy lacked the requisite genocidal intent.[761] The Prosecutor stipulates that recent evidence shows that al Bashir has chosen rape, hunger and fear as an "efficient method of destruction" as he camouflages genocide "in the face of international scrutiny."[762]

He further claimed that systematic rape, an act which constitutes a crime against humanity, is used as a war weapon in Darfur. He emphasized that: "Seventy-year-old women, 6-year-old girls are raped,"[763] and he also quoted a Darfuri victim as saying: "when we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped – gang-raped. Maybe around 20 men rape one woman. These things are normal for us here in Darfur. They rape women in front of their mothers and fathers."[764] Bringing up further grounds that effectuate the crime he concludes: "Al Bashir does not need gas chambers, bullets or machetes. This is Genocide by attrition."[765] Reminding the world that there is no more time to wait and see, Moreno-Ocampo observed that the international community had "failed in the past, failed to stop Rwanda genocide, failed to stop Balkans crimes," and he built his case for immediate action stressing the urgency of *now* to prevent the slow death of 2.5 million Darfuris.[766]

The Sudanese government and parliament rejected the jurisdiction of the Court, and they labeled the Prosecutor as being politically motivated in filing the charges.[767]

Presently, it is up to Pre-Trial Chamber III of the ICC to decide on the application of the Prosecutor, either by challenging the legal analysis of the Commission as regards genocide, or maybe by simply providing enough proof that such acts were perpetrated after March 2005. Whatever the result, ensuring compliance with the Court's decision remains a responsibility of the Security Council. The Council was pressured from the inside to invoke Article 16 of the Rome Statute in order to defer al Bashir's prosecution for one year, which is a renewable action. Such an act would have meant interference with the Court's jurisdiction right after the Security Council had established such jurisdiction through Resolution 1593. That was unlikely, as the U.S. had accused Sudan of genocide, and the U.K. and France, members of the ICC,

761 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, at 4. *Available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

762 Prosecutor's Statement, *supra* note 755.

763 Mike Corder, *Sudanese President Charged with Genocide in Darfur*, Associated Press, July 14, 2008, *available at* http://ap.google.com/article/ALeqM5gMU9_nxHnfBspo342jYGonXyx7-gD91TMTT80.

764 Prosecutor's Statement, *supra* note 755.

765 *Id.*

766 Mike Corder, *supra* note 763.

767 *Id.*

have strongly opposed any interference with the independence of the court.[768] Additionally, seven[769] out of the ten present non-permanent members are states parties to the Rome Statute, and would probably not, in such a circumstance, opt to interfere with its work.[770]

However, in the month of July 2008, within the Security Council, matters were not so easy to deal with. The UNAMID mission in Sudan was about to expire on July 31, 2008, and the need to extend it for another year was urgent. The African Union had asked the UN Security Council to invoke Article 16 of the Rome Statute, in order to suspend the ICC's proceedings against al Bashir for one year. This request was backed up in the Security Council by Libya and South Africa, as well as Russia and China, who insisted that the resolution on renewing the UNAMID mandate should also ask for suspending the ICC's proceedings, arguing that prosecuting Sudan's president would set back, and probably make impossible, peace in Darfur. After long negotiations, and strong opposition by the UK, France, the US as well as Central American countries, the Resolution that renewed the UNAMID mandate only made notice of the African Union's request for the Council to postpone the ICC's proceedings, but it did not commit the Security Council to anything further.[771] The Resolution was approved with fourteen votes. Only the U.S. abstained, insisting that there should be no link between the mandate of the peacekeeping force and the Court's work.[772]

What we can conclude from this overview is that most of the situations dealt with by the Court have been submitted by governments that are not unwilling, but unable to prosecute offenders of the worst kind. They all are located on the continent of Africa, as is the one situation referred by the Security Council, Darfur. Also, the Prosecutor has shown a great deal of self-restraint, not having initiated any case *proprio motu.* Any fears of him politicizing his office have, at least not yet, materialized. This may also have to do with powerful antagonism from important quarters, particularly the United States.

The ICC's broader reach and, possibly, success has been imperiled since it has run into heavy opposition from the United States, which, particularly under the Bush Ad-

768 *Sudan's Bashir could escape war crimes indictment*, Reuters, July 16, 2008, *available at* http://www.reuters.com/article/homepageCrisis/idUSN16459860._CH_.2400. In this article Reuters quotes French Ambassador Jean-Maurice Ripert and British Ambassador John Sawers who noted that their countries have no intention to interfere with the ICC process, which should be independent and free of political pressure. Whereas, the US special envoy for Sudan is quoted to have said that "there can be no impunity" for crimes in Darfur. *Ibid.*

769 Namely: Belgium, Burkina Faso, Costa Rica, Croatia, Italy, Panama, South Africa.

770 See discussion of this issue by Kevin Jon Heller at Opinio Juris, July 14, 2008, *available at* http://opiniojuris.org/tag/bashir-icc-indictment/.

771 *UN extends Darfur peace mission*, BBC, August 1, 2008, *available at* http://news.bbc.co.uk/2/hi/africa/ 7535297.stm.

772 Alejandro Wolff, US deputy ambassador to the UN, noted that: "The United States abstained in the vote, because language added to the resolution would send the wrong signal to the Sudanese president." *UN extends Darfur peace mission*, BBC, August 1, 2008, *available at* http://news.bbc.co.uk/2/hi/africa/ 7535297.stm.

ministration, has fought it with single-minded determination. The Statute was seen as an intolerable intrusion into the country's sovereignty, and fears were expressed regarding its potential political manipulation by foes of the U.S., a country with many military engagements and leadership and alliance obligations throughout the world. Signed by President Clinton on the last possible day, December 31, 2000,[773] President Bush's point-man on the issue, Under-Secretary of State John R. Bolton declared that the United States will not ratify the Statute of Rome, removing thereby all potential legal effects of its signature under Article 18 of the Vienna Convention of the Law of Treaties (a treaty it has only signed, but not ratified).[774] Countries have been "pressured" into signing agreements with the U.S. pursuant to which they would not transfer U.S. citizens on their territory to the custody of the ICC, agreements argued to fall under Article 98 of the Statute of Rome. On August 2, 2002, Congress passed a statute entitled the "American Service Members' Protection Act"[775] which prohibited agencies of the U.S. Government from cooperating with the Court, denied any country that ratified the ICC Statute military assistance, and allowed the use of force to liberate U.S. citizens detained or imprisoned by or on behalf of the Court. The participation of U.S. armed forces in international, particularly UN and NATO, peacekeeping operations was made dependent upon those peacekeepers being immune from the jurisdiction of the ICC.[776] Only recently, some mellowing in the U.S. stance against the ICC has been observed, when the U.S. let pass a Security Council resolution which referred the investigation and prosecution of international crimes committed in Darfur to the ICC.[777]

773 ICC Statute, art. 125(1).

774 For the text of the Bolton Statement and its legal effect, *see* W. Michael Reisman et al., International Law in Contemporary Perspective 1320 (2004).

775 22 U.S.C. 7421 *et seq.*

776 Sean D. Murphy, *American Service Members' Protection Act*, 96 Am. J. Int'l L. 975 (2002).

777 The U.S. abstained in that vote, rather than vetoing the resolution. Since the U.S. had called the events happening in Darfur a genocide, a veto would have raised the claim for establishing another *ad hoc* tribunal along the lines of the ICTY and ICTR or a hybrid domestic-international tribunal, with all the additional expenses involved. The comments by the U.S. Representative to the Security Council at that meeting, Ms. Anne Woods Peterson, were summarized as follows: "While the United States believed that a better mechanism would have been a hybrid tribunal in Africa, it was important that the international community spoke with one voice in order to help promote effective accountability. The United States continued to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. Because it did not agree to a Council referral of the situation in Darfur to the Court, her country had abstained on the vote. She decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties." UN Security Council, 5158th Meeting (Night), Press Release SC/8351, 31 March 2005.

Whatever the future of this institution may be, it has managed to attract the consent to be bound *via treaty* by many states to not only a broad and up-to-date array of substantive international crimes, but also to a most modern set of due process rights that build upon the Statutes, Rules and jurisprudence of the ICTY and ICTR – institutions that received their authority "only" from the Security Council, and, in the case of Rules and jurisprudence, the persuasiveness of their own arguments. As of October 20, 2008, the Statute of Rome has been ratified by and entered into effect for 108 states.[778] Many of its substantive and procedural provisions are uncontested; their affirmative support by this large number of important states' ratification of corresponding obligations reinforces their normative claim to reaching the status of customary international law.

778 United Nations, Status of Treaties, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372 &chapter=18&lang=en (last visited on October 20, 2008).

CHAPTER III Domestic Criminal Due Process Guarantees: A Case Study of the United States of America

A. Overview

The section below discusses the domestic guarantees of due process, which came into being long before those guarantees were recognized in international law. Even when we look at the history of the drafting of Article 14 of the ICCPR, we come across the fundamental role played by the United States, whose constitutional history with the Fifth Amendment of 1791 and the Fourteenth Amendment of 1868, as well as with the Sixth and Eighth Amendments of 1791, has constantly been centered on the criminal procedure (and later, administrative law) guarantee of the *due process of law*.[1] The U.S. constitutional guarantees, its Bill of Rights and its extensive case law, will represent the model of a country's legal system in which the liberty of the person denotes the identity of the nation. The American Constitution, in the majestic prose of the Fifth Amendment, stated that no person shall be "deprived of life, liberty, or property, without due process of law."[2] In the post-Civil War Fourteenth Amendment, this guarantee was extended, in virtually identical language, to the States of the Union.[3] While not necessarily original – the essential idea can be traced back to foundational rights documents such as the Magna Carta of 1215,[4] King Edward III's statute of 1354,[5] the English Bill of Rights of 1689,[6] as well as the Virginia Declaration

1 Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd revised ed., 2005), at 305, para. 1.

2 "[N]or [shall a person] be deprived of life, liberty, or property, without due process of law;" U.S. Constitution, Amendment V (1791).

3 "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S. Constitution, Amendment XIV (1868), Section 1.

4 For details on the Magna Carta, see *supra* Chapter I, notes 26-31.

5 *See supra* Chapter I, at note 31.

6 *See English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, *available at* http://www.webmesh.co.uk/englishbillofrights1689.htm. This bill, whose structure is similar to today's resolutions and declarations, *inter alia*, prohibits inflicting cruel and unusual punishments, and asks for independence of the judiciary in trials of serious offenses: "jurors ought to be duly impan-

of Rights of 1776[7] –, the concept of due process of law in its interpretation by the federal judiciary proved not only to become a most consequential Constitutional rule in the U.S., but it was adopted by constitution-makers and legislators around the world, and acknowledged by courts of many countries[8] as a legal principle of relevance and authority. Within the dynamic of the common law,[9] the judges, who interpret the

elled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders." *Id*.

7 *See Virginia Declaration of Rights,* June 12, 1776, *supra* Chapter I, note 26. Its sections VIII-XI enumerate several elements that constitute the due process. "That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers." *Id*., section VIII. *Available at* http://avalon.law.yale.edu/18th_century/virginia.asp.

8 Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 543 (1988). It is interesting to note here that Justice Frankfurter, when advising B.N. Rao during the process of the framing of the Indian Constitution, he suggested that India should not include the due process clause because "the power of review implied in the due process clause was not only undemocratic (because it gave judges the power of vetoing legislation enacted by the representatives of the nation) but also threw an unfair burden on the judiciary." Consequently, due process was not included in article 22 of the Indian Constitution which provides certain guarantees in case of arrest and detention, but it was replaced with the phrase "except according to procedure established by law." Later on, a number of cases before the Supreme Court of India in the 1950s and '70s proved that the omission of the due process clause did interfere with the rights of the citizens of the largest democracy in the world. This caused the Court in the *Maneka Gandhi* Case to introduce the "requirement of reasonable, fair and just procedure," bringing in the concept of due process in order to provide greater protection for the personal liberty and life of Indian citizens. *Id.* at 544-546.

9 It is also important to actually note the *dynamics* of the common law as it relates to its adversarial system of justice in contrast to the inquisitorial or investigative system of civil law jurisdictions. The rules of evidence as well as the cross-examination of witnesses of the adversarial system account for a strong belief among common law proponents that it is more likely for the trier of fact to discover the truth through the clash of adversaries. However, controversy on this issue exists even among those educated in the common law. *See* Hurst Hannum, Materials on International Human Rights and U.S. Criminal Law and Procedure 80-81 (1989), quoting Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1035-37(1975): "We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth…Despite our untested statements of self-congratulation, we know that others searching after facts-in history, geography, medicine, whatever-do not emulate our adversary system. We know that most countries of the world seek justice by different routes. What is much more to the point, we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often suited to defeat, the development of truth."

law, but at times also make law, at least in cases of first impression, have sometimes expanded and at other times restricted[10] the doctrine of due process, because of the necessity imposed by new situations and changes of local standards or social attitudes towards it. At the same time, several propositions have been concerned with the issue of how to apply the rights conferred in the amendments: literally, narrowly, according to the semantics of the words originally used, or in a wider sense, embracing the intent and the spirit of law.[11] With the latter perspective in consideration,[12] the Supreme Court has held that the prohibition of the deprivation of liberty without due process is not confined only to the specific liberties noted in the Bill of Rights, but extends to, and protects, all rights ranked as fundamental.[13] It thus created a distinction between procedural and substantive due process, with the latter guaranteeing not procedural rights, but substantive rights which could be taken away only when compelling governmental interests so require and when the means chosen to restrict that right were narrowly tailored to achieve the governmental objective.[14] Other rights relevant to the criminal justice process include: The Fourth Amendment's prohibition against unreasonable searches and seizures;[15] the Fifth Amendment with guarantees of indictment by grand jury, protection from double jeopardy, protection from self-incrimination, and the guarantee of due process; the Sixth Amendment[16] with its

10 E.W. Thomas, The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles 3 (2005). Thomas goes on opining that judicial law-making is not a monopoly of only "progressive judges, but [it] embraces the judiciary as a whole." For that reason judges should be directed by "a judicial philosophy that is articulated and transparent" and their law-making should "be justified by sound legal theory." *Id.* at 4.

11 J.G. Riddall, Jurisprudence 188 (1999).

12 Supreme Court Justices, especially those of the Warren Court, have often been accused of undue "activism," of infusing their own social or political views, their personal sense of right or wrong, into the interpretation of open-ended Constitutional terms such as "due process" or "equal protection." Technically, such choices of interpretation, as long as they remain such, may be difficult to avoid. Also, as revered Chief Justice John Marshall stated in *McCulloch v. Maryland*, "we must never forget it is *a constitution* we are expounding," 17 U.S. 316, 407 (1819) – a living document reflecting the changing structure and needs of society.

13 Riddall, *supra* note 11, emphasizing the natural law underpinning of this reasoning.

14 This judicial review of impairments of fundamental rights is referred to as "strict scrutiny." A prime example of such "substantive due process" rights is the right to privacy, developed in case-by-case analysis since *Griswold v. Connecticut*, 381 U.S. 479 (1965). Others include the right to marry, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and the right to live together as a family, *Moore v. East Cleveland*, 431 U.S. 494 (1977).

15 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Constitution, Amendment IV (1791).

16 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been commit-

rights to a speedy and public trial, the proper notification of charges, the confrontation of witnesses and other important guarantees such as impartiality of the jury and effective assistance of counsel;[17]and the Eighth Amendment banning excessive bail, excessive fines and cruel and unusual punishment.[18] The language of the Ninth Amendment that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," reveals that the framers of the Constitution believed in more fundamental rights than those enumerated in its text. Thus the liberty of the individual and the protection of his rights would be particularly vulnerable to government power[19] and official capriciousness, if the procedural fairness, so uncompromisingly required by due process,[20] was not to be meticulously observed. Is it so observed? What is the rule in the law of due process, and what are the exceptions to the rule in the United States?

All steps in the U.S. process of criminal justice engage, in one form or another, a balancing between the needs of society to enforce its core beliefs through the criminal law and the interests and human dignity concerns of the individual accused of violating such laws. In the federal system, which has to respect all the guarantees of the U.S. Bill of Rights, those steps are, generally speaking, the following: A crime comes to the attention of the authorities, through either it being reported to them or them finding out about it. An investigation ensues, which may lead to the arrest of a suspect and the booking, *i.e.* photographing and fingerprinting of that individual, as well as a review by the magistrate. Further investigation follows, which may lead to the decision to charge the individual and the filing of a complaint. After the first appearance and a preliminary hearing, a grand jury review may take place, which may lead to the filing of an "indictment" or "information." An arraignment may take place on the information or indictment, and, after certain pre-trial motions are dispensed

ted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Constitution, Amendment VI (1791).

17 Though not operative any longer according to the terms it was formulated, the almost archaic Seventh Amendment provides that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Constitution, Amendment VII (1791).

18 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Constitution, Amendment VIII (1791).

19 The power of government is particularly daunting in the system of criminal justice as it enforces the substance of criminal law by having the exclusive power and the legitimate authority to accuse, prosecute and punish individuals. In this inherent imbalance between the government and the individual, restraining the government power through due process guarantees remains the only redress, the only mitigation.

20 This claim of Justice Robert Jackson in *Shaughnessy v. United States*, 345 U.S. 206, 224 (1953), remains *per se* unchallenged, despite the bumps in the road of due process. *See* David J. Bodenhamer, Fair Trial: Rights of the Accused in the American History 4 (1992).

with, the trial may be held. If it results in a conviction, sentencing will follow. Appeal and post-conviction remedies complete the process of criminal justice.[21] These phases will be addressed *seriatim*.

In the investigational phase, in terms of constitutional ramifications, the Fourth Amendments' prohibition against unreasonable searches and seizures is of paramount importance. So is the exclusionary rule developed by judges as a balancing test for constitutional rights protected by the Forth Amendment. The exclusionary rule came into being as a mechanism needed to give meaning to the constitutional protections, to remedy the violations of the rights of the accused. Excluding evidence extorted in violation of the constitutional guarantees was deemed to be the better solution compared to the only other way to remedy a violation: bring charges against the police officer. The exclusionary rule will be discussed in more detail in a later section.

B. Due Process before Trial

1. The Prohibition against Unreasonable Search and Seizure

Once police or prosecutorial authorities are apprised of a possible criminal act, usually their investigative machinery is set in motion directed toward getting to the bottom of the truth about what happened and who was legally responsible for it. In this search for the truth, zones of privacy of persons, whether suspects or not in the alleged crime, may need to be infringed upon, upon showing of probable cause. Witnesses may be asked or even compelled to share their recollection of relevant events, and a person's property may be searched and seized, *i.e.* taken in custody by the government, and proceeds gained from illegal activity are forfeited.

Like many other governments, the U.S. is limited by its constitution not to randomly or arbitrarily invade individuals' zones of privacy. The place of such restriction is the Fourth Amendment which sets out the rule:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This provision goes back to pre-Independence colonial times and experiences and draws on the maxim "My home is my castle," elaborated upon in early English decisions of the common law.[22] One of them, *Entick v. Carrington*,[23] declared a general warrant according to which government agents had raided the home of an associate

21 For a good overview of these "thirteen steps to criminal justice," see Robert Henley Woody, Search and Seizure: The Fourth Amendment for Law Enforcement Officers 9-13 (2006), with further references.

22 *See, e.g.,* Semayne's Case, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604).

23 19 Howell's State Trials 1029, 95 Eng. 807 (1705).

of a foe of the King and indiscriminately seized charts, pamphlets and other materials, defective as subversive "of all the comforts of society." The seizure of all of a person's papers rather than only those alleged to be criminal in nature was considered to be "contrary to the genius of the law of England."[24] Instead, a good warrant had to be specific rather than general, it had to be issued on a showing of probable cause, and a record had to be made of what had been seized.[25] This decision, together with libertarian attacks against British general warrants – termed "writs of assistance" – in the Colonies,[26] was used by the U.S. Supreme Court in determining the Framer's intent in interpreting the Fourth Amendment.[27]

Historically speaking, the Court emphasized that the Fourth Amendment "was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the amendment, therefore, the requirement that 'no Warrants shall issue but upon probable cause,' plays a crucial part."[28] However, there are different levels of searching, and limited search without warrant was permissible on a different show of probable cause, such as the articulable suspicion, *i.e.* a reasoned suspicion. The police thus had to "whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure."[29] Thus the two parts of the Fourth Amendment (the prohibition of unreasonable searches and the qualifications of a warrant) were tied together. The rule thus was that a valid search depended on a valid warrant, which in turn flows from probable cause. However, there always were exceptions, which were said to be "jealously and carefully drawn."[30] But, they have recently multiplied in numbers and breadth to such an extent that the warrantless searches have become a matter of practical importance.

One such exception is consent by the owner of the property in question. Police officers do not have to inform the owner or suspect that he or she may refuse to grant such consent. Still, the consent must be voluntary, a criterion determined by the "totality of circumstances."[31]

Whether a warrant is necessary, however, when there is no actual physical trespassing into one's home, but the information from the home was gathered via wiretapping or other electronic invasion was controversial when the issue first emerged.[32]

24 *Id*. at 817, 818.

25 *Id.*

26 Compare Oliver M. Dickerson, *Writs of Assistance as a Cause of the American Revolution*, in The Era of the American Revolution 40 (Richard B. Morris ed., 1939).

27 Boyd v. United States, 116 U.S. 616, 626 (1886).

28 Chimel v. California, 395 U.S. 752, 761 (1969).

29 Terry v. Ohio, 392 U.S. 1, 20 (1968).

30 Jones v. United States, 357 U.S. 493, 499 (1958).

31 *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

32 The Supreme Court, in *Olmstead v. United States*, 277 U.S. 438 (1928), held that wiretapping did not fall under the Fourth Amendment, *inter alia*, because it did not involve actual physical invasion of defendant's premises.

Today this issue has been resolved in the affirmative, as the Court, in *Katz v. United States*,[33] recognized that the principal purpose of the Fourth Amendment is the protection of privacy rather than property. The later test thus probes whether there is an expectation of privacy upon which one may justifiably rely.[34] The legitimacy of such expectation has now become the battleground of case law. The Court, in this determination, recently appears to use a test which looks first at whether the interest invaded is important or persuasive enough so that a warrant is required to justify it; in cases of lesser expectations of privacy, it looks secondly at the reasonableness of the intrusion. Lately, the Court appears to show more concern for the objectives of law enforcement in justifying such intrusions.[35]

There is still a bright line, though, with respect to the doorstep of one's home: whenever governmental authorities step beyond that line, this step must be based on a valid warrant – absent exigent circumstances.[36] Such circumstances exist when police reasonably believe that persons in need of assistance are present, that evidence is in imminent danger of being removed or destroyed, or where there is a continuing danger,[37] or when in hot pursuit.

A lowered expectation of privacy exists inside of automobiles,[38] while the privacy interest in personal luggage and closed containers is substantially higher.[39]

No "reasonable expectation of privacy" exists, for example, when an individual has abandoned a particular piece of property – for example, of garbage left outside the confines of the person's home.[40]

Searches of a limited nature are particularly permitted during an investigatory stop or incident to a lawful arrest, as was the case in *Terry v. Ohio* cited above. The person of a lawfully arrested individual may be searched without a warrant, but case

33 Katz v. United States, 389 U.S. 347 (1967).

34 *Id.* at 353. Other non-physically intrusive sensing technology is subject to the same reasoning. In a recent case, *Kyllo v. United States*, 533 U.S. 27 (2001), the use by law enforcement of equipment to detect and measure heat waves penetrating through the walls of a house (thermal imaging) – indicating possible processing of marijuana – was declared unconstitutional in the absence of a search warrant or probable cause for suspecting criminal activity. *Cf.* Woody, *supra* note 21, at 34.

35 Woody, at 26: "[A]s contrasted to certain previous eras when U.S. Supreme Court rulings seemed to be more 'liberal' or protective of the rights of offenders, the modern trend has seemingly been towards a refinement that provides LEOs [*i.e.* law enforcement officers] with more guidance and leeway for searches and seizures."

36 "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, 445 U.S. 573, 590 (1980); Steagald v. United States, 451 U.S. 204, 212 (1981).

37 *Id.*

38 Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (collecting cases); United States v. Ross, 456 U.S. 798, 804 -09 (1982).

39 United States v. Chadwick, 433 U.S. 1, 13 (1977).

40 California v. Greenwood, 486 U.S. 35 (1988).

law varies regarding how far this governmental power may reach into areas within and without the control of the arrestee.[41] This leads us to the issue as to whether an individual's arrest or detention is lawful under the U.S. Constitution.

2. Arrest

Liberty constitutes the root of the American Bill of Rights. It also animates the Declaration of Independence in its focus on the pursuit of happiness and preservation of life and liberty. Though the colonies had some protections and rights, long before the Declaration of Independence, John Adams, perceiving the helplessness of the individual in front of the arbitrary power of the government, noted that liberty and security of the person rested solely upon the wisdom and precautions of the legislative and the judiciary, because "[t]hey have no other fortification against wanton, cruel power; no other indemnification, against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds; no other defense against fines, imprisonments, whipping posts, gibbets, bastinadoes and racks."[42] As the touchstone of the Anglo-American jurisprudence, procedural due process laid out pre-determined rules for the deprivation of one's liberty and for the trial of cases. The notion of liberty would normally exclude the arbitrariness of arrest and detention. Historically, however, it seems that the powers of arrest and detention have been the most abused ones. The U.S. Constitution in its Fifth and Fourteenth Amendment protects the right to liberty of a person, and the U.S. courts have been continuously struggling over the meaning of this concept without agreeing on a final authoritative interpretation of this "broad and majestic term."[43] There is, however, no objection to the statement that the term, above all, means freedom from physical restraint. This brings to the fore the question of arbitrariness and lawfulness of an arrest and/or detention. There is some discussion regarding the issue of the essence of the term *arbitrary*. Most commentators hold the view that *arbitrary* is not merely *illegal*. It includes both procedural and substantive elements, i.e. the arrest and detention need not be merely in accordance with the law, but the law *per se* needs to be compatible with the core of the right to liberty and security of a person.[44]

41 *See* Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925).

42 *Clarendon*, Boston Gazette, January 27, 1766, quoted in Alfredo Garcia, The Fifth Amendment: A Comprehensive Approach 6 (2002).

43 Hurst Hannum, *supra* note 9, at 18, quoting *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

44 *See, e.g.,* United Nations, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, at 5-7. Generally on the idea of protecting the core, or essence, of a right, see Article 19(3) of the German Basic Law, and Article II-112(1) of the Treaty Establishing a Constitution for Europe, part of the Charter of Fundamental Rights which, despite the lack of ratification of the treaty as a whole, is part of European Union law, the *acquis communautaire*. *See* Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Perspective*, 23 Berkeley J. Int'l. L.

The place U.S. courts would look for regarding protection against arbitrary arrests in individual cases was, however, primarily the Fourth Amendment. This location in the provision prohibiting, on its face, only unreasonable searches and seizures, goes back to Chief Justice Marshall's decision in *Ex parte Burford*,[45] and has been established case law ever since.[46] Seen as a "seizure" of a person, the Fourth Amendment would allow the arrest of a person in a public place without warrant if probable cause existed[47] – while a warrant would be needed if a person were to be arrested in his or her home.[48] A "seizure" in this sense would occur "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[49] Thus a formal arrest is not necessary to trigger the requirements of the Fourth Amendment; however, the nature of such more or less brief detentions determines whether it is necessary to show probable cause, which is mandatory in cases of arrest, or only some reasonable and articulable suspicion, in cases of detention.[50]

A person properly arrested without warrant, but on probable cause can only be kept in custody if he or she is heard promptly by a magistrate using procedures ensuring a fair and reliable determination of probable cause.[51] If the magistrate agreed, however, with the judgment of probable cause, the suspect could be kept in custody and presented to court even if unconstitutionally seized.[52] However, under the recently developed exclusionary rule, first applied to evidence gathered in violation of

223, 266, 269-270 (2005). As to the German Basic Law article, see also Pati, at 238; as to the Charter provision, cf. Christoph Engel, *The European Charter of Fundamental Rights. A Changed Political Opportunity Structure and its Dogmatic Consequences*, 7 Eur. L.J. 151 (2001).

45 7 U.S. 448 (1806).

46 *See, recently,* Giordenello v. United States, 357 U.S. 480, 485-86 (1958); United States v. Watson, 423 U.S. 411, 416-18 (1976); Payton v. New York, 445 U.S. 573, 583-86 (1980); Steagald v. United States, 451 U.S. 204, 211-13 (1981).

47 United States v. Watson, 423 U.S. 411 (1976).

48 Payton v. New York, 445 U.S. 573 (1980); Steagald v. United States, 451 U.S. 204 (1981); and Hayes v. Florida, 470 U.S. 811 (1985).

49 United States v. Mendenhall, 446 U.S. 544, 554 (1980) (J. Stewart). According to this case, seizure "might occur when the citizen is subjected to a threatening presence of multiple LEOs [i.e. law enforcement officers], and/or an LEO displays a weapon, physically touches the citizen, or uses language or tone of voice that connotes compliance is compelled." Woody, *supra* note 21, at 39. *See also* Florida v. Royer, 460 U.S. 491 (1983).

50 Adams v. Williams, 407 U.S. 143, 146 -49 (1972); Delaware v. Prouse, 440 U.S. 648, 661 (1979); Brown v. Texas, 443 U.S. 47, 51 (1979); Reid v. Georgia, 448 U.S. 438, 440 (1980); Michigan v. Summers, 452 U.S. 692 (1981).

51 Gerstein v. Pugh, 420 U.S. 103 (1975).

52 Even if the suspect was abducted from a foreign country, in violation of formal extradition agreements and practices, the so-called *Ker-Frisbie* doctrine (Ker v. Illinois, 119 U.S. 436, 440 (1886); Frisbie v. Collins, 342 U.S. 519 (1952)), as reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992).

the prohibition of unreasonable searches and seizures,[53] confessions and other admissions, even fingerprints and other physical evidence garnered as a result of an unlawful detention are to be suppressed.[54] Only confessions that are obtained in a way that shows that the causal connection between the original unlawful arrest and the verbal evidence that ensued has become too attenuated are no longer tainted and may be used in court.[55]

3. Pre-Trial Detention and Bail

Detention on remand and bail are other important elements of the fairness of criminal procedure. International standards presume that the accused should be released pending trial.[56] Detention thus would be more of an exception than the rule. However, the guarantees to appear for trial as well as such dangers as the repetition of the offence, the suppression of evidence, interference with the witnesses, the nature of the offence and the "wickedness" of the accused are all to be considered legitimate concerns on the part of domestic courts when considering pre-trial detention and the imposition of more severe conditions of release.[57] Bail is determined, *inter alia*, on the basis of risk of flight, or probable danger to community.

In the U.S., the Eighth Amendment does not establish a right to release or to bail *per se*, though it prohibits excessive bail. However, under aggravated circumstances no bail would be excessive. Viewed historically, for U.S. courts the main problem was to impose conditions that would merely guarantee the accused's appearance for trial.[58] However, fear of crime and growing concerns for lack of standards in such determinations brought about a more stringent set of rules known as the Bail Reform Act of 1984, amended several times afterwards. This Act allowed for denial of bail if the government would be able to prove that the released person could endanger the life

53 The landmark case is Mapp v. Ohio, 367 U.S. 643 (1961). For further discussion of the exclusionary rule, *see infra*, at notes 96 *et seq.*

54 Wong Sun v. United States, 371 U.S. 471 (1963), also called an application of the "fruit of the poisonous tree" doctrine. *See also* Davis v. Mississippi, 394 U.S. 721 (1969); Taylor v. Alabama, 457 U.S. 687 (1982).

55 In considering a suspect's "intervening act of free will," Wong Sun v. United States, 371 U.S. 471, 486 (1963), courts may consider the amount of time passed between the arrest and the confession, the flagrancy and intentionality of police conduct, consultation with others, etc. The connection between the law enforcement officer's unlawful conduct and the ultimately obtained evidence must not be so "attenuated as to dissipate the taint." *Id.* at 487. *See also* Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

56 *See* ICCPR Article 9(3), providing that "it shall not be the general rule that persons awaiting trial shall be detained in custody…"

57 *See* Neumeister v. Austria, App. No. 1936/63, ECtHR, Judgment of 27 June 1968, Ser. A, No. 8, at 39, 40. Also see generally *supra* Ch. II.A on international guarantees.

58 Hannum, *supra* note 9, at 30.

or safety of others.[59] This act added the element of dangerousness, which was going to be proved by clear and convincing evidence, as a criterion in determining bail or detention, and excluded the presumption of release in cases where capital punishment or a sentence longer than ten years were at stake, where the accused had a repeated track of the offence, as well as in cases dealing with violent crimes and some drug offences.[60] Perceived dangerousness as a motive for preventive detention brought about a sharp constitutional debate,[61] particularly as it relates to the presumption of innocence, and this issue came to be addressed by the Supreme Court in the case of *United States v. Salerno*.[62] The Court ruled that the practice of pretrial detention based on *dangerousness* was constitutional: a legitimate regulatory function and not a punishment, thus upholding the constitutionality of the Act itself as not violating due process.[63] Interestingly though, the Court "intimate[d] no view as to the point at which detention in a particular case might become excessively prolonged"[64] thus potentially bringing about a violation of due process. Naturally, the pre-trial detention can also be considered under the light of the constitutional right to a speedy trial, which is another potential defense to be invoked. Additionally, while the provisions of the Constitution obligate states to hold to these minimum standards, states might provide better protections than the constitutional guarantees.[65] The *Salerno* Court

59 *See* Bodenhamer, *supra* note 20, at 136 (1992).

60 See for more details the Bail Reform Act in The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984), codified at 18 U.S.C. paras. 3141-3150, 3156 (1988 Supp.). *See also* Allen Daniel Applebaum, *As Time Goes By: Pre-Trial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 Cardozo L. Rev. 1055 (1987).

61 *See* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology 1 (1985); Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 Mich. L. Rev. 510 (1986). However, even before the Bail Reform Act of 1984, the Supreme Court had upheld the constitutionality of detention based on the likelihood of flight. *See* Bell v. Wolfish, 441 U.S. 520, 533–34 (1979).

62 United States v. Salerno, 481 U.S. 739 (1987).

63 Justice Rehnquist observed that the due process requirements were met by the Act because it provided for expedited procedures. He also added that the state had a strong interest in detaining individuals that presented a real threat to the community. *See* Hannum, *supra* note 9, at 31.

64 United States v. Salerno, *supra* note 62, at 747 n.4.

65 This deferential approach of the Supreme Court regarding excessive detention in the *Salerno Case* did not prevent the arrestee or detainee from enjoying the protection from prolonged detention. Several Circuit Courts held that this issue had to be decided on a case by case basis considering all circumstances. *See* United States v. Frisone, 795 F. 2d 1 (2d Cir.1986), where the Court of Appeal for the Second Circuit found the pretrial detention for 12 months to be unconstitutional. *But see* United States v. Infelise, 934 F. 2d 103 , 104 (7th Cir. 1991), where the Court noted that absent a showing of government culpability, no amount of time in detention, by itself, can constitute a due process violation. *See also* United States v. Tortora, 922 F.2d 880, 889 (1st Cir. 1990); United States v.

also rejected the argument that the Act violated the Eighth Amendment prohibition of excessive bail.

This decision did not seem to convince those who did not believe in making imprisonment of the legally *innocent until proven guilty* acceptable by simply calling it a regulation. The issue of the definition of *dangerousness* was considered mostly a policy judgment, it was not based on an empirical assessment.[66] The U.S. Supreme Court had ruled on the *likelihood of danger* or *substantial risk* or *demonstrated danger*, but not on issues of magnitude, harm or the necessary probability of the outcome that would provide the justification for detaining an accused for being *dangerous*. Nevertheless, the courts have recognized that "[p]retrial detention is still an excep-

Hare, 873 F.2d 796 , 799 (5th Cir. 1989), where the court noted that in determining pretrial detention the judicial officer should consider factors like the seriousness of the charges, the strength of the government's case, the risk of flight or threat to the community. In addition, "the length of detention that has in fact occurred or may occur in the future, the non-speculative nature of future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay" are all to be considered, and the Court remanded because the magistrate failed to consider all these factors; *see also* United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986). In *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988), the Court focuses the due process discussion on "the length of confinement in conjunction with the extent to which the prosecution bears responsibility for the delay." In *United States v. Ojeda Rios*, 846 F. 2d 167, 169 (2d Cir. 1986), the Court held that due process required release of a defendant who had spent thirty-two months in pretrial detention and whose prolonged trial was still several months away. Although it noted that some of the delay resulted from the defendant's overzealousness, the court observed that, "[o]n the other hand, the government has been reluctant to agree to a severance." For more on such cases and other issues related to the Act, see Federal Judicial Center, The Bail Reform Act of 1984 (2nd ed. 1993), *available at* http://www.fjc.gov/.

66 Dangerousness was not considered to be a medical or a psychiatric diagnosis. Moreover, it is always considered difficult to predict accurately who will commit a violent crime, because even clinical assessments of violent behavior rarely exceed 50% accuracy, according to Monahan. *See The Clinical Prediction of Dangerousness: An Interview with John Monahan*, Currents in Affective Illness, Vol X, June (1991), *see also* J. Monahan, The Clinical Prediction of Violent Behavior 47-49 (1981). This had also been reflected in the case of *Barefoot v. Estelle*, 463 U.S. 880 (1983) where the American Psychiatric Association filed an amicus curiae brief with the Court stating that psychiatric predictions of future dangerousness are unreliable and incorrect two out of three times in the U.S., concluding that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." The Supreme Court ruled that such testimony is not always incorrect and expressed faith in the adversary process (and juries) to know the difference by stating that the Court is "unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness." *Available at* http://caselaw.lp.findlaw.com/scripts/getcase.pl? navby=search&court=US&case=/us/463/880.html (last visited on October 21, 2006).

tional step," not the rule,[67] and that before deciding on detention the courts have to first consider all reasonable less restrictive options.[68]

4. Pre-Trial Investigation

a. The Privilege against Self-Incrimination

From the perspective of the accused, one of the most important protections against an overreaching government is the Fifth Amendment protection against self-incrimination.[69] As a common law right, this privilege of the accused derives from the maxim *nemo tenetur seipsum accusare.*[70] This right appears to be in conflict with the desired confession of the guilt, this "queen of proofs in the law,"[71] the guilt that the system of justice is supposed to be concerned to establish. When we consider that in the accusatorial justice system the burden of proof lies with the prosecution, who has to prove guilt beyond a reasonable doubt, admitting confession as evidence appears to make the trial superfluous, for so long as the confession is trustworthy. To ensure this, the confession needs to be, first and foremost, voluntary, but also entered knowingly and intelligently. In *Bram v. United States*,[72] the Court established that the admissibility of a confession as evidence depended upon whether it was compelled within the meaning of the Fifth Amendment. For the confession to be admissible, it had to be "free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[73] Since 1936, in *Brown v. Mississippi*,[74] the Court refined the test of the voluntariness of confessions on the basis of the Fourteenth Amendment due process clause, noting that a trial based solely on confessions violates the Constitution's fair trial guarantee. As the Fifth Amendment guarantees for everyone not to "be compelled in any criminal case to be a witness against himself,"

67 *See* United States v. Torres, 929 F. 2d 291, 292 (7 th Cir. 1991), *citing* United States v. Salerno, 481 U.S. 739 , 749 (1987); United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) noting that "only in rare cases should release be denied."

68 18 U.S.C. § 3142 (e). *See* United States v. Song, 934 F.2d 103, 105 (7th Cir. 1991). The court decided on remand because the defendants had proposed electronic surveillance anklets as an alternative to detention, and the trial court had failed to consider whether that was a reasonable alternative.

69 "… [N]or shall [any person] be compelled in any criminal case to be a witness against himself …" U.S. Constitution, Amendment V (1791).

70 Latin for: *no one is bound to accuse himself* (Garcia, *supra* note 42, at 15). At the time of its ratification, the clause on self-incrimination seems to have meant to grant protection only to witnesses who testified at trial, and that was obviously at odds with the practice of that time, whereby defendants could not testify at trial. *Id* at 16.

71 Hopt v. Utah, 120 U.S. 430, 584 (1887). *Cf. Confessio est regina probationum*, *infra,* note 158.

72 Bram v. United States, 168 U.S. 532 (1897).

73 *Id.* at 542-543.

74 *See generally* Brown v. Mississippi, 297 U.S. 278 (1936).

it preserves the accusatorial system of criminal justice, safeguards the integrity of the judicial system, and also shields personal privacy against unwarranted governmental intrusion.[75] However, the privilege gained its full meaning only when the lawyers had their role validated in courts, when they were speaking for the accused.[76] The privilege protects against compulsion of "testimonial" disclosures only,[77] though the Court takes pains in applying the difficult distinction between testimonial and physical evidence. The privilege can be claimed in any proceeding where a testimony by the accused is legally required and his or her answer could potentially be used against him or her either in that proceeding or in a future criminal proceeding, or it might be used to uncover other evidence against him or her.[78]

75 In arguing some of its earlier cases, the Supreme Court used to base the privilege of protection from self-incrimination on a certain set of values. Thus in the case of *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1954), the Court states that the privilege against self-incrimination "…reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,…'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' …, our distrust of self- deprecatory statement; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"

76 *See* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 307-311 (1978); John Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1050-1054 (1994); Eben Moglan, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination,* 92 Mich. L. Rev. 1086, 1091-1094 (1994).

77 For example, requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood does not compel him to incriminate himself within the meaning of the clause. *See* California v. Byers, 402 U.S. 424 (1971), where requiring any person involved in a traffic accident to stop and give his name and address was considered not to involve testimonial compulsion and therefore the privilege was inapplicable, *id.* at 431-434. *Also see* South Dakota v. Neville, 459 U.S. 553 (1983), where the Court indicated that a State may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and if the suspect would refuse to do so, his refusal could be used as evidence against him. The Court rested its evidentiary ruling on the absence of coercion, preferring not to apply the sometimes difficult distinction between testimonial and physical evidence. In the case of *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), which involved roadside videotaping of a drunk driving suspect, the Court found that the slurred manner of the suspect's speech, as well as his answers to routine booking questions as to name, address, weight, height, eye color, date of birth, and current age, were not testimonial in nature.

78 The privilege may be claimed by a defendant or a witness in a criminal trial, including a juvenile proceeding, In re Gault, 387 U.S. 1, 42 -57 (1967), by a witness in a civil court

In applying the privilege against self-incrimination, the Court does not permit prosecutorial or judicial comment to the jury when a defendant refuses to take the stand in his own behalf. Such comment would be a "penalty imposed by courts for exercising a constitutional privilege."[79]

It also applies to other situations, such as the time of arrest and during the police interrogation of suspects, where they are asked though they have no legal obligation to speak.[80] One must explicitly claim one's privilege or one will be deemed to have waived it. This discussion brings us to one of the most conspicuous and well-known features of U.S. criminal procedure related to the rights of the suspect that are mandated under the Fifth Amendment, *i.e.* the *Miranda warning*.[81]

b. *Miranda*

The Supreme Court did not specify the exact wording to be used when informing a suspect of his or her rights, but it gave certain guidelines expressed as follows in its ruling: "In the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him."[82] The Court went on reiterating that: "If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present."[83] It is important to note that Miranda attaches to custodial interrogations, and to ones out of custody. If the officer fails to clearly inform the person in custody of his rights,

proceeding, McCarthy v. Arndstein, 266 U.S. 34 (1924), by a potential defendant or any other witness before a grand jury, Reina v. United States, 364 U.S. 507 (1960); Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), except in the circumstances modified by use immunity or derivative use immunity, Kastigar v. United States, 406 U.S. 441 (1972). The privilege can also be invoked by a witness before a legislative inquiry, Watkins v. United States, 354 U.S. 178, 195 -96 (1957); Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955), or even before an administrative body. In re Groban, 352 U.S. 330, 333 , 336-37, 345-46 (1957); ICC v. Brimson, 154 U.S. 447, 478 -80 (1894). Above cases noted in *Self Incrimination*, *available at* http://caselaw.lp.findlaw.com/data/constitution/amendment05/07.html#f177.

79 *See* Griffin v. California, 380 U.S. 609, 614 (1965). The Griffin rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence. Also, a prosecutor cannot impeach the trial testimony of a defendant by exploiting the fact that upon his arrest and receipt of a Miranda warning the defendant remained silent and did not give the police the exculpatory story he told at trial, *see* Doyle v. Ohio, 426 U.S. 610 (1976).

80 Miranda v. Arizona, 384 U.S. 436 (1966).

81 *Id.*

82 *Id*. at 467-473.

83 *Id.* at 473-474.

the statement will be inadmissible because of the exclusionary rule. Also, as a matter of practice invoking the right to remain silent does stop the interrogation momentarily, but at the discretion of the officer, it may restart again after a while, and then all over again. The real effectiveness of the privilege becomes visible when the person in custody asks for an attorney. In such cases, interrogation really stops until attorney is present, because statements will be otherwise considered tainted and consequently inadmissible under the exclusionary rule. Every U.S. jurisdiction has its local rules. However, such warnings read more or less the same mirroring the above.

The *Miranda* warning has been considered by some scholars as a strong antidote to the voluntariness standard which was deemed to be intractable,[84] and by some others as affording less putative safeguards than the old voluntariness test.[85] While the substance of it is pretty much in conformity with the international standards,[86] the latter rules lack the precision and the technicality of Miranda. Believed to be a logical development of the due process doctrine,[87] *Miranda* has also gone through more or less stringent permutations. In 1986, the Court arguably went against the spirit and letter of the *Miranda case*. The Rehnquist Court in *Colorado v. Connelly,*[88] in argument on the admission of a confession that did not reflect the exercise of free will,

84 George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: Embedded in Our National Culture*, 29 Crime & Just. 214 (2002). The authors have observed that in order to determine the criterion of *voluntariness* there was a need for inquiry into the metaphysical states of mind, which at that time were considered to be inherently unknowable.

85 Garcia, *supra* note 42, at 86. Professor Garcia considers the *Miranda* warning a "useful adjunct to law enforcement," a way "to sanitize an otherwise coerced confession," and suggests eliminating *Miranda* warnings altogether and to resort to the old voluntariness standard. *Id.,* at 86, 115-119. Other opponents have suggested that taping the interrogation sessions would bring an end to the conflicting claims of the defendant and the police regarding the "voluntariness" of the confession. *See* Paul Cassell, *Miranda's Social Costs: An Empirical Assessment*, 90 Nw. U. L. Rev. 387 (1996), at 488. *See also* Richard Uviller, Tempered Zeal 189 (1988), and Richard Uviller, Virtual Justice (1996), where at 124 he writes: "Most people I have spoken to say the warnings have become largely an empty ritual, embarrassing to cops and superfluous to suspects." Quoted in Garcia, *supra* note 42, at 118-119.

86 *See* ICCPR Article 9(2), ECHR Article 5(2), IACHR Article 7(4).

87 *See* Catherine Hancock, *Due Process Before Miranda*, 70 Tul. L. Rev. 2195 (1996), at 2232-2236.

88 Colorado v. Connelly, 479 U.S. 157 (1986). The Court reasoned: "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context. The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word. There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context."

effectively allowed the police to use non-threatening tactics, such as sympathizing with the suspect, in order to get a valid declaration of guilt from the suspect. Later, in *Minnick v. Mississippi,*[89] the Court held that once the suspect requested counsel, no questioning could go on until the lawyer was present. However, there still exists the very rare circumstance of *public safety* exception to Miranda,[90] which when deemed applicable will not exclude the admission of a confession, even if the defendant has already asked for an attorney.[91]

Determining the validity of a *Miranda* waiver has also turned into a great challenge both for the courts and for the defense attorneys. Since any waiver has to be voluntary, knowing and intelligent, it is important, and at the same time could be very difficult, to assess the competency of the person who waives his or her rights; psychological factors in such an assessment have been deemed to be necessary.[92] In the case of *Dickerson v. United States*,[93] *Miranda* came at odds with Section 3501,[94] which in its paragraph (a) provides: "In any criminal prosecution brought by the United States or by the District of Columbia, a confession … shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness." The focus of inquiry was whether *Miranda* was a constitutional rule or just an evidentiary standard. The Fourth Circuit had acknowledged that petitioner had not received *Miranda* warnings, but it had held that Section 3501 was satisfied since his statement was voluntary. It had further concluded that *Miranda* was not a constitu-

89 In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court stated, "When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney… Since Minnick's interrogation was initiated by the police in a formal interview which he was compelled to attend, after Minnick had previously made a specific request for counsel, it was impermissible." Justice Scalia and Chief Justice Rehnquist dissented, stating: "The Court today establishes an irrebuttable presumption that a criminal suspect, after invoking his Miranda right to counsel, can never validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple Miranda warnings and has actually consulted his attorney." *Available at* http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=498&invol=146 .

90 *See* New York v. Quarles, 467 U.S. 649 (1984) where the decision was based on the fact that "[t]he prophylactic Miranda warnings ... are 'not themselves rights protected by the Constitution,' " *id*. at 654, as the Court created a "public safety" exception. "The doctrinal underpinnings of Miranda do not require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *Id.* at 650.

91 Garcia, *supra* note 42, at 114.

92 For an analysis of the inter-relationship of the law of confessions, the *Miranda* holding and psychology, *see* I. Bruce Frumkin & Alfredo Garcia, *Psychological Evaluations and the Competency to Waive Miranda,* in The Champion (National Association of Criminal Defense Lawyers) 12-23 (November 2003).

93 Dickerson v. United States, 530 U.S. 428 (2000).

94 18 U.S.C.S. §3501.

tional holding, and that, therefore, Congress could by statute have the final say on the admissibility question. The Supreme Court concluded that *Miranda* announced a constitutional rule and reasoned that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress."[95] It thus confirmed *Miranda*'s reach to State courts.

c. The Exclusionary Rule

In the above sections, the implications of the exclusionary rule were visible in several stages of U.S. criminal procedure. International standards as well as the civil law system of justice do not generally require the exclusion of improperly obtained evidence, in the way that is guaranteed in the U.S. criminal law and procedure. Thus, the jurisprudence of the international and regional systems of human rights protection rarely finds a violation of the right to a fair trial based on improperly obtained evidence.[96]

In contrast, there is an immense U.S. jurisprudence related to the Fourth Amendment as well as other constitutional protections featuring the "exclusionary rule," through the prohibition against unreasonable searches and seizures, and consequently unconstitutionally obtained evidence. The most effective way, it is perceived, to discourage police and other investigative and prosecutorial authorities from illegally obtaining evidence is to prohibit its use in trial. Under the "fruit of the poisonous tree doctrine," this exclusion of evidence may even reach other evidence obtained by use of the illegally received information. However, only evidence, and its fruits, obtained by the government and its agents are subject to the exclusionary rule. Like in various other respects,[97] compared to the universal system of protection, the procedural guarantees available to the accused are definitely more extensive in the U.S. evidentiary rules.

In the case of *Weeks v. United States*,[98] the U.S. Supreme Court established the exclusionary rule in 1914 on the federal level on the basis of the Fourth Amendment.

95 *Id.* at 432. The Court further reasoned: "Given §3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and its instruction for trial courts to consider the totality of the circumstances surrounding the giving of the confession, this Court agrees with the Fourth Circuit that Congress intended §3501 to overrule *Miranda*. The law is clear as to whether Congress has constitutional authority to do so. "This Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure." *Id.* at 437. Following the rule of *stare decisis* the Court declined to overrule *Miranda* noting: "The requirement that *Miranda* warnings be given does not dispense with the voluntariness inquiry, but cases in which a defendant can make a colorable argument that a self-incriminating statement was compelled despite officers' adherence to *Miranda* are rare." *Id.* at 444.

96 *See* Hannum, *supra* note 9, 96-99. However, international norms do guarantee certain protection through mandating the right to privacy and to respect for private life. See discussion *supra*.

97 Some of them being fundamental only in the U.S. system of criminal justice, such as the full scope of the prohibition against self-incrimination, right to trial by jury, plea bargaining, use of the exclusionary rule.

98 232 U.S. 383 (1914).

It was extended to the states in 1961 in *Mapp v. Ohio*[99] through incorporation of the Fourth in the Fourteenth Amendment's due process clause. It has always been subject to limitations and exceptions.

As in the arrest cases mentioned above,[100] evidence will only be suppressed if there is a clear causal connection between illegal police activity and the evidence. Factors sufficiently attenuating that causal link are the time passed between the illegal action and the obtaining of the evidence; intervening events; and the purposefulness and flagrancy of the official misconduct.[101] Also, the exclusionary rule does not apply if regular police operations would, to a very high degree of probability, inevitably have led to discovery of the evidence.[102] The rule also is not applied if knowledge of the evidence is gained from an independent source completely unrelated to the official misconduct.[103] Lastly, a good faith exception, with various exceptions to itself, was created in 1984 in *U.S. v. Leon*.[104]

The exclusionary rule was dealt a heavy blow by the majority of the new Roberts Court in *Hudson v. Michigan*, a case decided over a vigorous dissent on June 15, 2006. It involved the violation of a rule that required police to knock at the door of a suspect's home and announce themselves before entering. In declining to suppress the evidence gained from a violation of this rule, the Court stated: "Suppression of evidence … has always been our last resort, not our first impulse. The exclusionary rule generates 'substantial social costs' … which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding" it, and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application. … We have rejected 'indiscriminate application' of the rule, … and have held it to be applicable only 'where its remedial objectives are thought most efficaciously served'" – that is, "where its deterrence benefits outweigh its 'substantial social costs.'"[105]

The Court thus separated the issues of a violation of the Fourth Amendment by police conduct from the "exclusionary sanction," and found that the benefit of deter-

99 367 U.S. 643 (1961).

100 *See supra* notes 45-55, re search and seizure, particularly in Wong Sun v. United States, 371 U.S. 471, 486 (1963), and other cases mentioned in notes 54-55.

101 People v. Martinez, 898 P. 2d 28, 33 (Colo. 1995).

102 Nix v. Williams, 467 U.S. 431 (1984). This exception was limited to the admission of secondary, not primary evidence, in People v. Stith, 69 NY2d 313 (1987).

103 People v. Arnau, 58 N. Y. 2d 27, 32-33 (1982).

104 468 U.S. 897 (1984). It had to do with exception for evidence obtained as a result of officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. For an analysis of the modification of the exclusionary rule with the "good faith" exception, see Jeremy M. Miller, *The Good Faith Exception to the Exclusionary Rule: Leon and Sheppard in Context*, 7 Criminal Justice Journal (1984). *See also* Kenneth C. Halcom, *Illegal Predicate Searches and the Good Faith Exception*, 2007 U. Ill. L. Rev. 467 (2007).

105 547 U.S. 586, 126 S. Ct. 2159, 2163 (2006).

ring police conduct violative of the "necessarily gray" area of the "knock and announce" requirement was outweighed by the costs of applying the exclusionary rule.

Fourteenth Amendment cases on due process also condemned the brutal and violent interrogation techniques that brought about a "substantial risk" of false confessions,[106] and illegally obtained evidence.

5. Grand Jury Review

Indictment by a grand jury[107] is constitutionally prescribed only for federal criminal charges, though about half of the states also use grand juries.[108] Its main function is accusatory: to return criminal indictments by reviewing the evidence presented by the prosecutor and determining whether there is probable cause,[109] while at the same time protecting citizens against unfounded criminal accusations. However, the grand jury, composed of no less than 16 and no more than 23 common citizens,[110] through federal courts rulings, particularly after the 1950s,[111] has developed an extraordinary

106 *See* generally Yale Kamisar, *What is an Involuntary Confession: Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 Rutgers L. Rev. 728 (1963). *See also* Welsh S. White, *What is an Involuntary Confession Now*, 50 Rutgers L. Rev. 2001 (1998).

107 "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders…The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." Costello v. United States, 350 U.S. 359, 362 (1956). *See also*: "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges . . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." United States v. Mandujano, 425 U.S. 564, 571 (1976). For the federal requirement of a grand jury, see U.S. Constitution, Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger…"

108 *See* American Bar Association, *Frequently asked questions about the Grand Jury system*, *available at* www.abanet.org/media/faqjury.html.

109 Determination of probable cause in issuing an indictment by the grand jury is sometimes seen with suspicion as regards the ability of the grand jury, a body of fellow citizens devoid of legal qualifications. *See* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260 (1995).

110 Rule 6(a)(1), Federal Rules of Criminal Procedure, *available at* http://www.law.cornell.edu/ rules/frcrmp/#chapter_iii.

111 This is in total contrast with the first half of the 19th century when opponents of the grand jury reasoned that there was a need for a reform or even abolishment of the grand jury

investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally [such as through use immunity or derivative/ limited use immunity].[112] Some scholars have considered this fact as "the equivalent of coerced testimony," [113] diminishing in this way the privilege against self-incrimination, and firmly remarking that the framers of the Constitution intended that "no amount of evidence could justify compelling a person to supply testimonial evidence against himself in a criminal case."[114]

The grand juries operate in secret, a fact which has sometimes raised concerns and led to comparing it with the deliberations of the Star Chamber.[115] The grand jury deliberates under the direction of a good faith prosecutor, who in many cases has proved to have an unchecked power over what sometimes has been called a "puppet" grand jury.[116] The jurors are not screened for biases; the witnesses are not sworn to secrecy. Grand juries are not bound by many evidentiary and constitutional restrictions; the exclusionary rule is not applicable. Witnesses are not entitled to have counsel present in the room. They might not be informed of the object of the investigation or the place of the witnesses in it, and they may be questioned on the basis of knowledge obtained through the use of illegally-seized evidence. The commission of perjury by a witness is at all times punishable.[117] All of the above characteristics

considering it costly, inconvenient and also inefficient. In addition, as Jeremy Bentham put it at that time, the grand jury, this "miscellaneous company of men" and its secret proceedings were considered a threat to the liberty of the person in a democratic society. Bodenhamer, *supra* note 20, at 59.

112 *See* details in *Indictment by Grand Jury, available at* http://www.law.cornell.edu/anncon/html/ amdt5afrag1_user.html.

113 Garcia, *supra* note 42, at 152.

114 Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in R.H. Helmholz et al., The Privilege Against Self-incrimination: Its Origins and Development 183 (1997).

115 Garcia, *supra* note 42, at 131. For background on the Star Chamber, see *supra* Chapter I, note 43.

116 *See id.* at 155-163, referring to the Clinton impeachment, where Independent Counsel Kenneth Starr subpoenaed Lewinsky in his expansive grand jury investigation.

117 This is irrespective of the nature of the warning given him and despite the fact that he may already be a reputed defendant when called to witness. *See* United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977). Mandujano had been told of his right to assert the privilege against self-incrimination, of the consequences of perjury, and of his right to counsel, but not to have counsel with him in the jury room. Chief Justice Burger and Justices White, Powell, and Rehnquist took the position that no Miranda warning was required because there was no police custodial interrogation and that in any event commission of perjury was not excusable on the basis of lack of any warning. Justices Brennan, Marshall, Stewart, and Blackmun agreed that whatever rights a grand jury witness had, perjury was punishable and not to be excused. *Id*. at 584, 609. Wong was assumed on appeal not to have understood the warnings given her and the opinion proceeds on the premise that absence of warnings altogether does not preclude

have brought about a good deal of criticism[118] of the institution of the grand jury time and again. The frustration of defense lawyers over such issues was reflected even in a proposal of a federal grand jury "bill of rights" by the National Association of Criminal Defense Lawyers, which among others would allow criminal attorneys access to the grand jury room.[119] Such criticisms would conclude that the grand jury has failed to shield citizens from "arbitrary and oppressive governmental action."[120] Also, it has been observed that this institution has been constantly manipulated by the Executive Branch.[121] The Supreme Court would also sometimes admit that at times the grand jury was not serving its historic purpose of protecting citizens from the "overzealous prosecutor."[122]

However, "the grand jury's subpoena is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law . . .,"[123] such as the marital privilege, lawyer/client privilege, or the privilege against self-incrimination.[124] "A grand jury's subpoena *duces tecum* [document request] will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment.'"[125]

The indictment by grand jury does not extend "in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger." Those

a perjury prosecution. See *Indictment by Grand Jury, n.9, available at* http://www.law.cornell.edu/anncon/ html/amdt5afrag1_user.html.

118 *See* generally Peter J. Hennings, *Prosecutorial Misconduct in Grand Jury Investigation Investigations*, 51 S.C. L. Rev. 1 (1999); Alexander J. Menza, *Witness Immunity: Unconstitutional, Unfair, Unconscionable*, 9 Seton Hall Const. L. J. 505 (1999). *See also* John Gibeaut, *Indictment of a System*, 87 A.B.A. J. 35 (Jan. 2001).

119 John Gibeaut, at 36.

120 United States v. Calandra, 414 U.S. 338, 343 (1974).

121 Garcia, *supra* note 42, at164.

122 United States v. Dionisio, 410 U.S. 1, 17 (1972).

123 Hale v. Henkel, 201 U.S. 43, 76 (1906).

124 The Fifth Amendment clause of protection against self-incrimination must be respected. Blau v. United States, 340 U.S. 159 (1950); Hoffman v. United States, 341 U.S. 479 (1951). *See also* Blau v. United States, 340 U.S. 332 (1951) (husband-wife privilege); Alexander v. United States, 138 U.S. 353 (1891) (attorney-client privilege).

125 Hale v. Henkel, *supra* note 123.

serving in the armed forces[126] are subject to court martial rather than grand jury indictment or trial by jury.[127]

6. *The Right to Be Clearly Informed of Charges in Indictment or Information*

The Sixth Amendment guarantees the right to be *informed of the nature and the cause of the accusation.* This right is a fundamental element of due process, and all States are required to observe it.[128] They first have to have clearly and precisely phrased laws that indicate what is proscribed as criminal conduct. The Court has noticed that in order to "avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed."[129]

As to the application of the criminal law in an individual case, the Constitution does not require the prosecution to provide the accused with a written copy of the indictment.[130] However, the offense must be described clearly and accurately in the information or indictment that described the charges he is accused of;[131] the defendant is usually informed of charges against him at the arraignment. This description will give the accused the opportunity to be able to build his defense properly.

126 The exception's limiting words "when in actual service in time of war or public danger" apply only to members of the militia, not to members of the regular armed forces. In *O'Callahan v. Parker*, 395 U.S. 258 (1969), the Court held that offenses that are not "service connected" may not be punished under military law, but instead must be tried in the civil courts in the jurisdiction where the acts took place. This decision was overruled, however, in 1987, the Court, emphasizing the "plain language" of Art. I, Sec. 8, cl. 14, ("The Congress shall have power to…make rules for the government and regulation of the land and naval forces), and not directly addressing any possible limitation stemming from the language of the Fifth Amendment. "The requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged," *see* Solorio v. United States, 483 U.S. 435 (1987), at 450-451. Even under the service connection rule, it was held that offenses against the laws of war, whether committed by citizens or by alien enemy belligerents, could be tried by a military commission, *see* Ex parte Quirin, 317 U.S. 1, 43 , 44 (1942). Discussion *available at* http://caselaw.lp.findlaw.com/data/constitution/amendments05/01.html#f33 .

127 *See* Johnson v. Sayre, 158 U.S. 109, 114 (1895). *See also* Lee v. Madigan, 358 U.S. 228, 232 -35, 241 (1959).

128 *See* In re Oliver, 333 U.S. 257, 273 (1948).

129 Rabe v. Washington, 405 U.S. 313 (1972).

130 United States v. Van Duzee, 140 U.S. 169, 173 (1891).

131 United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872).

7. The Presumption of Innocence

The presumption of innocence or otherwise proof of guilt beyond a reasonable doubt is a cornerstone of the criminal justice system in the U.S. In *In re Winship*,[132] the Supreme Court noted that "the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bedrock *axiomatic and elementary* principle whose *enforcement lies at the foundation of the administration of our criminal law*." For the first time the Court held that "the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction *except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged*."[133]

8. The Prohibition of Double Jeopardy

The Fifth Amendment also guarantees that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb."[134] As stated in *Green v. United States*,[135] "[t]he constitutional prohibition against *double jeopardy* was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense…."[136] This provision has been held to

132 397 U.S. 358 (1970). The Court reasoned as follows: "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt."

133 *Winship* at 364 (emphasis in the original text). *See also* Ivan V. v. City of New York, 407 U.S. 203, 204;; Lego v. Twomey, 404 U.S. 477, 486 -487; Mullaney v. Wilbur, 421 U.S. 684; Patterson v. New York, 432 U.S. 197; Cool v. United States, 409 U.S. 100, 104.

134 This Fifth Amendment clause speaks of being put in "jeopardy of life or limb," which referred to the possibility of capital punishment upon conviction, however it has been held that it protects with regard "to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute," Ex parte Lange, 85 U.S. (18 Wall.) 163, 169 (1874). The clause generally has no application in non-criminal proceedings, see Helvering v. Mitchell, 303 U.S. 391 (1938).

135 355 U.S. 184 (1957).

136 *Id.* at 187. The Court added: "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, at 187-188. *See also* North Carolina v. Pearce, 395 U.S. 711 (1969), where the Court elaborates

apply fully to federal and state courts alike,[137] when the Supreme Court enunciated the due process incorporation theory under which most of the Amendments of the original Bill of Rights apply to the States as well. It is worth mentioning here that the constitutional standards allow retrial if the person has been acquitted of the same crime in another sovereign jurisdiction.[138] Such a prosecution would not constitute double jeopardy.[139] So, while double jeopardy's fundamental value is considered to be its "finality,"[140] thus entitling the defendant to "an end point in the criminal justice process,"[141] this value of the clause does not seem to be given effect in the context of dual sovereignty, according to which "the federal and state governments, acting in tandem, can generally do what neither government can do alone - prosecute an ordinary citizen twice for the same offence."[142] The case of *Heath v. Alabama* [143] illustrates

that double jeopardy "protects against a second prosecution for the same offence after an acquittal; it protects against a second prosecution for the same offence after conviction. And it protects against multiple punishments for the same offence." *Id*. at 717.

137 *See* Benton v. Maryland, 395 U.S. 784 (1969). In this case, referring to *Palko v. Connecticut*, 302 U.S. 319, the Supreme Court stated: "The double jeopardy prohibition of the Fifth Amendment, a fundamental ideal in our constitutional heritage, is enforceable against the States through the Fourteenth Amendment." It also reasoned "'that the double jeopardy prohibition . . . represents a fundamental ideal in our constitutional heritage. . . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments." *Id.* at 793-796.

138 International law provides the same standards: prohibition against double jeopardy applies only to prosecutions within a given country. *See* A.P. v. Italy, Comm. No. 204/1986, *Report of the Human Rights Committee,* 43 UN GAOR, Supp. (No. 40), U.N. Doc. A/43/40 (1988) at 242. Since international law is applicable both to the States and to the federal government, the United States, in order to mitigate the international standard with its dual sovereignty theory and practice, has attached an understanding to Article 14 (7) of the Covenant on Civil and Political Rights upon its ratification: "The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause." *See* United States of America's Reservations to the ICCPR, available at http://www.internationaljusticeproject.org/juvICCPR.cfm .

139 *See* United States v. Lanza, 260 U.S. 377 (1922), where the Court stated "'We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *Id*. at 382. *See also* Hebert v. Louisiana, 272 U.S. 312 (1924); Screws v. United States, 325 U.S. 91, 108 (1945); Jerome v. United States, 318 U.S. 101 (1943).

140 *See* George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. Ill. L. Rev. 827 (1988).

141 Garcia, *supra* note 42, at 186.

142 Akhil Reed Amar & Jonathan Marcus, *Double Jeopardy Law after Rodney King*, 95 Colum. L. Rev. 1, 2 (1995).

143 Heath v. Alabama, 474 U.S. 82 (1985).

the irony of such an application. The defendant was convicted to life in prison, after pleading guilty to murder, in Georgia, but was given the death penalty in Alabama for the very same crime. For the Supreme Court, "the conception of crime as an offense against the sovereignty of the government" is the foundation of the dual sovereignty doctrine in the common law. Consequently, quoting from *United States v. Lanza*, Justice O'Connor explains: "When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct offences."[144] Hence, it is the term *offense* contained in the Fifth Amendment that becomes the Achilles heel of the provision. Is *that same criminal act* actually the *same offense*?[145] As per the interpretation of the majority opinion of Supreme Court, it obviously may not be. It is most interesting to note here the dissenting opinion of Justice Marshall. First, he argues that in the case of *Nielson v. Oregon*,[146] the Court, considering competing state prosecutorial interests, had "observed that where an act is prohibited by the laws of two States with concurrent jurisdiction over the locus of the offense 'the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other.'[147]"[148] Then he concludes that Alabama's relentless prosecution of the petitioner could not survive *constitutional scrutiny* either "as a violation of the Double Jeopardy Clause or simply as an affront to the due process guarantee of fundamental fairness."[149] Scholars followed suit calling this an instance of unimaginable government oppression,[150] whose avoidance is supposed to be the overriding purpose of the double jeopardy clause.

144 *Id*. at 88.

145 For an analysis of what the offence is, see Garcia, *supra* note 42, at 194-203. *See also* Akhil Reed Amar, *Double Jeopardy Made Simple*, 106 Yale L.J. 1807, 1815 (1997), as he argues that this "mess" is a result of the Court's reluctance to interpret the term "same offense" as what it really and literally means, that is "the same offense." However, it is worth noting in this context, that there could be other occasions that limit the use of double jeopardy, namely the "elements test." It has to do with conduct that might constitute two offenses at once. Just because the defendant can be tried on one charge, it does not mean that the other charge can be dismissed, because the second might need proof of different sets of elements.

146 Nielsen v. Oregon, 212 U.S. 315 (1909).

147 *Id.* at 320.

148 Heath v. Alabama, supra note 143, Justice Marshall dissenting, at 100.

149 *Id.* at 103. He goes on to argue: "Even before the Fourteenth Amendment was held to incorporate the protections of the Double Jeopardy Clause, four Members of this Court registered their outrage at 'an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieve[d] its desired result of a capital verdict.' Ciucci v. Illinois, 356 U.S. 571, 573 (1958). Such 'relentless prosecutions,' they asserted, constituted 'an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment, whatever its ultimate scope is taken to be.' *Id*. at 575." *Id*. at 103.

150 Garcia, *supra* note 42, at 211.

Mistrial concerns within the ambit of double jeopardy have been another area of controversial interpretation by scholars and courts. In *United States v. Forn*,[151] the Court considered the defendant's interest in solving "his confrontation with society through a verdict of a tribunal" that might acquit him[152] and society's interest in determining guilt which does not guarantee "a single proceeding free from governmental or judicial error."[153] This concern for a mistrial is best described in Justice Black's famous reasoning in *Green v. United States:*[154] "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, ordeal and compelling him to live in the continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty. In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence,'[according to] United States v. Ball, 163 U.S. 662, 671."[155] Many hold the idea that as a practical matter, multiple prosecutions are a rare occurrence.[156] One last important issue to note is the timing when double jeopardy attaches. In the trials by jury, double jeopardy attaches when the jury is sworn, whereas at bench trials, it attaches when the first witness is sworn.

9. Plea Bargaining

It is of interest to analyze in this section, prior to the rights in trial, the element of plea bargaining. Characteristic of U.S. criminal procedure, the system of plea bargaining has constantly come under attack by scholars within and outside[157] of the United

151 United States v. Forn, 400 U.S. 470 (1971).

152 *Id.* at 486.

153 *Id.* at 484.

154 Green v. United States, 355 U.S. 184 (1957).

155 *Id.* at 187-188.

156 Jimmy Gurulé, *The Right to a Fair Trial in United States Law*, in The Right to a Fair Trial, 95, 97 (European Commission for Democracy through Law 2000). Such an example is the prosecution both in federal and state courts of Terry Nichols who perpetrated the 1995 bombing of the Murrah Federal Building in the Oklahoma City, Oklahoma, killing a total of 168 people. *Ibid.*

157 John H. Langbein, *Torture and Plea Bargaining*, in Philosophy of Law 349, 352 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995). In this legal-philosophical treatise, Langbein expresses his disdain for the "spectacle of plea bargaining" in the U.S. as he compares the American law of plea bargaining to the medieval European judicial torture, a law which constituted the heart of European criminal procedure from the mid-thirteenth to the mid-eighteenth century. Drawing parallels between these two laws he discovers that they have striking resemblances in purpose and nature; though coercion in the law and practice of torture is greater than in plea bargaining, nevertheless "the resulting moral quan-

States. There are several grounds on which plea bargaining is frowned upon, but "the resulting moral quandary," as Langbein puts it, seems to be the essence of it. *Confessio est regina probationum*,[158] this maxim of the medieval Glossators fittingly portrays the American concept of plea bargaining.[159] It originated in the late nineteenth century and started to become visible as a non-trial procedure in the 1920s.[160] Plea bargaining is a non-trial procedure which consists of the rendering of a confession by the

dary is the same." He gives several arguments to support this conclusion. First, the intent of both laws is to safeguard the accused by trying to eliminate the discretion of the trier of fact: the torture law requiring the judge to adhere to objective criteria of proof, and the plea bargaining protecting the accused from the dangers of the jury trial; second, each of these laws focus on inducing the accused to confess guilt, rather than having the accusers prove it, and the coercion in both laws differs only in degree, but not in kind; third, like medieval Europeans, modern-day Americans resort to a procedural system "that engages in condemnation without adjudication;" forth, like the law of torture, the sentencing differential elicits confessions, that would not otherwise be tendered, and some of these confessions are false; fifth, in the substance of both systems lies the illusory safeguard of voluntarism—the accused respectively had and has to repeat the confession or the plea before the judge "voluntarily;" sixth, both systems enhanced their laws respectively with a "probable cause determination for investigation under torture," and the requirement of an "adequate factual basis for the plea," but these safeguards do not suffice to protect an innocent from condemnation. Langbein illustrates this point with two examples: 1) the Case of *North Carolina v. Alford* before the U.S. Supreme Court, which found it permissible to condemn without trial a person who had declared before the sentencing court: "I just pleaded guilty [of second degree murder] because they said if I didn't they would gas me for it…I am not guilty but I plead guilty;" 2) the Case of Johannes Julius, a 17th century burgomaster of Bamberg, who wrote to his daughter, as he awaited execution, that he had pleaded guilty of witchcraft "for which I must die. It is all falsehood and invention, so help me God….They never cease to torture until one says something." Langbein concludes that in addition to an increased danger of convicting an innocent man, the plea bargaining, "this willful mislabeling," reinforces the cynicism about the processes of criminal justice, and he opts for "a streamlined non-adversarial trial procedure," similar to the "irresistible model" of modern European criminal procedure. For a summary of more arguments in favor and against this component of the U.S. justice system, see W.R. LaFave & J.H. Israel, Criminal Procedure 766-772 (Student ed. 1985 & Supp. 1987). As to recidivism concerns in plea bargaining, *see* Peter T. Wendel, *The Case Against Plea Bargaining Child Sexual Abuse Charges: "Déjà Vu All Over Again,"* 64 Mo. L. Rev. 317, 331 n.46 (1999).

158 Latin for "the confession is the queen of tests."

159 Langbein, *supra* note 157, at 353. Plea bargaining *per se* is found in Rule 11 of the Federal Rules of Criminal Procedure in the U.S., which provides for a detailed procedure for plea bargaining starting with the court's advising and questioning of the defendant, ensuring that a plea is voluntary, determining the factual basis for a plea, describing the procedure for the agreement of the plea, disclosing the plea, judicial consideration of the plea, acceptance or rejection of the plea by the court, rules for withdrawing the plea, and its finality. Federal Rules of Criminal Procedure (including the amendment that entered into effect in December 1, 2007), Chapter IV, Rule 11.

160 John H. Langbein, *id.* at 352.

accused, usually to a lesser charge, in exchange for the prosecutor's recommendation of leniency with respect to the criminal sanction imposed, but also for a reduction in the number of counts, and, sometimes, even acquittal of all charges. Generally it is offered by the prosecutor to the accused, mostly in cases of crimes that bear the highest sentencing ranges, and less frequently used for most serious crimes, or notorious cases. There are two basic types of plea negotiation: charge bargaining and sentencing bargaining.[161] The accused pleads guilty and waives his right to trial, in exchange for a lesser punishment compared to the one he might be sentenced to if the case were adjudicated and the accused had been found guilty. Thus, for the accused and its defense, plea bargaining is an instrument that helps them do damage control and it appeases them with the certainty of a known outcome. It seems convenient to convict the accused on the basis of his confession, since the prosecutor is no longer charged with the burden of proof for the accused's guilt, and the court is spared of the adjudication of the case. Hence, for the prosecution, plea bargaining plays an important role in reducing its workload. In many cases, the prosecution bargains with less culpable defendants in exchange for facts and evidence that could help secure guilty findings of the more culpable defendants, who would otherwise risk of being acquitted. In other cases, where the facts and the law may be not clear enough to bring about a desired conviction, plea bargaining guarantees at least a partial victory for the prosecution. A system of justice, some would argue, that relies overwhelmingly upon plea bargains to dispose of cases is built upon the "bad man" inference.[162] Some commentators thus consider plea bargaining to be *the defining feature* of the present

161 For a summarized description of the two kinds of plea bargaining and the implications of the Supreme Court's decision of *United States v. Booker*, 543 U.S. 220 (2005), *see* Barry Boss, Nicole L. Angarella, *Negotiating Federal Plea Agreements Post-Booker: Same as It Ever Was?*, 21-SUM Crim. Just. 22 (Summer, 2006). (*United States v. Booker* dealt with the constitutionality of the Federal Sentencing Guidelines, which were made advisory by the Court, which in turn reasoned as in *Apprendi v. New Jersey*, 530 U.S. 466 (2000): "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Here it is important to note the Federal Sentencing Guidelines were styled as mandatory rules setting out a uniform sentencing policy for convicted defendants in the United States federal court system since 1980s. Recently, they were made advisory only, both on the federal and the state levels, by the Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005), which found that the Guidelines, as originally constituted, violated the Sixth Amendment right to trial by jury. Judges still have to calculate the guidelines and consider them when determining a sentence but they are not required to issue sentences necessarily within the guidelines.

162 Michael H. Graham, *The "Mere Fact" Method of Prior Conviction Impeachment: "Bringing Some Honesty and Fairness To Being Dishonest,"* 42 No. 4 Crim. Law Bulletin 6 (July-August 2006).

federal criminal justice system that actually circumvents "the preferred way of resolving criminal cases,"[163] *i.e.* a jury or bench trial that guarantees a full due process.

However, if we consult the U.S. Constitution or its Bill of Rights, not only do we not find any reference to plea bargaining, but, on the contrary, in several amendments we face guarantees which appear to imply its very opposite. By pleading guilty without trial, the accused waives several constitutional rights provided through the due process of law, such as the right to remain silent, the right against self-incrimination, the right to have the attorney assist the defendant during the trial, the right to use the court to induce the production of documents and witnesses, the right to cross-examine witnesses for the prosecution, the right to have witnesses testify on behalf of the defendant during the trial, the right to appeal the case, except with *de novo* review and/ or on the issue of voluntariness of the plea (also depending on what level of court the guilty plea is entered in), the right to a trial by a jury of twelve peers (individuals selected from the community) who must unanimously find the accused guilty. As it can be seen, there is not much room left for the true soul of the adversarial model of adjudication. The above mentioned guarantees enshrined in the Fifth, Sixth and Fourteenth Amendments have always been seen by the Supreme Court as the basis of the U.S. adversarial system.[164] Still, we see that plea bargaining is not an exception to the rule; it has become the norm, the commonplace disposition vehicle of U.S. criminal procedure in 95% of cases, and repeatedly upheld by the Supreme Court,[165] – a court requesting from the prosecution to abide by the bargain it makes

163 Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia,* 43 Am. Crim. L. Rev. 1063, 1064 (2006).

164 *See* Nix v. Williams, 467 U.S. 431, 453 (1984), where the Court reasons: "The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process…." For a concise collection of cases and articles on the substance of the adversarial system in the Fifth, Sixth and Fourteenth Amendments, see Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, in 18 Crim. L. Rev. 625 (1996), at 629, n. 11.

165 For comparative figures on plea bargaining, see George Fisher, *Plea Bargaining's Triumph*, 109 Yale L. J. 857, 1012-1013 (2000), as well as Stephen C. Thaman, *The Role of Plea and Confession Bargaining in International Criminal Courts*, in ICTY: Towards a Fair Trial? (Thomas Kruessmann ed., 2008). For Supreme Court cases, see Corbitt v. New Jersey, 439 U.S. 212 (1978), stating that "[n]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid; specifically, there is no per se rule against encouraging guilty pleas… Absent the abolition of guilty pleas and plea bargaining, it is not forbidden under the Constitution to extend a proper degree of leniency in return for guilty pleas…" http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol= 439&invol=212 . *Also see* McKune v. Lile, 536 U.S. 24, 122 S.Ct. 2017, U.S.,2002, where the Court reasons that "plea bargaining does not violate the Fifth Amendment [privilege against self-incrimination], even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment. *See, e.g.,* Bordenkircher v. Hayes, 434 U.S. 357 (1978); Brady, 397 U.S., at 751." Another interesting case is U.S. v. Mezzanatto, 513 U.S. 196 (1995). In paragraph 12, quoting *Corbitt,,* the Court notes: "The plea bargaining process necessarily exerts pressure on

with the defendant, and from the judge to make sure that the plea is knowing and voluntary. This all seems to have a good reason in the country of business, as it clears the busy dockets with cost-effective pleas, resulting in work load reduction. In light of the amount of criminality in this populous country a full jury trial with all its due process guarantees is simply not affordable any longer.

In many cases, though, the fundamental motive for entering into pleas is consideration for the victims of crimes – the would-be-witnesses at trial. In cases like human trafficking, the prosecutors agree to, or initiate, plea deals because they want to protect the victim from the trauma of testifying, especially if the victim is very young. These victims are too fragile, too psychologically bruised, to be able to face the perpetrator. Fear of further revenge, particularly threatened harm to their loved ones, remains a persistent co-traveler of the victims, and could lead them to simply give up fighting. This could further weaken the case of the prosecution. Additionally, lack of sufficient evidence, because of having to investigate in foreign countries, as well as potential flaws in the investigation of facts, or even the law itself could provide an opportunity for acquittal, thus risking the crime to go unpunished after all. In other occasions, plea bargaining could help prosecutors get more out of the defendant than just imprisonment.

But that is not all. "Draconian sentences" of the U.S. criminal law, wide margins in minimum and maximum sentencing do not leave much room for the defendant to experiment with a jury or bench trial; often, he is better off with a plea, regardless of his guilt or innocence. This issue leads to another kind of pleas: the *nolo contendere* or *Alfred* plea, according to which the defendant neither admits guilt, nor wants to go to trial, because of fear of losing. *Nolo contendere* seems to cut right in the middle.

A matter of great concern for the courts is always assurances that the plea was entered voluntarily, knowingly, and had a factual basis, moreover because of the fact that once entered into a guilty plea, there is no backing out of it, unless on grounds of violations of the criteria mentioned above. All things considered, plea bargaining does not seem to be an American barbarism, but on the contrary, quite an upright solution to a situation that could be rather complicated, potentially yielding a most unwelcome result.

C. Rights to and in Trial

The Sixth Amendment to the U.S. Constitution provides for a speedy and public trial, a trial by jury previously ascertained by law, complete notice of the accusation,

defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'" Then it goes on reasoning that "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" – and permissible – "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." Bordenkircher v. Hayes, at 364, quoting *Chaffin v. Stynchcombe,* 412 U.S. 17, 31 (1973); Mezzanatto, para.12.

confrontation of witnesses, calling witnesses on one's behalf, assistance of counsel including self-representation.

1. Trial by Jury

The trial by jury is one of most conspicuous features of the American legal system. Trial by jury dates back to the Dark Ages[166] of England. It became a routine part of the English criminal legal system in the thirteenth century when the Fourth Lateran Council of November 1215 prohibited the clergy from administering the ordeals,[167] essential to the pre-existing criminal procedure of trial by ordeal. In contrast, in Continental European jurisdictions the ordeals were replaced by a system of proof which called for, with respect to particularly serious crimes, the presence of either two eye witnesses or a confession by the accused obtained through, *inter alia*, torture[168] as part of the fact-gathering system. There are contradictory opinions on the superiority of one or the other system.[169] However, they were both a response to the demand for a fair process in criminal proceedings. Trial by jury continued to be the governing

166 Dark Ages- a term used to denote a period from A.D. 4-1000, characterized by lack of written records. It is said that the origin of juries usually dates back to the Dark Ages with stories about accused and accusers fighting it out in front of feudal authorities. Russell Baker on *The Jury, available at* http://www.pbs.org/wgbh/masterpiece/jury/baker.html (last visited on June 4, 2006).

167 Canon 18 of The Canons of the Fourth Lateran Council of 1215 states *inter alia* that no cleric shall participate "in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing." *Available at* http://www.fordham.edu/halsall/basis/lateran4.html.

168 John H. Langbein, Torture and the Law of Proof: Europe and England in the Ancient Regime (1977). In this book Langbein points out, that the new system relied on direct evidence: witnesses or voluntary confession. But, in the absence of both witnesses, and a voluntary confession there came the need to extract confession through systematic torture, which developed as part of the fact gathering process in the jurisdictions observing Roman-canon law . Torture was seen as a means of eliciting direct evidence, a confession was (theoretically, at least) not regarded as determinative of guilt. Accentuating the objective evidence, the torture-induced confession was considered reliable only if the accused revealed information that none but the guilty would know. The confession required practical verification and the confession had to be repeated in front of the judge later, in the absence of torture. The most common methods of torture were the strappado, the rack and the thumbscrew.

169 According to various scholars, despite the different responses to the end of the trial by ordeal, claims that the English system was morally superior are hard to sustain. Maitland, The History of English Law (1898) pointed out that the lack of systematic torture in England was not because the English were possessed of "any unusual degree of humanity of enlightenment." Torture was only permitted in the continental systems where there was sufficient indirect evidence amounting to "half proof" of the offence alleged. The jury system on the other hand allowed guilt to be established on the basis of circumstantial evidence alone – what Maitland described as the "rough verdict of the countryside." John H. Langbein, *supra* note 168. Among others, Langbein asserts: "The [English] were the beneficiaries of legal institutions so crude that torture was unnecessary... The

proceeding, functioning swiftly and effectively[170], even in the 1790s when the U.S. was constitutionalizing the model of the English jury trial. In the U.S., to date, the trial by jury remains a central piece both of the legal discourse and the formal law, still viewed with reverence by a population which appears to be content with this distinctly Anglo-American component of its criminal justice system. On the contrary, in the middle of the nineteenth century, while the Continental criminal procedure was shaping into its modern form, it "resisted the temptation to adversary domination."[171] They did the same with the guilty plea.[172]

However, fewer and fewer cases are now tried by jury or bench in the U.S., because the criminal justice system disposes of most cases through plea bargaining.[173] It is important to note here that this came as a result of the vast transformation that the Anglo-American institution of the jury trial underwent over two centuries – from the mid-eighteenth to the mid-twentieth – "rendering it absolutely unworkable as an ordinary dispositive procedure."[174] During this period, the jury trial gained several characteristics, due to increased pressure for a greater level of safeguards against mistaken convictions. Among the most important of such guarantees were the adversary procedures, the reduction of *pro se* trials, extended *voir dire,*[175] techniques and

English jury [could] convict on less evidence than was required as a mere precondition for interrogation under torture on the Continent."

170 In Old Bailey, London's Central Criminal Court, in the 1730s the court routinely processed between 12 and 20 jury trials for felony in a single day, and there were no lawyers obtained for the defense or prosecution in ordinary criminal trials. Langbein, *supra* note 157, at 352.

171 *Id*. at 353. This general American fascination with the idea of the jury is, however, far from universal. There are a number of perceived defects of the jury system. *Abraham Lincoln,* a lawyer himself, once said that "A jury too frequently has at least one member more ready to hang the panel than to hang the traitor," a*vailable at* http://www.tempe.gov/citymgr/weekly/08302004.htm (last visited on June 4, 2006), whereas *Mark Twain* in his book titled "Roughing it," depicting a scene of jury selection in Virginia, summed up the common criticism and his own indignation in two sentences: "The jury system puts a ban upon intelligence and honesty and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago." *Available at* http://faculty.cua.edu/pennington/Law508/RoughingIt.htm (last visited on June 4, 2006)

172 Since 1850s, the German scholars disagreed with the fact that the court would sentence an accused on the basis of his confession "without satisfying itself of his guilt." Langbein, *ibid.*

173 *Ibid*. For more on the issue, see George Fisher, *Plea Bargaining's Triumph*, 109 Yale L. J. 857-1086 (2000); Ronald F. Wright, *Distortion and the End of Innocence in Federal Criminal Justice*, The Berkeley Electronic Press (2005), Paper 483.

174 Langbein, *supra* note 157, at 353.

175 *Voir dire* denotes the pre-trial probing of the backgrounds and views of jurors and allows for juror challenges. British juries are apparently chosen with much less fuss than American juries. A British Web site, which advises people what to expect if called to jury duty, states that it is rare for a potential juror to be rejected after arriving in the courtroom. In

sensational addresses of the counsels, the exclusionary rules of the law of criminal evidence, motions to incite and save issues for appellate review, all of which, in the aggregate, made a jury trial intricate and time-consuming.[176]

Some scholars and legal analysts have long ago voiced their arguments in favor of the wholesale abolition of the trial by jury, but the overall sentiment seems to stay with the U.S. Supreme Court's holding of 1937[177] and later in 1968 that the juries are "necessary to an Anglo-American regime of ordered liberty,"[178] and particularly so in the wording of Article 3, Section 2 (3) of the U.S. Constitution "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,"[179] further confirmed in the Sixth Amendment as "an impartial jury of the State and district wherein the crime shall have been committed."

However, no matter what the actual status of the jury trial is, despite of its *de facto* yielding to the practice of plea bargaining, regardless of its sometimes glaring defects[180] and the blows it may throw to the idea of substantive justice, the millennium year old practice of jury trial will most probably remain the flagship of the Anglo-American criminal legal system. Though it is no longer fulfilling the function it used to have, *i.e.* protection against government, still it cannot be considered entirely antiquated. While improvement of the jury trial process will always be welcome, its elimination is almost out of the question – not only because of the high hurdles of the Constitutional amendment process.[181] For one reason, there is no element of the whole legal system that appeals to the people as much as the trial by jury does. Trial by jury especially in the U.S. is an identity-forming myth which can not be destroyed;

American courts, picking the perfect jury is now a high art, and there are very expensive businesses that counsel lawyers about which jury candidates to accept and reject. Russell Baker on *The Jury, available at* http://www.pbs.org/wgbh/masterpiece/jury/baker.html (last visited on June 4, 2006)

176 Langbein, *supra* note 157, at 352.

177 Palko v. Connecticut, 302 U.S. 319 (1937): a "fair and enlightened system of justice would be impossible without" a right to jury trial.

178 Duncan v. Louisiana, 391 U.S. 145 (1968).

179 Also reaffirmed in the Sixth Amendment: "*In all criminal prosecutions, the accused shall enjoy the right to* a speedy and public trial, by *an impartial jury* of the State and district wherein the crime shall have been committed…" (*emphasis added*).

180 *See* Zofia Smardz, *The Jury's Out: How 12 Reasonable People Got Hung Up on Reasonable Doubt*, Wash. Post, June 26, 2005, at B1; Neil Vidmar et al., *Should We Rush To Reform the Criminal Jury?: Consider Conviction Rate Data,* 80 Judicature 286 (1997); Shari Siedman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857 (2001). *Cf.* also the recent discussion of the "*CSI* effect," which describes the potential weight that watching the TV show *Crime Scene Investigation* might have on the conduct and deliberation of jurors, resulting in more acquittals or more convictions, depending which side of the claim a scholar takes. *See* Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 Yale L. J. 1050 (2006); Simon Cole & Rachel Dioso, *Law and the Lab*, Wall St. J., May 13, 2005.

181 An amendment to the U.S. Constitution requires a two-thirds majority of the Congress and four quarters of the legislatures of the States. U.S. Constitution art. V.

it remains one jurisprudential theme of discussion that every citizen can participate in and feels knowledgeable of. Doing away with it would thus probably cause more harm than good, it would shake the structure of beliefs and attitudes of the public at large, who would possibly feel disempowered.

As Bentham wrote, "However odd … a law, a custom may be, it is of no consequence, so long as the people are attached to it. The strength of their prejudice is the measure of the indulgence which should be granted to it."[182]

2. The Right to an Impartial, Independent and Competent Tribunal

> *And what my Lord Coke says in Dr. Bonham's Case*[183] *in his 8 Co. is far from any extravagancy,... for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the Government and the party.*"
>
> Sir John Holt, C.J. (1701)[184]

The right to an *impartial tribunal* is another guarantee provided by the Sixth Amendment. This principle relates back to the Roman law concept of *nemo iudex in propria causa* (no man should be judge in his own cause). Now generalized, this principle of law asks for procedural fairness in any legal system emphasizing, conceivably, one of its most vital characteristics: the objectivity or neutrality of the decision-maker in a suit at law, free from personal stakes as well as from any concerns of retribution, whatever the outcome of the case may be. Compliance with this principle is an indicator of the prevalence of the rule of law in a country; it is the heart and soul of the due process. Its violation was often enshrined in the positive laws on decision making authority, so the struggle had to be directed toward nullifying such laws. Sir William Blackstone[185] in his Commentaries cuttingly observed that making a judge

182 Jeremy Bentham, Theory of Legislation, at 76-77, quoted in Graham Hughes, *Morals and the Criminal Law*, in Essays in Legal Philosophy 183, 185 (Robert S. Summers ed., 1968).

183 This case comes to our readings from year 1610, when Dr. Thomas Bonham was charged by the Royal College of Physicians with practicing medicine in London without a license. The College tried Bonham in its own court, found him guilty, convicted him with a fine and imprisonment, and finally suggested that the College appropriated half the fine. Sir Edward Coke, at that time Chief Justice of the Court of Common Pleas, extra-judicially (because there was no judicial review at that time) discharged the case commenting that the physicians "cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture." John V. Orth, Due Process of Law: A Brief History 19 (2003).

184 Lord Chief Justice of England and Wales, from April 17, 1689 to March 11, 1710. Quotation noted in Orth, at 15.

185 Sir William Blackstone, (1723–1780) was an English jurist and professor who produced the historical treatise on the common law called Commentaries on the Laws of England, first published in four volumes from 1765 to 1769. His Commentaries are available online through the Avalon Project at Yale Law School, at http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm.

in one's own case would be outright objectionable, and described it as "characteristic of life in the state of nature" and as "one of the evils civil government was intended to remedy."[186] Thus he was siding with Sir Edward Coke's extra-judicial conclusion in defending Dr. Bonham's right to a fair trial and his attempt to put forward the restraint of law on power. In the U.S., where due process of law became a hallmark of the Constitution, somehow, examples of gross conflicts of interest among judges remained a practice[187] until 1928, when Justice William Howard Taft found it to be "a violation of due process."[188] This was true even though, as early as 1787, James Madison, in his famous Federalist Paper No. 10, had declared that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[189] Following *Tumey v. State of Ohio*, the Congress enacted a statute which provides for disqualification of a federal judge "in any proceeding in which his impartiality might be reasonably questioned."[190]

Impartiality[191] is a complementary attribute of an independent tribunal, and judicial independence gains its real worth when exercised objectively, free of prejudice and favoritism.[192] That is why the lady of justice is blind: objective and impartial,

186 Orth, *supra* note 183, at 26.

187 As per Orth, "for a century and a half a substantial number of American states allowed something very like it (making a man a judge in his own case) with respect to the lowest level of judiciary, paying the salaries of magistrates or justices of the peace from the fines they levied." *Id.* at 31.

188 Tumey v. State of Ohio, 273 U.S. 510 (1928), concluding that: "No matter what the evidence was against [the defendant], he had the right to have an impartial judge. He reasonably raised the objection, and was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification." *Id.* at 523.

189 At the U.S. Department of State website: http://usinfo.state.gov/usa/infousa/facts/democrac/7.htm.

190 28 U.S.C. § 455 (A) (1999).

191 In some American literature the term is understood to mean "the denial of one's partiality" which in turn has to do with "particularity…[as] taking a partial view of some matter, seeing it narrowly or incompletely," or with "affective attachment or desire…[which refers to] being partial to something, as when one is partial to chocolate cake, or committed to principles of liberty and equality, or attached to the philosophic life." *See* Sharon Krause, *Partial Justice*, 29 Pol. Theory 315, 318-319. For this and for an interesting and challenging discussion on the (im)partiality of judges, see John Kang, *John Locke's Political Plan, or, There's No Such Thing as Judicial Impartiality (And It's a Good Thing*, Too), 29 Vt. L. Rev. 7 (2004).

192 The American Bar Association (ABA)'s Model Code of Judicial Conduct (1990), which consists of statements of norms denominated Canons, specific Sections and Commentary, states appropriate ethical obligations of judges. One of the issues addressed is also the impartiality of judges. In Canon 3B (5) it prescribes that: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias

bearing no fear or ill will. "The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law."[193] Judges swear the judicial oath[194] that they will do justice "according to law," but sometimes the rules of law conflict, in many cases the law might be vague, uncertain, or sometimes, even non-existent. In these cases the judges mandated to provide a decision are not only applying law, but also creating new law.[195] In all of this process, it is crucial that judges render justice "faithfully and impartially" and they "do equal right to the poor and the rich," using their balancing faculty. Actually, it is an inherent imperative of the legal process to place the weak and the powerful on equal terms in the same courtroom, in which money, strength and power, so dominant in our everyday life, seem to lose their advantage, as this imperative mandates justice due to all. It is the duty of a judge not to allow family, social, political or other relationships to influence his judicial conduct or judgment.[196] Not only should the court be impartial but it must also appear to be impartial. In the same trend as its international counterparts,[197] the U.S. judge is cautioned against any "[f]acial expression and body language, in addition to oral communication, [which] can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial."[198]

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or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so."

193 ABA Code, Preamble, *supra* note 192.

194 28 USCS 453, *Oaths of Justices and Judges*: Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of this office: "I, _ _ _ _ _ _, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _ _ _ _ _ _ under the Constitution and laws of the United States. So help me God."

195 Riddall, *supra* note 11, at 98 (1999). In Chapter 9 of his book, Riddall discusses in detail how judges decide cases, as he reflects upon Dworkin's analysis of adjudication in Law's Empire (1986). The author argues that by calling "interpretation" as the "proper role," Dworkin avoids the drawback created by the fact that judges make new law, and this law operates retrospectively, binding the unsuccessful party to a law that did not exist when the case was brought before the court. A judge's proper function is to be seen, Dworkin theorizes, not in filling the gaps by the exercise of his discretion, but in undertaking interpretation. *Id.* at 100.

196 ABA Code, Canon 2B. *Supra* note 192.

197 *See* European Court of Human Rights, noting that as regards impartiality, even appearances are important. *Supra* Ch. II.A, note 343.

198 ABA Code, Canon 3B (5), comment. However, judges are always "judged" by the public according to their perceived liberal or conservative tilts, and some come to be seen as "commanding the power to control a closely divided court." *See* Ruth Marcus, *The Kennedy Center: The Supreme Court's Balance is Precarious*, Washington Post, July 5, 2006, at A 13, analyzing Justice Kennedy's decisive vote against the Bush administration's military tribunals.

Beyond the impartiality of the decision maker, a judicial decision with binding force on any party, be it an individual or a group, must be devoid of any sort of intervention from other governmental bodies. So, viewed in a simplistic way, *prima facie*, in any democratic society, where the doctrine of the separation of powers[199] prevails, the judiciary has to be *independent*, and this independence is no doubt an "integral part of the judiciary's core function."[200] However, for centuries, there has always been widespread resentment and suspicion toward the power exercised by the judiciary. This distrust tends to be even greater when one of the parties is a government institution,[201] and in criminal proceedings, this is always the case.

The last requirement is that judges be *competent* to decide the cases before them. Judges are supposed to come to the bench with extensive training and experience. Their specialized professional education would be beneficial towards enhancement of their capabilities to reach reasoned, logical, coherent, and, to their best judgment, fair decisions. This education should normally continue while they are on the bench.

Another way to view the tribunal's competence is by observing the ability of the judges to minimize the intrusion of their personal values in the decisions they make, and their sensitivity towards the values of the community by discerning and then reflecting upon these values. Parties in a suit at law do not submit their case to decision by the personal values of the judges,[202] but to a well-deliberated, competent, independent and impartial process. However, in many appellate decisions one comes across consenting and dissenting opinions of certain judges. Part of the legal community, or community at large, sides with one or the other opinion. This is a normal reflection of a judge's formation and values versus those of the rest of society. It indicates that just like society, in the manifestation of their understanding of law, the judges too are split into more liberal, or rather conservative; more audacious, or rather hesitant; and more progressive, or rather cautious personalities. In this interplay of reasoning, intellect, and competence, the judicial process remains true to the era in which it serves. Ultimately, in the American legal system, the judge remains an impartial and independent referee, particularly in jury trials, during the adversarial battle between

199 Separation of powers = the legislature making laws + the executive administering those laws + the judiciary interpreting and applying those laws. However, some hold views that political scientists have exposed this strict doctrine, as having been "diluted to a formula that acknowledges the core functionalism," meaning that this formula allows one branch of government to venture into the domain of the other, but not interfering with its core functions. E.W. Thomas, The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles 77 (2005).

200 *Id*. at 78.

201 This would probably originate in the positivist creed related to the authority of the law as read from Justice Brandeis citing Holmes' statement: "[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it…[T]he authority and only authority is the State, and if that be so, the voice adopted by the state as its own [whether it be of its legislature or of its Supreme Court] should utter the last word." *See* Ronald Dworkin, Justice in Robes 211 (2006).

202 Thomas, *supra* note 199, at 86.

litigants, mostly ruling on their legal motions and objections, and rarely intervening with motions or questions of their own.[203]

3. The Right to a Speedy and Public Trial

The right to a *speedy trial*[204] guaranteed in the Sixth Amendment of the United States Constitution has generally come to be considered by the courts and scholars to be one of fundamental[205] importance. This provision was first dealt with by the Supreme Court in the 1905 case of *Beavers v. Haubert*.[206] The Court argued that the defendant's right to a speedy trial was not "so unqualified and absolute," and that it had to "be considered with regard to the practical administration of justice."[207] It actually placed more importance on other procedural rights, and further balanced the defendant's constitutional right to a fair trial with societal or governmental interests.[208] However, the course of defining the scope and the rationale of the right came to change later.

In *United States v. Ewell*,[209] the Court found the provision to be "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself." At the same time

203 Gurulé, *supra* note 156, at 104.

204 Before it appeared in the Sixth Amendment, this right is believed to have originated from the Magna Carta of 1215: "We will sell to no man, we will not deny or defer to any man either justice or right." Ch. 40 of the 1215 Magna Carta, a portion of ch. 29 of the 1225 reissue. Klopfer v. North Carolina, 386 U.S. 213, 223-24 (1967). It was first included in the Virginia Bill of Rights of 1776, paragraph 8 (available at: http://www.constitution.org/bor/vir_bor.htm), which reads: "That *in all capital or criminal prosecutions a man hath a right to* demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to *a speedy trial* by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers." (*emphasis added).*

205 Klopfer v. North Carolina, *supra* note 204, at 223. Some scholars, however, find a "glaring paradox" in the dichotomy of the characterization by the Supreme Court of the "speedy trial" element of the Sixth Amendment. Labeled sometimes as "relative," or "amorphous," or "slippery," and at other times "fundamental" or a "most basic right," the speedy trial is considered a double-edged sword that could benefit or prejudice the defendant. *See* Alfredo Garcia, The Sixth Amendment in Modern American Jurisprudence: A Critical Perspective 157-158 (1992).

206 Beavers v. Haubert, 198 U.S. 77 (1905).

207 It further added: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Beavers v. Haubert, at 87.

208 Garcia, *supra* note 205, at 159.

209 United States v. Ewell, 383 U.S. 116, 120 (1966). *See also* Klopfer v. North Carolina, *supra* note 204, at 221-22; Smith v. Hooey, 393 U.S. 374, 377 -379 (1969); Dickey v. Florida, 389 U.S. 30, 37-38 (1970).

society's interest, particularly as it relates to the costs of providing for pre-trial detainees and sometimes their families, were also considered though it actually "exists separate from and at times in opposition to the interests of the accused."[210] United States jurisprudence is rich in detailed reasoning on delays related to pre-indictment and post-indictment.[211] The Court held that such a delay should not be "purposeful or oppressive,"[212] ultimately reasoning that "the essential ingredient is orderly expedition and not mere speed,"[213] when administering justice with dispatch. In *Barker v. Wingo*,[214] the Court suggested four criteria to be considered when determining a possible violation of the defendant's right to a speedy trial: "[the l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[215] Two years later, the Speedy Trial Act of 1974 established time limits for completing the various stages of a federal criminal prosecution.[216] Similar provi-

210 Barker v. Wingo, 407 U.S. 514, 519 (1972).

211 *See* In United States v. Marion, 404 U.S. 307, 313 , 320, 322 (1971), the Court held that the right to a speedy trial "'is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." But Justices Douglas, Brennan, and Marshall argued that the "right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pretrial indictment delays as it is to post-indictment delays." *See also* United States v. MacDonald, 456 U.S. 1 (1982); United States v. Loud Hawk, 474 U.S. 302 (1986).

212 Pollard v. United States, 352 U.S. 354, 361 (1957).

213 Smith v. United States, 360 U.S. 1, 10 (1959).

214 Barker v. Wingo, 407 U.S. 514 (1972).

215 Barker v. Wingo, at 530. The Court probed into technical details related to these four factors. So, the first factor, the length of the delay, was considered "to some extent a triggering mechanism … because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar … circumstances of the case." Regarding the second factor, the Court dwelled on the reason that "the government assigns to justify the delay…. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." As to the third factor the Court stressed: "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." As regards prejudice to the defendant, the Court noted "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Ibid.*

216 The information or indictment must be filed within 30 days from the date of arrest or service of the summons, 18 U.S.C. § 3161(b). Trial must commence within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later, 18 U.S.C. § 3161(c)(1).

sions were introduced in state jurisdictions. Though not governed by the interest of the defendant,[217] the act, as amended in 1979,[218] aims to ensure that defendants are not rushed to trial, but are given adequate time to prepare, and it prohibits a defendant to expressly waive his rights,[219] unless the trial judge determines that the "ends of justice" served by a continuance would outweigh the interest of the public and the defendant in a speedy trial.[220] But according to Supreme Court recently, *that* public interest cannot be served "if defendants may opt out of the Act entirely."[221] "In this case, continuance is not excluded from the speedy trial clock."[222] As to the mandate of a *public trial*, there has always existed a distrust for secret trials in the Anglo-American legal system, probably springing from "the notorious use of this practice by the Spanish Inquisition, … the excesses of the English Court of Star Chamber, and … the French monarchy's abuse of the *lettre de cachet*…," which "symbolized a menace to liberty."[223]

However, while respecting this right, the problem of over-publicized crimes and pervasive sensationalism might lead to a lack of due process and jeopardize the right to fair trial,[224] as most probably prejudice to the accused will result. In the case of *Estes v. Texas*,[225] the Court reasoned that "the constitutional guarantee of a public

217 Garcia, *supra* note 205, at 174, writes: "The impulse behind the act was not to provide the defendant with an effective antidote to the feeble relief fashioned by the Supreme Court's constitutional standard;" and referring to the preamble of the act notes that "its main thrust" was "to reduce crime and the danger of recidivism…"

218 Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, Section 3, 93 Stat. 327. For a good review of the Act see *Twenty-Fifth Annual Review of Criminal Procedure*, 84 Georgetown L.J. 1022-1039 (1996).

219 *See* United States v. Saltzman, 984 F.2d 1087, 1090-1092 (10th Cir. 1993).

220 18 U.S.C. § 3161(h)(8)(A).

221 Zedner v. U.S. 126 S.Ct. 1976, 1985 (2006).

222 *Id*. at 1989.

223 In re Oliver, 333 U.S. 257, 266 -70 (1948). The Court further added: "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."

224 In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Supreme Court considered the trial proceedings of the Calcasieu Parish, Louisiana, to be "kangaroo court proceedings" involving "a more subtle but no less real deprivation of due process of law" than it would have been in case of physical brutality, after a televised interrogation of the arrested without the presence of his lawyers had taken place. The Court held that "[i]t was a denial of due process of law to refuse the request for a change of venue after the people of the Parish had been exposed repeatedly and in depth to the spectacle of the petitioner personally confessing in detail to the crimes with which he was later to be charged." *Id.* at 723-727. Referring to the case of *Chambers v. Florida*, 309 U.S. 227, 241 (1940), the Court concluded: "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

225 381 U.S. 532 (1965). The Court explains how the right to fair trial could be jeopardized by a high degree of publicity: "There are numerous respects in which televising court

trial is to ensure that the accused is fairly dealt with and not unjustly condemned,"[226] and it subjected the right of press to access and communicate judicial proceedings as enshrined in the First Amendment to the "maintenance of absolute fairness in the judicial process."[227] The closure of trials or pretrial proceedings may be justified in cases when the state shows proof of an overriding interest to preserve higher values, and such closure must be "narrowly tailored to serve that interest."[228] Still, the Court has constantly held that openness of trials or *voir dire* proceedings enhance the substance of fairness of the criminal trial, particularly since the conduct of police and prosecutor is often at issue.[229] It also promotes the appearance of fairness[230] which is always considered to be vital to public confidence in the administration of criminal justice.[231]

4. The Right to Counsel

Another very important guarantee enshrined in the Sixth Amendment to the U.S. Constitution is the assistance of *counsel for the defense of the accused* in all crimi-

proceedings may alone, and in combination almost certainly will, cause unfairness, such as: (1) improperly influencing jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, distracting their attention, facilitating (in States which do not sequester jurors) their viewing of selected parts of the proceedings, and improperly influencing potential jurors and thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, and generally influencing the testimony of witnesses, thus frustrating invocation of the "rule" against witnesses; (3) distracting judges generally and exercising an adverse psychological effect particularly upon those who are elected; and (4) imposing pressures upon the defendant and intruding into the confidential attorney-client relationship." *Id.* at 544-550.

226 *Id.* at 538-539.

227 *Id.* at 539-540.

228 Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

229 Waller v. Georgia, 467 U.S. 39, 47 (1984).

230 Within this parlance there is an interesting discussion according to which the defendant's right to appear before the jury in his best posture and not in a way that suggests his guilt (like wearing prison garb: Estelle v. Williams, 425 U.S. 501, 512 (1976), or shackling: Holbrook v. Flynn, 475 U.S. 560, 568-569 (1986)) also includes granting a well-behaved defendant (and consequently his lawyers) the autonomy to choose his seat. According to such views, that would provide the jury with "relevant, non-verbal evidence from the defendant's confrontations with hostile witnesses. *See* Steven Shepard, *Should the Criminal Defendant Be Assigned a Seat in Court?*, 115 Yale L. J. 2203 (2006). *See* also, Stephen W. Comiskey, *A Good Lawyer (and Their Best Clients) Already Know*, 66 Tex. B. J. 338 (2003). "Arrive early enough … to claim the counsel table closest to the jury." *Id*. at 340.

231 *See* Smith v. Doe, 538 U.S. 84 (2003), a decision of March 05, 2003. The Court observed that "our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Id*. at 99.

nal prosecutions where imprisonment could be a potential punishment.[232] Later, the standard of *effective* assistance of counsel was developed and required to permeate this right.

This right includes the right to appointed counsel in all felony cases in federal courts,[233] but also in all felony cases before state courts[234] as guaranteed by the due process clause of the Fourteenth Amendment.[235] *Gideon v. Wainwright*,[236] "one of the most popular decisions ever handed down by the Supreme Court,"[237] opined that, without counsel, a defendant would be totally vulnerable to government power and

232 *See* Baldasar v. Illinois, 446 U.S. 222, 232 (1980). The court noted that *Gideon v. Wainwright* established the right to counsel in felony cases, but it does not control misdemeanor convictions. International standards do not relate the right to counsel to imprisonment or non-imprisonment cases, but they do base their examination on the interests of justice for the appointment of counsel. Though since early on with cases like *Powell v. Alabama*, 287 U.S. 45, 71 -72 (1932) and *Glasser v. United States,* 315 U.S. 60, 70 (1942), the Supreme Court had talked about effective aid in preparation of trial, it was in *McMann v. Richardson,* 397 U.S. 759 (1970), that the Court observed that whether defense counsel provided adequate representation, depended "on whether [the] advice [given] was within the range of competence demanded of attorneys in criminal cases." *Id*. at 768-771. Further, in *Strickland v. Washington,* 466 U.S. 668 (1984), the Court articulated a two components test for ineffective assistance of counsel in criminal trials and in capital sentencing proceedings: deficient attorney performance and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question. More cases followed suit.

233 *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938), according to which the Sixth Amendment right to counsel in criminal proceedings withholds from federal courts "the power to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."

234 Gideon v. Wainwright, 372 U.S. 335, 342 (1963): The Sixth Amendment right to counsel in criminal proceedings applies to the States through the Fourteenth Amendment. It is interesting to note here that cases such as this one are proof of Chief Justice Earl Warren's Court's efforts to create national standards of justice in the 1960s. However, it is very important to observe that after Justice William Brennan stated that the U.S. Supreme Court only creates a floor for the protection of rights (*see* William J. Brennan, Jr.*, State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489-504 (1977), certain states responded by expanding defendant's guarantees. Thus, a Michigan court, for example, expanded the suspect's right to counsel even in identification proceedings. *See* Bodenhamer, *supra* note 20, at 136-137 (1992). Nevertheless, since judges in state courts are elected to the bench, there is always a greater probability that the judges respond more to the voters' fear of crime than to the pleas for a broader interpretation of defendant's rights.

235 The Supreme Court also used the Fourteenth Amendment in to give the "voluntariness" doctrine of confessions a constitutional dimension when applying to state cases, and the Fifth Amendment self-incrimination clause in federal cases.

236 *Supra* note 234.

237 *See* Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y. Times, March 10, 1988, at A27, col. 1., cited in Alfredo Garcia, *supra* note 205, at 9.

eventually lose in an unfair trial.[238] The celebrated *Gideon* decision was further implemented and clarified in 1964 in *Massiah v. United States.*[239] There the Court, while dealing with the law governing confessions, was also concerned with the moment in time when the right to counsel attaches. This right was found to have been violated, when evidence of the defendant's incriminating words obtained after he was indicted and in the absence of counsel, was used in trial.[240] This decision was followed in *Escobedo v. Illinois*,[241] where the Court was determining whether the refusal by the police to honor the petitioner's request to consult with his lawyer during the course of an interrogation constituted a violation of the defendant's Sixth Amendment right to counsel. The Court reversed the decision of the Illinois Supreme Court stating, "We hold only that when the process shifts from investigatory to accusatory - when its focus is on the accused and its purpose is to elicit a confession - our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[242] Some scholars have also proposed that suspects in custody should have an unwaivable right to counsel before any police interrogation starts.[243] The right to a defense counsel in the Sixth Amendment has also been interpreted to mean the right to self-representation on the part of the accused.[244] However, some scholars argue that courts should enforce rules to disfavor the accused's decision to proceed *pro se,* mindful of the extreme responsibility on defendant who opts for self-representation in criminal proceedings."[245] According to such views, the

238 Gideon, *supra* note 234, at 342-344.

239 Massiah v. United States, 377 U.S. 201 (1964).

240 *Id*. at 206.

241 Escobedo v. Illinois, 378 U.S. 478 (1964).

242 *Id*. at 492.

243 *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul?,* 100 Harv. L. Rev. 1826 (1987).

244 Faretta v. California, 422 U.S. 806 (1975). After an in-depth analysis of the English and colonial jurisprudential history, the Supreme Court concluded that the right of self-representation finds support in the structure of the Sixth Amendment and the common law. The Court noted that "the Sixth Amendment as made applicable to the States by the Fourteenth Amendment guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so." Practically it is the defendant who bears the personal consequences of a conviction and not his lawyer or the State. However, the Court uses the word *intelligently*, which means that accepting the waiver to the right to counsel is to be decided by the court who in turn evaluates the observance of the rights of the defense. This is in line with international standards as well. The European Commission of Human Rights had also noted that the European Convention provides for "adequate representation of the case for the defense, but does not give the accused person the right to decide himself in which way his defense should be assured." Hannum, *supra* note 43, quoting X v. Austria, App. No. 1242/61, Eur. Comm. H.R.

245 Anne Poulin, *Strengthening the Criminal Defendant's Right to Counsel* (July 2006). Villanova University School of Law Working Paper Series. Working Paper 54, *available at*: http://law.bepress.com/villanovalwps/papers/art54.

courts should go above the minimal test of competency to stand trial.[246] Another forwarded proposition is that the due process right to counsel in criminal proceedings also covers capital postconviction cases,[247] particularly as regards indigent convicts who do not have the ability or means to file a *pro se* petition.

5. The Adversarial Process: Equality of Arms

The principle of the *equality of arms between prosecution and defens*e entails several components of procedural guarantees that if not observed would result in inequality that compromises the fairness of the whole process. It is essential to the concept of the adversarial process on which the U.S. criminal justice systems rests.[248] The adversarial process leaves the determination of guilt or innocence to a jury who can only hear two combating versions of past reality presented by counsel for the prosecution and the defense; usually the judge, unlike in his role in the Continental system often dubbed "inquisitorial,"[249] will not intercede to right the scales of the argument presented by the two advocates. Thus imbalances in skill may result in favoring one side over the other; this possible imbalance should not be compounded by one side, say the defense, having less procedural rights than the other, say the prosecution. The most important element within the U.S. criminal procedure would be the right of the

246 *See* Godinez v. Moran, 509 U.S. 389 (1993), and in response to it, *see* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument For Fairness and Against Self-Representation In the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 171-85 (2000), as well as David L. Shapiro, *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions,* 34 CAL. W. L. REV. 177, 178-82 (1997). *Cf.* Cooper v. Oklahoma, 517 U.S. 348 (1996) stating "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." 516 U.S. at 354.

247 Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings,* 91 Cornell L. Rev. 1070 (2006), stating, *inter alia*, that due process as well the Eighth Amendment are good enough sources to require states to provide counsel in capital postconviction proceedings. *Id*. at 1095. The author concludes that U.S. falls short of international standards as regards the right to counsel. Such standards applicable to all criminal cases in all phases are a fortiori applicable in capital cases, where one's life is at stake. *Id*. at 1102-1103.

248 For details, see Jay Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L. Rev. 1007.

249 Continental systems of criminal procedure often mix the inquisitorial element with the adversarial, thus reaching, possibly, the best of both worlds. Usually, the judge or judges first question witnesses, then counsels for prosecution and the defense may ask questions of the witnesses as well.

accused *to have compulsory process for obtaining witnesses in his favor* as guaranteed in the Sixth Amendment.[250]

6. Discovery Rights

Another very important element would be the *disclosure by the prosecution of exculpatory evidence*. Though the Supreme Court has held in *Weatherford v. Bursey*[251] that there is not a general constitutional right to discovery in a criminal case,[252] it has nevertheless held that, in certain circumstances, due process requires the disclosure to the defense of exculpatory evidence possessed by the prosecution,[253] if the evidence withheld has a material effect in the eyes of the judge. The standard of materiality was understood by Justice Blackmun, and Justice O'Connor in these terms: "…the nondisclosed evidence at issue is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A *reasonable probability* is a probability sufficient to undermine confidence in the outcome."[254] It should be noted though that the defendant, upon his request, can have access to his prior oral, written or recorded statements, to his prior criminal record within government's possession, to documents and tangible objects that are material to his defense and will be used by the prosecution in trial, as well as reports of any examinations, tests, and summaries of any testimony of expert witnesses. Nevertheless, this access is not absolute.[255] Neither can it be mandatory for the prosecution to preserve evidence that could serve the defense, absent bad faith. Thus the Supreme Court reasoned that "[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not

250 This right is much broader in the U.S. system compared to international standards discussed above.

251 Weatherford v. Bursey, 429 U.S. 545 (1977). .

252 *Id*. at 559-561: "2) The Due Process Clause does not require that the prosecution must reveal before trial the names of undercover agents or other witnesses who will testify unfavorably to the defense. (a) *There is no constitutional right to discovery in a criminal case*." The Court noted that *Brady v. Maryland*, 373 U.S. 83 (1963) did not create such a right either, though it held that *the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.* (*emphasis added*).

253 U.S. v. Bagley, 473 U.S. 667, 682-3 (1985): "[T]he prosecutor's failure to respond fully to a Brady request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption."

254 *Id.*

255 See *United States v. Pelton*, 578 F.2d 701 (8th Cir. 1978), where the defendant was not given access to a tape of his conversation because of concerns of interference with the prosecution's witnesses.

constitute a denial of due process of law."[256] However, it is mandatory for the prosecution to correct false evidence, when knowing such.[257]

7. The Right to an Interpreter

A deaf defendant also has a due process right to an interpreter in order to have proper access to courts. This also provides for judicial efficiency.[258]

8. Sentencing

a. The Prohibition of Cruel and Unusual Punishments

The Eighth Amendment of 1791 also mandates that *no cruel and unusual punishments* be inflicted. Also, the Thirteenth Amendment prohibits involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted." While the international prohibition of torture, cruel, inhuman and degrading treatment and punishment surpasses the Eighth Amendment guarantee on such, it is necessary to mention that the U.S.[259] courts have actually given an equal contemporary meaning to the Amendment. In *Trop v. Dulles*,[260] the Supreme Court noted that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man…

256 Arizona v. Youngblood, 488 U.S. 51 (1988). .

257 In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court held: "The failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment," reasoning *inter alia* that "[t]he established principle that a State may not knowingly use false testimony to obtain a tainted conviction does not cease to apply merely because the false testimony goes only to the credibility of the witness."

258 *See generally* Deirdre M. Smith, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 Me. L. Rev. 87 (1994). For a detailed analysis of the hurdles of the justice system dealing with people with language deficits and the ways to fix such a problem in order to ensure their right to due process and access to justice, see Michele La Vigne & McCay Vernon, *An Interpreter isn't Enough: Deafness, Language, and Due Process,* 2003 Wis. L. Rev. 843.

259 Actually, since 1931, the National Committee on Law Observation and Enforcement, known as the Wickersham Commission, evidenced that certain police interrogation tactics, known as the third degree tactics – the inflicting of pain, physical or mental, to extract confessions or statements – were widespread throughout the country. *See* The Wickersham Commission, National Commission on Law Observance and Enforcement, Pub. No. 11, Report on Lawlessness in Law Enforcement (1931). Five years later, the Supreme Court in the *Brown case*, *supra* note 931, considered such tactics to be remnants of "the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions." *Id.,* at 287.

260 Trop v. Dulles, 356 U.S. 86, 101 (1958). The very same philosophy permeated the Court in its earlier decisions. So, in *Weems v. United States*, 217 U.S. 349 (1910), the Court noted that the Eighth Amendment has an "expansive and vital character" which "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *See* Hannum, *supra* note 9, at 59.

The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In addition, the international prohibition of torture binds United States both under its obligations as a state party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and under customary law which is directly binding on the United States.[261]

b. Proportionality

The Supreme Court has also dealt with the proportionality of *sentencing*[262] – mostly with respect to the death penalty[263] or a sentence to life imprisonment without possibility of parole. In the case of *Solem v. Helm*,[264] after careful reasoning and by applying objective criteria, the Supreme Court concluded that Helm's sentence was significantly disproportionate[265] to his crime, and consequently unconstitutional, as prohib-

261 Restatement (Third) of the Foreign Relations Law of the United States § 111, Reporter's Note 4 (1987); W. Michael Reisman et al., International Law in Contemporary Perspective 123 (2004). The court in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), for example, stated that the right to be free from torture "has become part of customary law…[and] is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." *Id*. at 883, 884.

262 *See* Weems v. United States, 217 U.S. 349 (1910), where the Court considered the punishment, which consisted of hard and painful labor, shackling for the duration of incarceration, and permanent civil disabilities, to be inherently cruel and condemned it as excessive in comparison to the crime committed.

263 Actually some scholars find fault with the fact that the Supreme Court "never had worried about due process when it came to non-capital sentencing." Stephen A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 Am. Crim. L. Rev. 243, 249 (2001). Professor Saltzburg argues that before the adoption of Sentencing Reform Act of 1984, imposition of sentences upon defendants happened in an arbitrary and capricious manner through an unfettered discretion of judges and juries. *Id.* at 243.

264 Solem v. Helm, 463 U.S. 277 (1983). In 1979, respondent was convicted in a South Dakota state court of uttering a "no account" check for $100. Ordinarily the maximum punishment for that crime would have been five years' imprisonment and a $5,000 fine. Respondent, however, was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute because of his six prior felony convictions - three convictions for third-degree burglary and convictions for obtaining money under false pretenses, grand larceny, and third-offense driving while intoxicated. The South Dakota Supreme Court affirmed the sentence. After respondent's request for commutation was denied, he sought habeas relief in Federal District Court, contending that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. The District Court denied relief, but the Court of Appeals reversed. *Available at* http://supreme.justia.com/us/463/277/case.html.

265 Embracing an empirical approach the U.S. Sentencing Commission elaborated a detailed and quite tedious set of guidelines to be observed by judges in sentencing. *See generally* The United States Sentencing Commission, Guidelines Manual, §3E1.1 (Nov. 2006). They reflect the intent of the Congress when it passed the Sentencing Reform Act of 1984, namely to enhance the ability of the criminal justice system to reduce crime

ited by the Eighth Amendment. Helm was sentenced to life imprisonment without possibility of parole for committing his seventh non-violent felony. The Court noted that "[t]he Eighth Amendment's proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed,"[266] further stressing that the principle of proportionality was implicit in the Amendment. The Court analyzed the proportionality principle under the previously recognized objective criteria from the Court's prior cases such as: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[267]

Proportionality in sentencing is of utmost importance as it works towards solving the puzzle of due process by ensuring satisfaction of the concern for human liberty confirming that "each year of human life matters."[268] Not only should sentencing be proportionate but it should also be reasoned.

c. The Death Penalty and Death Row

The United States is the only Western country[269] that has retained capital punishment[270] in peacetime. Removal of execution from the list of acceptable criminal sanc-

through an effective, fair sentencing system through honesty in sentencing (by abolition of parole), uniformity in sentencing (by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders), and proportionality in sentencing (through a system that imposes appropriately different sentences for criminal conduct of different severity.) USSG §1A3.1, p.s.

But the sentencing guidelines cannot per se provide for a *reasonable* sentencing. It is for the sentencing judge to explain the reasons behind a certain sentence, and to "meaningfully document how he grappled with … factors to reach the sentence imposed." Hence the ultimate need for writing sentencing opinions, which in turn would provide the appellate judge with more than bare ground in reviewing of sentencing which has become a recent phenomenon. This argument and more are to be found in Steven L. Chanenson, *Write On!*, 115 YALE L.J. Pocket Part 146 (2006), *available at* http://www.thepocketpart.org/2006/07/ chanenson.html.

266 Solem v. Helm, *supra* note 264, at 284-290.

267 *Id.* at 292.

268 Saltzburg, *supra* note 263, at 253 (2001).

269 Many times, the European Union has appealed to the U.S. to consider the abolition of the death penalty as a contribution to the enhancement of human dignity and the progressive development of human rights. In its latest statement of November 30, 2006, the EU expressed its concern about the imminent case of execution of Mr. Percy Levar Walton in the State of Virginia on 8 December 2006. The EU had previously intervened, thus reaching a stay of the execution, in this case in May 2003 and in May 2006, on the basis of mental sickness. *See* www.diplomacymonitor.com (last visited on November 30, 2006).

270 The U.S. is the only Western country among 85 retentionist countries, according to Amnesty International 2001, *available at* http://www.amnestyusa.org/abolish/abret.html (last visited on October 22, 2006).

tions has, however, historically been an issue under discussion in the U.S. As early as in the 1840s, the abolitionist movement was at its peak. However, there were only two states at that time that actually abolished the death penalty, namely Michigan and Wisconsin, and other states replaced the public hangings with private executions. A few more states abolished it in the 1950s and '60s. This lack of further abolitions seems to have been attributed to the development of cities and consequently an increase of urban crime, as well as to the rapid surge of non-English immigration. That, in turn, led to considerations which did not consider capital punishment as cruel and unusual punishment, particularly in the light of restriction of capital punishment to fewer crimes, no matter that capital punishment was considered the "natural offspring of monarchical governments," as Benjamin Rush called it, and that such "idea of cruelty inspire[d] disgust" as Alexander Hamilton would agree, finding it more of an erosion than a bolstering of the republican values and behavior.[271] In the twentieth century, the discussion resurfaced, adding to the appeal to judges to consider the capital punishment as cruel and unusual under the Eighth Amendment the argument that it also violated the Equal Protection Clause of the Fourteenth Amendment since it was disproportionately applied to groups such as African-Americans and the poor. Empirical evidence maintained that capital punishment did not help deter violent crime either, though public polls throughout the 1980s showed there was a belief among the people that it actually was a deterrent. In 1972, the Supreme Court of California concluded that the "capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its process. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process."[272] In 1972, in *Furman v. Georgia*,[273] the U.S. Supreme Court imposed a moratorium on all executions in the U.S., since it was not satisfied that there was no discrimination in its application. It required states to articulate particularly aggravating factors to justify death penalty. Such factors, *inter alia*, included multiple homicide, felony murder, torture murder.[274] This moratorium was, however, lifted in 1977.[275]

More than the legality of the death penalty itself,[276] the conditions of life on "death row," *i.e.* waiting for execution after years or decades of appeals, have been challenged as constituting psychological torture amounting to *cruel and inhumane treatment.*

271 Bodenhamer, *supra* note 20, at 56-59.

272 *Id.* at 132-133.

273 408 U.S. 238 (1972).

274 "Furman v. Georgia was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty – particularly in Southern States, and most particularly in rape cases." Justice Thomas concurring in Graham v. Collins, 113 S. Ct. 892 (1993), at 904.

275 On January 17, 1977 the moratorium on executions was lifted with the execution of Gary Gilmore by firing squad in Utah. *Available at* http://www.deathpenaltyinfo.org/article.php?did=410&scid=.

276 Federal and state courts have accepted the constitutionality of capital punishment. *See* Bodenhamer, *supra* note 20, at 133.

Courts have, however, consistently concluded that the death penalty *per se* does not amount to inhuman treatment, though the opponents of capital punishment in the U.S. have time and again tried to use the language of the Eighth Amendment to remove the death penalty from the criminal codes, and many reforms were actually introduced which helped in avoiding arbitrary or capricious punishments.[277] Such a mitigating measure would be the Court's decision in *Gregg v. Georgia*,[278] which, though declining to outlaw executions *per se*, mandated that guilt be determined first and punishment be fixed at a later stage.

Two landmark cases dealing with the issue of the "death row" in the U.S. have been played out before international fora: *Soering v. United Kingdom,*[279] argued before the European Court of Human Rights, and *Kindler v. Canada,*[280] argued before the United Nations Human Rights Committee.[281] Both complaints challenged a requested extradition into the U.S. They were based, *inter alia,* on the alleged fact that facing the death penalty and the "death row phenomenon" as such, subjects the offender to torture, inhuman and degrading treatment. In both instruments, the applicable legal standards, *i.e.* Article 7 the ICCPR and Article 3 of the European Convention on

277 *See Constitutionality of the Death Penalty in America*, at http://www.deathpenaltyinfo.org/article. php?did=410&scid=.

278 Gregg v. Georgia, 428 U.S. 153: "Upon a guilty verdict or plea, a presentence hearing is held where the judge or jury hears additional extenuating or mitigating evidence and evidence in aggravation of punishment if made known to the defendant before trial. At least one of 10 specified aggravating circumstances must be found to exist beyond a reasonable doubt and designated in writing before a death sentence can be imposed. In jury cases, the trial judge is bound by the recommended sentence."

279 Soering v. United Kingdom, ECtHR, 11 EHRR 439, Judgment of 7 July 1989.

280 Kindler v. Canada, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

281 It is also of great interest to note that the Human Rights Committee somehow modified its position of *Kindler*, in a most recent case, *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), which deals with the deportation from Canada of a U.S. national sentenced to death in Pennsylvania, by finding Canada in violation of the right to life under Article 6 of the ICCPR, merely because of the fact that it did not request assurances from the U.S. that the death penalty would not be carried out, thus establishing "the crucial link in the causal chain that would make possible the execution of the author." *Id*. at para. 10.6. The HRC established an obligation "not to expose a person to the real risk" of death penalty for all countries that have abolished the death penalty, by stating that "they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out." *Id*., para. 10.4. The HRC based these conclusions on the reasoning that the "Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of the present-day conditions." *Id*., para. 10.3. The HRC found such conditions to show "notable factual and legal developments and changes in international opinion" toward a broader consensus in favor of abolishing the death penalty, at a time when the states which have retained the capital punishment are reaching a broader consensus not to carry it out. *Ibid.*

Human Rights and Fundamental Freedoms, prohibiting torture, cruel, inhuman and degrading treatment or punishment, to the extent they apply, are virtually identically worded.

In the *Soering Case,* the Court dealt with the potentiality of the death penalty to be declared and imposed. The U.S. had not given adequate assurances that the death penalty if declared would not be executed. Then, based on the statement by the Attorney General of the U.S. that if extradited to the U.S. Mr. Soering ran some risk which was more than "merely negligible" that the death penalty would be imposed, based on the "vileness" of the crime, it declared that "it is hardly open to the Court to hold that there are not substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon,"[282] thus bringing Article 3 into play.

The Court consequently discussed the death row phenomenon in light of Article 3, *i.e.* the minimum level (which is relative) of severity of ill-treatment and punishment, its nature, context and duration, the manner and method of execution, its physical and mental effects, the personal circumstances of the convicted person, his/her sex, age and state of health, the conditions of detention awaiting execution, etc. Exceeding a certain threshold of suffering and degradation might violate Article 3.[283] The average time on "death row" in Virginia ranged from 6 to 8 years. The Court in *Soering* discussed the conditions on death row, the stringency of the custodial regime in Mecklenburg, its services and controls as requiring "extra scrutiny for the safe custody of the prisoners condemned to death", and "the severity of [the Mecklenburg] special regime" being compounded by the fact that prisoners are subjected to it for many years.

The Court concluded that "[h]owever well-intentioned and potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions

282 In the *Kindler Case*, *supra* note 280, in contrast, the HRC rejected the notion that Article 6 "necessarily requires Canada to refuse to extradite or to seek assurances." Only "exceptional circumstances" would lead to such a requirement, *id.* paras. 14.5-14.6.. Also, the HRC noted, with apparent approval, that Canada legitimately failed to seek assurances because it did not want to become a "safe haven" for those accused of murder in the U.S., *see* para. 14.6. This consideration was not part of the *Soering* opinion. In the recent *Judge* case, *supra* note 281, the argument of lack of any "exceptional circumstances" on death row is made by the State Party, Canada (*see* para. 5.1.), but the HRC does not even address this issue any longer. The HRC refuses to cling to its decision of 10 years before, observing that "the protection of human rights evolves and that the meaning of the Covenant rights should in principle be interpreted in reference to the time of examination." *See* para. 10.7.

283 The HRC in the *Kindler Case,* taking note of the reasons given by Canada not to seek assurances, referred, *inter alia,* to the lack of specific documentation on death row conditions in Pennsylvania, as well as the lack of "any submission made about the specific method of execution." *See supra* note 280, para. 15.3. Again, the HRC's recent views in *Judge* case require abolitionist State Parties to ultimately seek such assurances. *See Judge*, *supra* note 281.

on death row and the anguish and mounting tension of living in the ever-present shadow of death."[284] As to the age of the applicant, being 18 at the time he committed the crime, the Court referred to the ICCPR and the Inter-American Convention and held that "as a general principle the youth of the person concerned is a circumstance, which is liable … to put in question the compatibility with Article 3 of measures connected with a death sentence." The Court goes on reasoning that "… the applicant's mental state, on the psychiatric evidence as it stands, is therefore to be taken under consideration as contributory factor tending in his case, to bring the treatment on death row within the terms of Article 3."[285]

Finally, Mr. Soering, a German national, was asked to be extradited not only by the U.S., but also by Germany, his home state, under the active personality theory of jurisdiction. The Court stated that "sending Mr. Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished, as well as the risk of intense and protracted suffering on death row". The Court considered it a "circumstance of relevance for the overall assessment under Article 3, in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case."[286] As it can be seen, in *Soering* the Court had to deal with the consideration of the death row phenomenon as such as violative of Article 3, and the specificity of the allegations needed to be made regarding detention conditions in the "shadow of death", as well as the requirement to seek assurances of non-execution.

d. The Execution of Juveniles

Another issue of international dispute involving the U.S. criminal justice system is the execution of juveniles. Article 6 of the International Covenant on Civil and Political Rights allows for the death penalty for most serious crimes, but it outlaws the execution of persons below eighteen years of age in its paragraph 5. The U.S. has ratified this treaty – not without, however, submitting, *inter alia,* a reservation to Article 6, in particular excepting its acceptance of paragraph 5. The U.S. justice system in many states allowed for the execution of juveniles; thus the reservation was trying to pro-

284 Contrary to this statement, in the *Kindler Case,* the HRC recalled its jurisprudence stating that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman and degrading treatment if the convicted person is merely availing himself of appellate remedies" and added that there was no submission by the applicant "about the possibility or the effects of the prolonged delay in the execution of the sentence." *Kindler,* para. 15.2. The HRC in the *Kindler* case appeared to have much less concern about the effect of death row, blaming largely the offender's appeals for its duration.

285 In this issue, the *legal* reasoning of the Court and the HRC does not seem to differ. Referring to *Soering*, the HRC notes that "important facts leading to the judgment of European Court of Human Rights are distinguishable on material points" – they differ *inter alia* "as to the age and mental state of the offender."

286 This element was missing in the *Kindler Case*, as Mr. Kindler was a U.S. national. Thus the HRC distinguished the *Soering* case noting that "there was a simultaneous request for extradition by a state where the death penalty would not be imposed." *Kindler*, para.15.3.

tect that practice against scrutiny under the ICCPR. The most significant contradiction between the ICCPR and U.S. law and practice, in fact, occurs in the field of the death penalty. According to a 2007 Fact Sheet of Amnesty International,[287] 21 U.S. states allow executions of juvenile offenders, and as of January 2004, more than 70 juvenile offenders sat on death rows throughout the United States. This figure constitutes approximately 2% of the total death row population. "In the past five years, the United States has executed 13 juvenile offenders. Eight of these executions took place in the state of Texas. The rest of the world combined carried out five such executions. The United States accounts for four of the last five known juvenile offender executions in the last two years."[288]

This issue has been a longstanding point of contention between the U.S. and the international community, since the U.S. has constantly rejected proposals to prohibit the use of the death penalty or life imprisonment without parole for crimes committed by juveniles. The execution of juveniles might independently violate customary international law, but the U.S. might be seen as exempt from such a norm due to its status as a persistent objector.

In this respect, the Inter-American Commission considered a case against the United States.[289] The United States is not a state party to the 1969 Inter-American Convention on Human Rights, but it is bound by the 1948 American Declaration on the Rights and Duties of Man which refers to standards of customary international human rights law. The Inter-American Commission agreed to the U.S. being exempted from the reach of customary international law due to its status as persistent objector to the norm; however, it added that there exists a *jus cogens* norm against the execution of juvenile offenders,[290] which the U.S. could not evade, and thus it ruled that the U.S. was in violation of the American Declaration.[291]

287 *Death Penalty Fact Sheets*, available at http://www.amnestyusa.org/abolish/juveniles.html.

288 Amnesty International, *ibid*.

289 Case 9647 (United States), OEA/Ser.L/V/II.71, Doc. 9 rev.1, 22 September 1987, at 147-184. *Available at* http://www.cidh.org/annualrep/2005eng/USA.12439eng.htm.

290 Case 9647 (United States), at para. 55: "The Commission finds that in the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children."

291 The Commission concluded as follows: "For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of state officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right – the right to life – results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively." *Id.* at para. 62.

Also, as early as 1988 the U.S. Supreme Court in *Thompson v. Oklahoma*[292] referred to the international consensus[293] against the execution of juvenile offenders, when discussing the "indicators of contemporary standards of decency" within the Eighth Amendment in order to confirm their judgment that a 15 year-old person "is not capable of acting with the degree of culpability that can justify the ultimate penalty."[294] However, it was only in 2005, that the U.S. Supreme Court joined the consensus of a great many countries when it concluded, in the case of *Roper v. Simmons*,[295] that the death penalty may not be imposed on persons who were below the age of eighteen when they committed their criminal offense. In a close 5:4, heavily disputed opinion, the Court based its decision on the Eighth Amendment's prohibition of "cruel and unusual punishment." The majority argued that "evolving standards of decency"[296] had now reached the point that they would not allow execution of juveniles any more.[297] Three key arguments backed up this conclusion: (1) there was an emerging consensus in the U.S. that juveniles should not be executed; (2) capital punishment for a person under the age of eighteen was disproportionately severe; and (3) virtually all, if not all, countries in the world had officially outlawed the death

292 487 U.S. 815 (1988).

293 In section III of the decision the Court reasoned as follows: "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."

294 *Id.* at section II, a*vailable at* http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=487 &invol=815 (last visited on October 22, 2006).

295 543 U.S. 551, 578 (2005).

296 The key decision introducing this concept to Eighth Amendment jurisprudence was *Trop v. Dulles*, 356 U.S. 86 (1958), a case on denationalization into statelessness.

297 *Id*. at 578. However, capital punishment as such does not yet, in the opinion of the Court, violate such standards. Stanford v. Kentucky, 492 U.S. 361 (1989). What the Court outlawed, however, in 2002, was the execution of mentally retarded offenders. Atkins v. Virginia, 536 U.S. 304 (2002).

penalty for juveniles.[298] This decision has been highly controversial, not only within the court,[299] but also without.[300]

D. Rights in Prison

One of the conspicuous components of judicial policy making is no doubt the reformation of prisons by the courts in the U.S.[301] The consideration of the Eighth Amendment as a living, dynamic right and its contemporary interpretation so as to include *treatment* in addition to the existing punishments has given rise to numerous successful litigations against conditions in detention or imprisonment. The earliest of claims under Eighth Amendment was the case of *Talley v. Stephens*,[302] where the inmates complained that they were denied access to courts, adequate medical service, and were subjected to harsh working conditions and severe corporal punishment. It was followed by *Jackson v. Bishop*.[303] The case was successful on appeal, when Judge Harry Blackmun ruled that corporal punishment was "unusual" because only two states still allowed it. It was "cruel" because "whipping creates other penological

298 "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'." *Id.* at 575.

299 In particular, Justice Scalia, in his dissent, scolded the majority for its perceived reliance on the practice of other countries: "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage." *Id.* at 622.

300 Compare, *e.g.*, for support, Dirk van Zyl Smit, *The Abolition of Capital Punishment for Persons Under the Age of Eighteen Years in the United States. What Next?*, 5 Hum. Rts. L. Rev. 393 (2005); and for strong rejection, Jason Mazingo, *Roper v. Simmons: The Height of Hubris*, 29 Law & Psychol. Rev. 261 (2005).

301 For an elaborate discussion of this issue, see Malcolm M. Feeley and Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998).

302 Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). Cummins Farm, the institution at the center of this litigation, required its 1,000 inmates to work in the fields 10 hours a day, six days a week, using mule-drawn tools and tending crops by hand. *Id.* at 688. Also, inmates were lashed with a wooden-handled leather strap five feet long and four inches wide. *Id.* at 687.

303 Jackson v. Bishop, 404 F.2d 571, 579 (CA8 1968). Against official policy, some inmates were whipped for minor offenses until their skin was bloody and bruised. *Id.* at 810-811. The most appalling allegation was the use of the notorious "Tucker telephone," a hand-cranked device, to administer electrical shocks to various sensitive parts of an inmate's body. *Id.* at 812.

problems and makes adjustment to society more difficult."[304] These cases[305] paved the road to future litigation, and served as precedents where judges seriously considered and steered change in the conditions of state prisons. Later, in *Rhodes v. Chapman*,[306] the Supreme Court held that prison conditions "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities."[307] Also, many U.S. jurisdictions have adopted as their guidelines the United Nations Standard Minimum Rules for the Treatment of Prisoners,[308] elaborating upon the minimum rights and facilities to be available in prisons. These norms have been cited in U.S. courts[309] as evidence of contemporary standards within the scope of the Eighth Amendment.

The requirement under international law, namely under the ICCPR and the Inter-American Convention on Human Rights, that the accused should be separated from the convicted prisoners and that the juveniles should be separated from the adults have been considered by the U.S. as "goals to be achieved progressively rather than through immediate implementation."[310]

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304 Feeley & Rubin, *supra* note 301, at 57.

305 *See also* Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), one of the Texas cases, which had undergone eight years of pre-trial activity. For an accurate account of this pre-litigation and later litigation see Ben Crouch & J.W. Marquart, An Appeal to Justice: Litigated Reform of Texas Prisons (1989) and Steve Martin & Sheldon Ekland-Olson, Texas Prisons: The Walls Came Tumbling Down (1987).

306 Rhodes v. Chapman, 452 U.S. 337, 347 (1981). *See recently* Lopez v. Smith, 203 F.3d 1122, 1133 (9th Cir.2000).

307 Courts in the U.S. have considered several conditions that could violate the Eighth Amendment, such as putting mattresses on the floor to sleep, lack of adequate ventilation, heating, lighting, presence of excessive noise, physical deterioration of the prison, lack of adequate fire protection, lack of sanitation, etc. So violation was found where "appalling, deplorable condition" of many housing units, and the continued overcrowding was present. Gates v. Collier, 390 F.Supp. 482, 488-89 (N.D.Miss. 1975). A Pennsylvania district court condemned the State Correctional Institution at Pittsburgh as an "overcrowded, unsanitary, and understaffed firetrap." Tillery v. Owens, 719 F.Supp. 1256, 1259 (W.D.Pa. 1989), affirmed by 907 F.2d 418 (3d Cir. 1990). The appellate court agreed that "almost every element of the physical plant and provision of services at SCIP falls below constitutional norms." 907 F.2d at 427. "The jail remains with us – old, dilapidated, and unconstitutionally overcrowded. An economic motive can no longer excuse or be used to justify the conditions imposed on the inmates." Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1296-97 (W.D.Pa. 1983).

308 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII), 13 May 1977. *At* http://www.ohchr.org/english/law/ treatmentprisoners.htm.

309 *See* Lareau v. Manson, 651 F.2d 96, 106 and n.6, 107 (2d Cir. 1981) (prisoners are entitled to adequate shelter); Morgan v. La Vallee, 526 F.2d 221, 226 n.8 (2d Cir. 1975). Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir.1991) (there is a constitutional right of prison inmates to adequate heat).

310 In 1978 when President Carter transmitted treaties pertaining to human rights (ICCPR, ICESCR, CAT, IACHR) to the Senate for its advice and consent, he particularly noted

Administrative segregation of prisoners was argued to be a violation of the liberty interest protected through the due process clause of the Fourteenth Amendment in the case of *Hewitt* et al. *v. Helms*.[311] The Court held, however, "The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. Accordingly, *administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving* at some point in their incarceration.... [and does not involve] an interest independently protected by the Due Process Clause."[312] However, this absence of a constitutionally based liberty interest to remain with the rest of the inmates could be filled legally if statutes or regulations have already created such a protectable liberty interest, which happened according to the facts of this particular case.[313]

There is an array of other rights pertaining to persons detained or imprisoned that stem from the Constitution. The First Amendment rights related to freedom of information, for example, pertain also to persons detained or imprisoned. However, certain restrictions apply. Such restrictions, as first articulated in the case of *Procunier v. Martinez*,[314] can be imposed by the government when pursuing an interest apart from the suppression of freedom of expression, and they are subject to the principle of proportionality, *i.e.* such a limitation cannot be greater than what is necessary to defend that particular government interest. However, about fifteen years later, in *Turner v. Safley*[315] and in *Thornburgh v. Abbott*,[316] the Supreme Court opted

that these two treaties contain provisions that the U.S. practice could not meet yet. *See* Natalie Kaufman Hevener, The Dynamics of Human Rights in U.S. Foreign Policy (1981), at 91-94.

311 Hewitt *et. al.* v. Helms, 459 U.S. 460 (1983).

312 *Id*. at 468. (*emphasis added*).

313 The Court observed that "in the light of the Pennsylvania statutes and regulations here in question, the relevant provisions of which are set forth in full in the margin, that respondent did acquire a protected liberty interest in remaining in the general prison population." *Id.* at 470-471. The court concluded that, however, the process afforded respondent satisfied the minimum requirements of the Due Process Clause. *Id.* at 477-478.

314 Procunier, Corrections Director et al. v. Martinez et al., 416 U.S. 396, 397 (1974). The Court held: "The censorship of direct personal correspondence involves incidental restrictions on the right to free speech of both prisoners and their correspondents and is justified if the following criteria are met: (1) it must further one or more of the important and substantial *governmental interests of security, order, and the rehabilitation of inmates*, and (2) it must be *no greater than is necessary* to further the legitimate governmental interest involved." *Id.* at 404-414." (*emphasis added)*. As discussed in the prior sections, this is a position analogous to the international standards regarding legitimate aims pursued by the government when limiting rights, and to the test of "necessary in a democratic society" when assessing the said limitation.

315 Turner v. Safley, 482 U.S. 78 (1987).

316 Thornburgh v. Abbott, 490 U.S. 401 (1989).

for a lesser standard[317] as being appropriate and stipulated that "inquiry is made into whether a prison regulation that impinges on inmates' constitutional rights is "reasonably related" to legitimate penological interests." It concluded that the correspondence regulation is, on the record here, reasonable and facially valid.[318]

Another important issue concerns *parole*. The granting of parole involves no liberty interest unless there are statutes or regulations that specifically create one. The mere possibility of parole does not entitle a prisoner to due process protections.[319] On the other hand, the revocation of parole involves a constitutionally based liberty interest, and parolees are entitled to due process. Such was concluded in *Morrissey v. Brewer*,[320] a landmark case still upheld to date.[321] In the same vein, the Court required

317 The Court argued that "prison officials are due considerable deference in regulating the delicate balance between prison order and security and the legitimate demands of 'outsiders' who seek to enter the prison environment. The less deferential standard of *Martinez* - whereby prison regulations authorizing mail censorship must be 'generally necessary' to protect one or more legitimate governmental interests - is limited to regulations concerning outgoing personal correspondence from prisoners, regulations which are not centrally concerned with the maintenance of prison order and security. Moreover, *Martinez* is overruled to the extent that it might support the drawing of a categorical distinction between incoming correspondence [490 U.S. 401, 402] from prisoners (to which Turner applied its reasonableness standard) and incoming correspondence from nonprisoners." Westlaw, summarizing *Thornburgh v. Abbott*, at 407-414.

318 In discussing these issues, the *Thornburgh* Court referred to its previous jurisprudence and particularly to the standards established in Turner v. Safley, 482 U.S. 78 (1987). The Court noted that the objective of protecting prison security is undoubtedly legitimate. *Id.* at 414-419.

319 *See* Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1 (1979): "A reasonable entitlement to due process is not created merely because a State provides for the possibility of parole, such possibility providing no more than a mere hope that the benefit will be obtained…." *Id.* at 9-11.

320 Morrissey v. Brewer, 408 U.S. 471 (1972). The Court reasoned: "Though parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding, a parolee's liberty involves significant values within the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation." *Id*. at 480-482." The Court went on to stipulate: "At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement … by the factfinders as to the evidence relied on and reasons for revoking parole." *Id.* at 487-490.

321 *See* Shabazz v. New Jersey Dept. of Corrections, 385 N.J. Super. 117, 896 A. 2d 473, N.J. Super. A.D., 2006; Samson v. California, 126 S. Ct. 2193 (2006).

that due process safeguards have to be followed when the authorities deny good time credits to prisoners because of misconduct.[322]

E. *Habeas Corpus*

Judicial review to determine the legality of detention via the writ of *habeas corpus* is one of the fundamental precepts of the U.S. criminal justice system as also enshrined in the U.S. Constitution. Its Article 1, paragraph 9, clause 2 mandates 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." Originally conceived in the English Magna Carta of 1215, *habeas corpus* is the equivalent to the *amparo* relief of various Latin American countries or to the more wordy guarantee of international law formulated as the right "to take proceedings before a court, in order that the court may decide without delay on the lawfulness of … detention and order release if the detention is not lawful."[323] Conventionally, the U.S. habeas corpus writ used to pertain to post-trial detention,[324] but lately, as the later sections will observe, habeas corpus was brought to courts in the context of pretrial arrest and detention as well, coming to a closer resemblance to the international guarantees in determining the initial legality as well as the reasonableness of a continued detention. Habeas corpus or the "Great Writ" also provides for a State prisoner to petition for review of his conviction in Federal court on the grounds that the conviction was reached violating the Due Process Clause. However, federal habeas review does not provide for relitigation of a criminal case on its merits.[325] Also, there is a one year period of limitation for the

322 *See* Wolff v. McDonnell, 418 U.S. 539 (1974). In this case, the Court concluded: "We hold that *written notice of the charges* must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice*, no less than 24 hours, should be allowed to the inmate to prepare* for the appearance before the Adjustment Committee. We also hold that there must be *a 'written statement by the factfinders as to the evidence relied on and reasons'* for the disciplinary action." Emphasis added. The Court also reasoned: "We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id*. at 566.

323 ICCPR, art. 9(4); also similar provisions in regional instruments: ECHR, art. 5(4), IACHR, art. 7(5), ACHPR, art. 7(1) (a).

324 Also, distinct from its international guarantee equivalent, U.S habeas corpus is also "a means of collaterally attacking unconstitutional or otherwise defective laws." Hannum, *supra* note 43, at 49.

325 *See* Herrera v. Collins, 506 U.S. 390 (1993) concluding: "That proof, even when considered alongside petitioner's belated affidavits, points strongly to petitioner's guilt. This is not to say that petitioner's affidavits are without probative value. Had this sort of testimony been offered at trial, it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict. Since the statements in the affidavits contradict the evidence received at trial, the jury would have had to decide

applicability of a writ of habeas corpus after conviction by a State court.[326] This issue leads us to the next section: the right to an appeal.

F. Right to Appeal

The Constitution of the United States does not expressly provide for a right to appeal a criminal conviction.[327] Substantially, for an appellate court to correct an error not raised at trial there are three conditions that must be satisfied; so there must exist an "(1) 'error;' (2) that is 'plain,' and (3) that affect[s] substantial rights."[328] There are also other standards of appellate review, abuse of discretion being one of them.

Applying a common law system the U.S. legal development means that through adjudication new interpretation and new rules come to being while modifying or overruling existing ones. As the appeals process tends to be a relatively long one, such shifts in legal standards could bring vital effects in the life cycle of a case pending in appeal.[329] Particularly Supreme Court decisions that alter the constitutional law of criminal procedure through a pro-defendant ruling would have drastic implications. Sometimes this issue has been solved by applying the rule retrospectively to cases that are still under direct review.[330] In other cases, because of impossibility of retroactive application, the problem has been mitigated by rejection of appeals on grounds of the no error or *harmless error* rule.[331]

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important issues of credibility. But coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo,* to exist."

326 *See* Antiterrorism and Effective Death Penalty Act of 1996, Publ. Law 104-132 amending 28 U.S.C. § 2244.

327 *See* Halbert v. Michigan, 125 S. Ct. 2582, 2586 (2005): "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," as held in McKane v. Durston, 153 U.S. 684, 687 (1894). *See also* Abney v. United States, 431 U.S. 651, 656 (1977), stating that "[I]t is well settled that there is no constitutional right to an appeal." For a discussion challenging this stance, see Mark Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503 (1992), and David Rossman, *Were There No Appeal: The History of Review in American Criminal Courts,* 81 J. Crim. L. & Criminology 518 (1990).

328 United States v. Olano, 507 U.S. 725, 732 (1993).

329 For an interesting discussion of such "transitional moments" in criminal cases, see Toby Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L. J. 922 (2006).

330 *See* Griffith v. Kentucky, 479 U.S. 314 (1987). The Supreme Court held that decisions dealing with conduct of criminal trials should be applied retroactively to all cases under review at the time of that ruling. *Id.* at 328.

331 *See* Arizona v. Fulminante, 499 U.S. 279, 306 (1991): "Most constitutional errors can be harmless…."

A discussion on harmless error can be conveniently found in Roger J. Traynor, The Riddle of Harmless Error (1970), as well as in Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1 (1994). A very good resource dealing with the case law of the Supreme Court as regards individual rights and liberties is the treatise

Appellate courts routinely dismiss the appeal of convicted criminal defendants who flee from justice while their appeal is pending.[332] This is based on the doctrine of the fugitive disentitlement established by the Supreme Court in the 19th century.[333]

Summary

As we explore the structure of the domestic criminal justice system, the various Constitutional amendments and the jurisprudence of the Supreme Court pertaining to due process rights, we come to realize that there is a necessity for a hyper-integrated approach to the reading of the Constitution.[334] Due process rights are closely intertwined with the entirety of the provisions regulating criminal proceedings in order to provide effective guarantees for the criminal suspect and the defendant. Missing or neglecting one link would jeopardize the whole process and undermine the administration of justice. A relative imbalance of constitutional guarantees for the defendant is noticed when analyzing the pre-trial and trial process. At trial, procedural protections seem to reach the apex; the investigative phase appears to subject the accused to the greatest vulnerability.[335]

Beyond the domestic law, international law also may play a role in the area under consideration as it is integrated in various ways into the domestic law of the United States.

G. Customary International Law of Human Rights as United States Law

The U.S. constitutional framework appears to welcome international law into its domestic legal system; according to Article VI, treaties are the supreme law of the land,[336] and customary law is recognized by the courts as federal common law.[337] However,

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of Ioannis G. Dimitrakopuolos, Individual Rights and Liberties Under the U.S. Constitution: the Case Law of the U.S. Supreme Court (2007). For further Supreme Court cases and its doctrines and rules on procedural rights, see Chapter III. B-F.

332 For a discussion of this issue, particularly in opposition to the application of the doctrine in civil forfeiture proceedings and claiming its applicability only in criminal appeals, see Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine (Degen v. United States, 116 S. Ct. 1777 (1996)),* 87 J. Crim. L. & Criminology 751 (1996-1997).

333 Smith v. United States, 94 U.S. 97 (1876).

334 *See generally* Laurence H Tribe & Michael C. Dorf, On Reading the Constitution 19-30 (1991).

335 Further analysis of this claim can be found in Gurulé, *supra* note 156, at 106-109.

336 Article VI(2) provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the Supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

337 Restatement (Third) of Foreign Relations Law of the United States § 111, Reporter's Note 4 (1987).

in practice, the applicability of this body of law in the U.S. legal system is rather limited, especially in the field of human rights. The reasons for this state of affairs are several. For one, the U.S. has been very selective in ratifying international agreements, particularly in the field of human rights; second, if treaties were ratified, the use of those treaties by courts, and thereby their invocability by individuals in litigation has been severely curtailed by application of the court-made distinction between self-executing and non-self-executing treaties;[338] and third, even if treaties under the criteria offered by the courts would be considered self-executing, the Government, especially in the field of human rights treaties, has, at times, attached declarations of understanding to its ratification stating that, for the U.S., the treaty is to be considered non-self-executing. Thus, in the area of human rights at issue in this study, the only specific and pertinent treaty binding on the U.S. is the 1966 International Covenant on Civil and Political Rights (ICCPR), since it never ratified the 1969 Inter-American Convention on Human Rights. The ICCPR, however, was excluded from direct applicability in U.S. courts by the U.S. declaration of understanding, attached to its instrument of ratification, that the treaty was to be considered non-self-executing.[339] The four Geneva Conventions of 1949 apply more to the area of emergency and anti-terrorist law to be discussed later. They were not covered by a declaration of non-self-executing character at the time of their ratification by the U.S. The U.S. Supreme Court in the June 29, 2006 decision of *Hamdan v. Rumsfeld*[340] left the issue

338 This distinction goes back to Chief Justice Marshall's decision in *Foster v. Neilson*, 27 U.S. 253 (1829). As to its content, the Restatement has concluded, "In general, agreements that can be readily given effect by executive or judicial bodies, federal or state, without further legislation, are deemed self-executing, unless a contrary intention is manifest. Obligations not to act, or to act only subject to limitations, are generally self-executing." Restatement (Third), *supra* note 337, at § 111, Reporter's Note 5 (1987). Most recently, the Supreme Court appears to have narrowed this definition, requiring, in Chief Justice Roberts' words, that the "treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." Medellín v. Texas, 128 S.Ct. 1346, 1356 (2008), citing *Igartua-De La Rosa v. United States,* 417 F.3d 145, 150 (C.A.1 2005) (en banc) (Boudin, C. J.). The majority applied this test to Article 94(1) of the U.N. Charter, according to which "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." It concluded that this provision was not self-executing, and that the decision of the International Court of Justice in the *Avena* case, which mandated court review and reconsideration of the state criminal proceedings against 54 Mexican nationals on death row, was thus not binding on American courts. *Id.* at 1361, 1367. "[M]any treaty-related cases interpreting the Supremacy Clause, … including some written by Justices well aware of the Founders' original intent," led Justice Breyer as well as Justices Ginsburg and Souter, in their vigorous dissent, "to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation." *Id.* at 1377.

339 U.S. Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, at 620, 102nd Cong., 2d Sess., Mar. 24, 1992, reprinted in 31 I.L.M. 645, 651-57.

340 126 S.Ct. 2749 (2006).

of their self-executing character, in particular, their Common Article 3, undecided.[341] The Military Commissions Act of October 17, 2006, however, quickly filled that void and cut off any cause of action possibly based on the Geneva Conventions.[342]

The only substantive contribution international law thus can make to U.S. law in the field of fair trial and due process guarantees is through customary international law. After initial uncertainty as to whether customary international law is on the same level as federal law or state law,[343] consensus has been achieved: "The proposition that customary international law … is part of this country's post-*Erie* federal common law has become a well-entrenched component of U.S. foreign relations law. During the last twenty years, almost every federal court that has considered the … position has endorsed it. Indeed, several courts have referred to it as 'settled.' The position also has the overwhelming approval of the academy."[344] The Supreme Court, in discussing the

341 *Id*. at 2794. Interestingly, before this decision was published, the following dialogue transpired during the U.S. Senate Judiciary Committee's confirmation hearings of then-Supreme Court nominee Judge Samuel C. Alito: "Graham [Sen. Bob Graham, Florida]: Now, let's go back to the legal application of the Geneva Convention. If someone was captured by an American force and detained either at home or abroad, would the Geneva Convention give that detainee a private cause of action against the United States government? Alito: Well, that's an issue I believe in the *Hamdan* case, which is an actual case that's before the Supreme Court. And it goes to the question of whether a treaty is self-executing or not. Some treaties are self-executing..." *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court,* (Part III of III), Washington Post, Tuesday, January 10, 2006; 7:11 PM (Courtesy FDCH e-Media), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR200601100 1418_pf.html. After confirmation, Justice Alito filed a dissenting opinion in *Hamdan v. Rumsfeld*, 126 S.Ct. 2849 (2006), based on a thorough analysis of Common Article 3, which he deemed complied with by the military commission system set up by the President.

342 Military Commissions Act of 2006, § 948b(f): "GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien enemy unlawful combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights at his trial by military commission."

343 For a discussion of this issue, see E. A. Young, *Sorting out the Debate over Customary International Law*, 42 Va. J. Int'l. L. 365 (2002). Philip C. Jessup had expressed the view that "[i]t would be unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law," since this would leave the rules of international law subject to divergent or parochial state interpretations. Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939). For the view that *Erie v. Tompkins* introduced a new federal common law, see Fred Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

344 Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 816-17 (1997). *See also* Jordan J. Paust, International Law As Law of the United States 9 (1st ed. 1996), with extensive case analysis, and Reisman et al., International Law in Contemporary Perspective 123-124 (2004), with further references.

"act of state" doctrine in *Sabbatino*,[345] confirmed: "[T]he modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts."[346]

In the context of this study, there does not seem to be any case on point, however, that has directly applied customary international law on issues of due process and fair trial in criminal proceedings. Still, this does not end the inquiry. The Restatement (Third) of Foreign Relations Law of 1987, a rather authoritative statement of what the U.S. legal community agrees on regarding the content of international law, sets forth a number of components considered part and parcel of the process that is due in criminal proceedings. To begin with, in § 111 (1) it states: "The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts." It continues in § 702 (g) with a definition of torture,[347] further concluding that " [t]orture as well as other cruel, inhuman, or degrading treatment or punishment, when practiced as state policy, are violations of customary international law. The prohibition on torture, at least, may also have been absorbed into international law as a general principle common to major legal systems."[348]

345 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

346 *Id.* at 425.

347 Restatement (Third), § 702 (g). "Torture has been defined as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.'" It makes reference to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1(1), G.A. Res. 3452, 30 U.N. GAOR Supp. No. 34, at 91.

348 Restatement (Third), § 702 (g). It further explains: "The prohibition is included in all comprehensive international instruments. "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, Art. 5. A similar provision is included in the International Covenant on Civil and Political Rights, Art. 7; the European Convention on Human Rights, Art. 3; the American Convention on Human Rights, Art. 5; the African Charter of Human and Peoples' Rights, Art. 5. The International Covenant adds: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation." Art. 7. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Comment *g*, was adopted unanimously by the General Assembly. Official torture is also barred by the constitutions or laws of states generally. In the United States, torture as punishment is barred by the Eighth Amendment to the Constitution, and confessions of crime obtained by torture are excluded pursuant to the Fifth Amendment; both amendments are incorporated in and made applicable to the States by the Fourteenth Amendment. The Civil Rights Acts provide remedies for torture by State officials, and the courts might provide a remedy also against federal officials. *See* 18 U.S.C. §§ 242-45; 42 U.S.C. §§ 1981-83, 1985; Screws v. United States, 325 U.S. 91 (1945) (State official's beating of prisoner a violation of United States criminal statute); compare

The same document refers to the case of *Filartiga v. Peña-Irala*,[349] where the Second Circuit Court of Appeals ruled that deliberate torture committed by an official authority constituted a violation of customary law and it supported the jurisdiction of the district courts "of a civil action by an alien for a tort only, committed in violation of the law of nations," according to the Alien Tort Claims Act.[350] The court further clarified: "Indeed, for purposes of civil liability, the torturer has become like the pirate and the slave trader before him *hostis humanis generis*, an enemy of all mankind."[351]

In its recent, first ruling on civil liability under the Alien Tort Claims Act, the 2004 case of *Sosa v. Alvarez-Machain*,[352] the Supreme Court stated that the law of the nations, for purposes of this Act, includes only those customary international law claims that are "specific, universal and obligatory."[353] In the said case, a brief illegal detention – Mr. Alvarez was abducted from his house in Mexico, held overnight in a motel, and brought the next day by private plane to El Paso, Texas – was not enough to constitute a violation of a binding norm of customary international law. However, the ruling did not exclude liability under the above Act when specific customary international law is violated, and it did not limit it to violations of *jus cogens*.[354] Thus, a prolonged arbitrary detention might qualify.

This argument leads us to another paragraph of the Restatement (Third) of Foreign Relations Law of 1987, which deals with prolonged arbitrary detention.[355] It notes that "[d]etention is arbitrary if it is not pursuant to law." Then, referring to a statement of the U.S. Delegation to the U.N. General Assembly,[356] it continues that

Carlson v. Green, 446 U.S. 14 (1980) (Constitution implies civil remedy for violation of Eighth Amendment prohibition of cruel and unusual punishment).

349 Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir.1980). This was a suit brought by an alien residing in the United States against a former official of Paraguay who was visiting in the United States, under the allegations of torture of the plaintiff's brother leading to his death.

350 28 U.S.C. § 1350: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

351 Filartiga v. Peña-Irala, *supra* note 1206, at 890. Also, the U.S. District Court in the case of *Mehinovic et al. v. Vuckovic*, 198 F.Supp.2d 1322 (2002) ruled, *inter alia*, on war crimes and crimes against humanity stating: "Plaintiffs have shown, as to each of them individually, that defendant Vuckovic committed the following violations of customary international law, which confer jurisdiction, and establish liability, under the ACTA: torture; cruel, inhuman or degrading treatment; *arbitrary detention*; war crimes; and crimes against humanity." *Id*. at 1344. (*emphasis added*).

352 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

353 *Id*. at 732.

354 Siegfried Wiessner, *The Articles on State Responsibility and Contemporary International Law*, 34 Thesaurus Acroasium 241, 269 (2006).

355 Restatement (Third), § 702 (h).

356 13 GAOR, U.N.Doc. A/C.3/SR.863 (1958)

detention may be arbitrary also if "it is incompatible with the principles of justice or with the dignity of the human person,"[357] and it explains that arbitrariness results "if [detention] is supported only by a general warrant, or is not accompanied by notice of charges; if the person detained is not given an early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time."[358] However, a distinction is made between an obligation resulting from a treaty and one resulting from customary law: "A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; *arbitrary detention violates customary law if it is prolonged and practiced as state policy*."[359]

357 13 GAOR, U.N.Doc. A/C.3/SR.863 at 137 (1958).

358 Restatement (Third), § 702 (h). In the same paragraph, it reasons: "Customary international law probably does not require a state to provide for release on bail pending trial so long as trial is not unreasonably delayed," and it refers to Article 9(3) of the Covenant on Civil and Political Rights, which provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgment."

359 *Id.* (*emphasis added*).

CHAPTER IV Criminal Due Process in Times of Emergency and Terrorism: The International Legal Regime and Comparative Perspectives

Similar to an individual's right to self-defense under criminal law, a government's emergency power allows it to take exceptional measures including suspensions of basic rights.[1] The genesis of such a special "state of emergency" dates back to ancient Rome, where a "dictator" was nominated to handle issues arising during exceptional circumstances involving either outside assault or domestic upheaval,[2] basically to restore order. Derogation of rights in times of emergency adapts the *doctrine of necessity* in general international law to a particular field of human rights.[3] It is important in this section to elaborate upon the difference between limitations to rights in a human rights treaty and the treaty's derogation clause. According to the traditional approach to the concept of liberty, rights guarantee protected spheres of life and gradually bring about new developments and social change. This approach conveniently demonstrates the vision of the individual as member of the human community embedded in numerous structures and interactions supported by law. In this respect, the concept of liberty, simultaneously, carries with it limitations on individual actions

1 Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 73 (1993).

2 *See* Jaime Oraá, Human Rights in States of Emergency in International Law 7 (1992) and Antonio Guarino, Storia del Diritto Romano 108-109, 216-218 (1981) regarding the institution of the "dictator," as well as Jean-Jacques Rousseau, *The Social Contract*, in Political Writings 136 et seq. (Frederick Watkins ed., 1953). *See also* Carl Schmitt, Die Diktatur (1921), and, generally, the discussion of emergencies and the proper reaction to them in Chapter I, *supra*.

3 "Necessity" is a ground for precluding the wrongfulness of an act not in conformity with an international obligation (Article 25 of the 2001Articles on State Responsibility, GA Res. 56/83 (Dec. 12, 2001)) when such an act "is the only way for the State to safeguard an essential interest against a grave and imminent peril" (Article 25(1)(a) of the Articles). These conditions for invoking the doctrine show that it "will only rarely be available to excuse non-performance with an obligation, and it is subject to strict limitations to safeguard against possible abuses." Reisman et al., International Law in Contemporary Perspective 950-951 (2004). *Also, see generally* the discussion in Oraá, *supra* note 2, at 220-226, and S. P. Jagota, *State Responsibility: Circumstances Precluding Wrongfulness*, 16 Neth. Y.B. Int'l L. 266-271 (1985).

of self-determination, and ultimately, implies obligations.[4] These traditions require conformity with public necessities, and consequently restrictions on individual rights and freedoms, be they related to economic, social, private behavior or a person's lifestyle.[5]

Domestic law in all legal regimes, while respecting the autonomy of the individual, has to secure the liberty and freedom of all. Thus it provides for potential governmental limitations on one individual's rights to the benefit of other individuals, community or society. An individual is not an island, isolated from others. Human beings are social by nature, and they are meant to live with others. Hence a well-ordered society requires that individuals recognize and observe their mutual rights and duties. Absolute freedom of the individual would be at the expense or the detriment of society and/or the rights and freedoms of others. The state is called in as the regulator, just as it is many times also the abuser. In its regulatory function, the state is given a lot of power to restrict, or as the case may be, even derogate from rights, in order to avoid irreparable harm to the general public[6] and the democratic order. As such, its authority expands as individual freedom is restricted, out of the necessity to protect shared social values and legitimate public interests in restoring social and political order and stability. In many cases, however, through its protective function, the state is essentially balancing conflicting private interests and rights.[7]

Thus, domestic law, mostly the constitution, impliedly, as in the U.S.,[8] or expressly,

4 Roza Pati, *Rights and their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 Berkeley J. Int'l L. 223, 228-231 (2005).

5 Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, in The Constitution of the Federal Republic of Germany 45-66 (Ulrich Karpen ed., 1988).

6 Nowak, *supra* note 1, at 73.

7 Eckart Klein, *Reflections on Article 5 of the International Covenant on Civil and Political Rights*, in Towards Implementing Universal Human Rights 127, 139 (Nisuke Ando ed., 2004).

8 The original Bill of Rights, a catalog of ten amendments added to the 1787 Constitution as an afterthought in 1791, as well as the rights added via amendments in the more than 200 years of the country's history, focus on the guarantee itself without, in many cases, spelling out express limitations on the right formulated. One such example is the revered First Amendment, which guarantees, apodictically, that "Congress shall make no laws abridging the freedom of speech, or of the press ..." It was left to the Supreme Court, successfully claiming its right to review, and possible invalidation, of any acts of the legislative or executive branch it determined to violate the Constitution, to formulate the limits that any right must have in a well-ordered society. In drawing these limits, the Supreme Court did not try to codify via its power of precedent "formal or "substantive" limitations in a general and abstract sense. In following a more pragmatic approach, guided as much by its common law tradition as the country's deep distrust of government, the Court developed a case-by-case jurisprudence which strikes the balance between individual rights and interests of the community in a way that responds to concrete historical situations of vulnerability of individuals and needs of the community, *e.g.* minimization of unauthorized violence with a view toward minimizing restrictions on individual freedom, while still protecting against real, concrete threats against the community. In sum,

as in Germany,[9] makes sure that restrictions are set up, and the State, in its duty to protect and to ensure human rights, will, in certain situations, resort to them[10] exactly "to maintain and advance social life" while the dignity of the human personality freely develops inside the social community.[11] The unlimited exercise of human rights by an individual could lead to conflicts with the public interests or the interests/rights of other individuals.[12] Consequently, to resolve such conflicts, there ought to be a legal recognition of circumstances in which it is justified to restrict a certain right.

As far as international human rights obligations in times of emergencies are concerned, most of the applicable treaties contain a *statutory reservation*. The reservation provides that the right can be limited by statutes or statutory instruments, but this does not mean that the legislator has unlimited discretion as to how and to what extent to restrict the said right.[13] A distinction should be made between the limits to the scope of a right enshrined in a treaty, say, the European Convention of Human

there is no general "doctrine of limitations" upon rights under American constitutional jurisprudence. Limits are imposed, and affirmed, by courts in response to the particular circumstances of typical fact patterns. For a detailed discussion of this issue, *see* Pati, *supra* note 4. On implied emergency powers, *see* the *Steel Seizure* Case, 343 U.S. 579 (1952), to be discussed below.

9 *See* Chapter Xa and related articles of the German Basic Law for mainly external threats.

10 *See generally* The Duty to Protect and to Ensure Human Rights (Eckart Klein ed., 2000).

11 *See* the *Lüth* Case, as part of the jurisprudence of the Federal Constitutional Court of Germany, BVerfGE 7, 198 (1958) (Film Director Case).

12 *See* Erica-Irene Daes, *Freedom of the Individual under Law: A Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, U.N. Doc. E/CN4/Sub.2/432/Rev.2, at 197-202 (1983).

13 So, certain criteria should be satisfied. For example, the Basic Law of Germany enumerates *five requirements that apply generally to limitations* on rights, and they can be found in *Article 19*: (a) The guarantee of an *untouchable core* as specified by Article 19(2) stating: "In no case may the essence of a basic right be infringed." Of course, defining the "core" of the right is quite subjective, and case law is usually expected to provide further elucidation. Nevertheless, the Federal Constitutional Court has seen little need to refer to Article 19(2). In pertinent cases, it prefers to apply the principle of proportionality; (b) the *statute restricting the right must apply generally, and not solely to an individual case*, serving in this respect a dual purpose: ensuring the separation of powers, by preventing the legislature to get involved in individual cases, and also protecting the individual from arbitrariness; (c) there must be an *express restriction*: the statute must name the basic right and the relevant article, so the legislature can only restrict rights intentionally, not incidentally or accidentally. Article 19(1) puts forth an obligation to quote in the statute the restriction of a constitutional right, that is, such limitation can only be placed by legislation and not by administrative ordinances or decrees; (d) there must be *legal certainty*, the statute must be clear and unequivocal; (e) it must satisfy the three tests of the *principle of proportionality: suitability, necessity and appropriateness. See* Pati, *supra* note 4.

Rights, and the restrictions regarding the exercise of such right.[14] The first has to do with the formulation of the substantive scope of a right and its express delimitation by means of specific qualifications.[15] The latter, more pertinent concept of limitations upon rights pertains to the potentiality of restriction of the exercise of a right by the specific limitation clauses provided for in the said Convention. Generally speaking, in human rights treaties there are three types of limitation clauses:

– limitations attached to a certain provision of a right for certain prescribed purposes (national security, public safety, health, morals, rights of others, etc.)
– limitations referring to certain activities (*e.g.* political activity of aliens; activities subversive of treaty rights)
– limitations referring to the suspension of a group of rights in public emergencies threatening the life of a nation (war, earthquake, etc.)

It has been stated that emergency and normalcy limitations "are closely linked and … rather than being two distinct categories of limitations, they form a legal continuum,"[16] which in all circumstances must not obliterate the core of the rights inherent in the human person. This conceptualization would, however, overlook the fundamental change in legal regimes that the invocation of a state of emergency would bring about: as it will be seen, some important rights that are not "emergency-proof," can be "obliterated," as there is no protection of their core. To conceive of a "continuum" between the law in peace and the law in the state of exception would also remove inhibitions that unscrupulous leaders of a country would have in declaring a state of emergency, and once declared, perpetuate it – as emergency law would only differ in degree, but not quality, from the law in normal times. The effect could be a net loss for the prospect of an order of human dignity, as it would tend to minimize, in the public's perception, the distrust that any member of the political elite should encounter when he or she contemplates taking that ultimate step. That step should only be taken when all other measures available to resolve a crisis situation endangering the survival of an order committed to human rights and fundamental freedoms have been exhausted or have no conceivable chance of success.

After World War II, the new values-based international legal order still stays the hand of the ruler even in the fundamentally different legal order of a state of exception, or emergency. It does so by way of the "derogation clauses" to human rights

14 Loukis Loucaides, Essays in the Developing Law of Human Rights 178-218 (1995).

15 For example, Article 11, freedom of peaceful assembly, automatically excludes from the scope of the right *ratione materiae* an assembly that is not peaceful; Article 12, the right to marry and to found a family pertains, *expressis verbis*, only to men and women of marriageable age, according to national laws governing the exercise of this right, as long as this legislation does not interfere with the core of the right. *See* Rees v. United Kingdom, (1987) 9 EHRR 56, para. 50; F v. Switzerland, (1988) 10 E.H.R.R. 411, para. 72.

16 Anna-Lena Svensson-McCarthy, *International Law of Human Rights and States of Exception - With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, in 54 Int'l Studies in Human Rights 49, 721 (1998).

conventions. These emergency clauses, the subject of this Chapter, chart a "middle course" the international community has found to reconcile the "recognition of the legitimate right of sovereign states to defend their constitutional order" and the "prevention of misuse of the right to emergency"[17] by states who would abuse that right. Different from those limitations which authorize governments to impose certain restrictions on the enjoyment of certain human rights during times of normalcy,[18] which are of a permanent nature, the derogations group of restrictions would only operate in exceptional circumstances, namely and precisely when the life of the nation is threatened. Invocation of the derogations provision could affect all the rights, except the ones listed under the rubric of non-derogable rights, and such derogation would only be valid for a certain period of time.[19] It would generally require a strict procedure to be followed by the state in order to ensure the necessary international accountability, which would in turn curtail or at least make difficult any potential abuse by the vast powers of the state. The respective procedure includes a declaration of a state of emergency by the state, the notification of the international community of the proclamation of the state of emergency, as well as a detailed enumeration of the rights suspended or derogated from, an elaboration upon the reasons for such suspensions or derogations, and the time frame predicted for those derogations to last. This procedure also implies a degree of international transparency and supervision. Furthermore, as stated, universal and regional human rights treaties feature a list of non-derogable rights to be respected even during states of emergency. Some of these rights are deemed fundamental and as such must be protected at all times; others belong to a category whose suspension would in no way help solve a crisis situation.

Guarantees of the due process of law were not expressly included amongst the list of non-derogable rights, despite the fact that during the deliberations of these treaties many state proposals favored their inclusion. It would have been preferable that

17 Nowak, *supra* note 1, at 74.

18 *See* Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 Brit. Y.B. Int'l L. 48 (1976-1977), 281-320, for an analysis of all groups of limitations on rights. *See also* Alexandre Charles Kiss, *Permissible Limitations on Rights*, in The International Bill of Rights 290-310 (Louis Henkin ed., 1981).

19 For a coverage of universal and regional systems of human rights protection related to emergencies and non-derogable rights, *see generally* Nowak, *supra* note 1, at 72-93; in Non-Derogable Rights and States of Emergency (Daniel Premont ed., 1996), *see:* Antônio Augusto Cançado Trindade, *The Case-Law of the International Court of Justice on Non-Derogable Rights* 73; M. Cherif Bassiouni, *States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law* 125; Liliana Valiña, *Inalienable Rights Within the Framework of the Inter-American System of Human Rights* 269; Victor-Yves Ghebali, *The Issue of the State of Emergency in the Context of the Organization for Security and Cooperation in Europe (OSCE)* 317; Matar Diop, *The African Charter on Human and Peoples' Rights and the Inviolability of the Fundamental Rights* 421; Osman El-Hajjé, *The Cairo Declaration on Human Rights in Islam and Non-Derogable Rights* 439. *See also* Rafael Rivas Posada, *Los Estados de Excepción y la Protección de los Derechos Humanos*, in Towards Implementing Universal Human Rights 117 (Nisuke Ando ed., 2004).

such guarantees be declared as, in principle, untouchable. Procedurally, they would ensure needed protection for the non-derogable substantive rights to life[20] and to freedom from torture, which remain among the guarantees most violated in many emergency situations[21] – even though the latter has been widely acknowledged to be a *jus cogens* norm.[22]

A. Treaty Law and Jurisprudence

1. *The International Covenant on Civil and Political Rights, Article 4, and the Jurisprudence of the Human Rights Committee*

In the modern international law of human rights, the origin of the derogation clauses seems to have come from a proposal of the United Kingdom to the U.N. Human Rights Commission in 1947 when the work on drafting the Covenant had just started.[23] Initially, this proposal was rejected,[24] as it was thought that a general limitations clause or specific limitations to the scope of certain right would suffice. Later, states came to consider the importance of such a provision in situations of war or other such crisis and upheavals, when trying to restore peace and order as a necessity for the existence of a nation. The United Kingdom had expressed the view that "if such

20 Such violations of the right to life have resulted from executions without due process, deaths from ill-treatment and torture, forced disappearances and excessive use of police force. *See* Oraá, *supra* note 2, at 96, also referring to B.A. Ramcharan, The Right to Life in International Law (1985); David Weissbrodt, *The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights*, 80 Am. J. Int'l L. 685-695 (1986); Nigel S. Rodley, The Treatment of Prisoners under International Law (1987).

21 For a discussion of this issue, see Oraá, *supra* note 2, at 106-114.

22 While admitting that "it is sound to agree that those rights which are commonly described in the relevant conventions as non-derogable form part of *jus cogens*," Professor Klein places emphasis on the fact that such a non-derogable right "may still be restricted as in normal circumstances, according to the principle of proportionality," further adding that in times of emergency the balancing of conflicting values on the basis of the proportionality principle could produce a different outcome from such balancing in normalcy situations. *See* Eckart Klein, *Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy*, Israeli Law Review (forthcoming 2008). Professor Klein further commends caution in the use of a terminology of "hierarchy of rights," because even the concept of *jus cogens* does not necessarily imply a hierarchy. *Id.*

23 *See* Oraá, *supra* note 2, at 7. For the U.K. proposal see United Kingdom Draft of an International Bill of Human Rights (London, June 1947). *Id.* at 8, n.6.

24 Particularly, the United States was against the inclusion of such a provision, and insisted only on a general limitations clause. The same goes for the Philippines and Lebanon. U.N. Doc. E/CN.4/SR.126, at 3, 5-6, and 8. On the contrary, France, insisting on a derogations clause also asked that the following principles be recognized: that limitations on human rights were permissible in time of war or other emergency; that certain rights were not subject to limitation under any conditions; that derogation from the Covenant must be subject to a specified procedure and that such derogation, undertaken under exceptional circumstances, must accordingly be given exceptional publicity. *Id.* at 8.

a provision were not included, in time of war it might leave the way open for a State to suspend the provisions of the Convention."[25] France added that the principle of non-derogability of certain rights "was a sound and permanent safeguard" that also brings forth "an essential distinction between the restriction of certain rights and the suspension of the Covenant's application."[26] The detailed legal regime, through listing of non-derogable rights, would somehow neutralize and prevent the potential abuses of vital rights under the extensive emergency powers of the states. In addition, France's proposal to insert a paragraph in the derogations clause asking for the official proclamation of the public emergency aimed at preventing States "from derogating arbitrarily from their obligations under the Covenant when such an action was not warranted by events."[27] Notification of the termination of the state of emergency was also added at Mexico's initiative.[28]

The drafters of the ICCPR recognized that human rights for all are "the foundation of freedom, justice and peace in the world."[29] They were also conscious that it is an unavoidable fact that some States would at some point in time be confronted with grave situations of crisis, hence the inclusion of Article 4, which in its paragraph 1 states:

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

This provision shows that the carrot and stick approach of the drafters brought about a well-balanced provision, which, being sensitive to the vulnerabilities of a state in times of exceptional emergency, empowers the state to maintain or restore constitutional order, and at the same time subjects these exceptional powers to a set of criteria such as: the existence of exceptional threat; the necessity of official proclamation; the standard of non-derogability of certain rights; the requirement of strict necessity; the condition of compatibility with other international legal obligations; the principle of non-discrimination; and the obligation of international notification.

Whenever derogating from the Covenant and resorting to emergency powers, any government should first and foremost be concerned with the restoration of a state of normalcy giving full application to all rights contained in the Covenant. In the view of the Human Rights Committee, a State party would resort to Article 4 of the Covenant only for as long as it is indisputably confronted with such a public

25 U.N. Docs. E/CN.4/AC.3/SR.8, at 11 (Working Group) and E/CN.4/SR.42, at 5.

26 U.N. Doc. E/CN.4/SR.127, at 7.

27 U.N. Doc. E/CN.4/SR.195, at 16, para. 82.

28 Nowak, *supra* note 1, at 77.

29 First paragraph of the preamble of the Covenant.

emergency which truly threatens the life of the nation.[30] It is in such times that there lies a greater risk of the abuse of the state's right to emergency on behalf of national security, by expanding the letter and spirit of permissible limitations.[31] Consequently, the condition of the existence of a strict necessity is an elementary requirement for any conduct and procedure derogating from the Covenant.[32] It also necessitates that any emergency legislation remain in force only for so long as it is strictly required[33] to guarantee that the "institutionalization" of a state of emergency[34] does not occur; that it does not become the *de facto* rule, but *remains an exception.*

When monitoring compliance with the Covenant,[35] the HRC has noted that Article 4 provides a specific regime of safeguards for the material consequences of a state of emergency. It places particular importance on the fact that "not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the na-

30 Civil war and other types of internal upheavals like social unrest, subversive activities, vandalism, guerilla war, terrorism, ethnic conflicts, etc. have been the most frequent reasons for states of emergency. *See* Nowak, *supra* note 1, at 78.

31 M. Cherif Bassiouni, *States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law,* in Non-Derogable Rights and States of Emergency 125, 131 (Daniel Premont ed., 1996).

32 According to the HRC, this requirement relates "to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers." *See* General Comment No. 29 on Article 4, in U.N. GAOR, Doc. A/56/40 (vol. I), at 203, para. 4.

33 In the case of Israel, the HRC recommended "that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights." U.N. GAOR, Doc. A/53/40 (vol. I), at 47, para. 307. The HRC was also concerned in the case of Spain, about "the suspension of the rights of terrorist suspects under article 55(2) of the Constitution and the fact that circumstances had given rise to what amounted to permanent emergency legislation." Furthermore, in the case of the United Kingdom, the HRC did not approve of "the excessive powers enjoyed by police under anti-terrorism laws" in Northern Ireland, "the liberal rules regarding the use of firearms by the police" and "the many emergency measures and their prolonged application." *See* U.N. GAOR, Doc. A/46/40, at 45, para. 183 (Spain), and at 102, para. 411 (United Kingdom).

34 E/CN. 4/Sub. 2/1982/15, at 31, paras. 129-145.

35 Such monitoring becomes particularly important because of the fact that it is the publication of findings of violation that would exert pressure on the states and also serve as preventive of future violations. For more on derogation measures and issues related to enforcement of the Covenant's derogation provision, see Joan Fitzpatrick, *Protection Against Abuse of the Concept of Emergency*, in Human Rights: An Agenda for the Next Century (Louis Henkin & John Lawrence Hargrove eds., 1994).

tion."[36] The principles of legality and the rule of law have to govern every such public emergency, so it is mandatory for a government to comply with two basic conditions before invoking Article 4(1) of the Covenant. First, "the situation must amount to a public emergency which threatens the life of the nation," and second "the State party must have officially proclaimed a state of emergency."[37] It would not be satisfactory within the meaning of Article 4(1) to merely invoke "the existence of exceptional circumstances,"[38] as a justification for measures derogating from the Covenant obligations. On the contrary, the State party is responsible for giving "a sufficiently detailed account" of the facts leading to a situation described in Article 4. For instance, in the view of several members of the HRC, Chile's offering of the existence of terrorist activities and the world economic situation, which was having an adverse effect on the country, as justifications for the state of emergency, "had nothing to do with what was intended by the same term in Article 4."[39] In furthering the principle of legality, the HRC requires that "[w]hen proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers."[40] Even so, such laws have to be in conformity with the conditions set for in Article 4. Accordingly, the HRC was concerned that in certain countries the municipal laws on "grounds for declaring a state of emergency [were] too broad and that the extraordinary powers of the President in an emergency

36 General Comment No. 29 adopted in July 2001, which replaces General Comment No. 5 of 1981. U.N. GAOR, Doc. A/56/40 (vol. I), at 202, para. 3. The HRC goes on stating that: "During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification why such a measure is necessary and legitimate in the circumstances."

37 *See* General Comment No. 29 adopted in July 2001, which replaces General Comment No. 5 of 1981. U.N. GAOR, Doc. A/56/40 (vol. I), at 202, para. 2.

38 Communication No. R. 8/34, J. Landinelli Silva and Others v. Uruguay, Views adopted on 8 April 1981, in U.N. GAOR, Doc. A/36/40, at 132, para. 8.3. The HRC further reasoned: "In order to discharge its function and to assess whether a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned, it needs full and comprehensive information. If the respondent government does not furnish the required justification itself, as it is required to do under article 4(2) of the Optional Protocol and article 4 (3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal régime prescribed by the Covenant."

39 Oraá, *supra* note 2, at 21.

40 General Comment 29, *supra* note 37, *ibid.*

[were] too sweeping,"[41] which consequently renders them irreconcilable with the requirements of Article 4.

Emergency situations because of terrorist threats have been commonplace in the United Kingdom.[42] Therefore, the emergency rules resorted to by the U.K. for a long time disturbed the HRC, which asked the U.K. "to dismantle the apparatus of laws infringing civil liberties which were designed for periods of emergency."[43] That means that the HRC, as the guardian of the Covenant, would only justify the types of emergencies in which the survival of the very nation could be jeopardized, and only for as long as such a risk is imminent. An emergency system of rules cannot be turned into a permanent or quasi-permanent internal legal system. Such a prolongation would turn them unlawful and incompatible with the principles of legality and rule of law which remain valid at all times, including emergency situations.

Having established a state of emergency within the meaning of Article 4(1) would mean relief from a number of obligations springing from the Covenant. However, in Article 4(2) a number of guarantees are identified as needing a higher standard of protection, and are thus considered *prima facie* non-derogable. This provision states:

> No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Thus, strictly safeguarded at all times are, namely: the right to life, Article 6; the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, and medical or scientific experimentation without one's free consent, Article 7; the right to freedom from slavery, the slave trade and servitude, Article 8; the right not to be imprisoned on the ground of inability to fulfill a contractual obligation, Article 11; the right not to be subjected to retroactive legislation (*ex post facto* laws), Article 15; the right to recognition as a person before the law, Article 16; the right to freedom of thought, conscience and religion, Article 18; and the right not to be subjected to the death penalty, Article 6 of the Second Optional Protocol. According to the HRC, the "[s]afeguards related to derogation, as embodied in Article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole."[44]

Though the Covenant has set standards to protect such rights at all times, nonetheless, departure from such standards by the derogating states has often been commonplace. These rights tend, in many countries, to be the ones most frequently vio-

41 U.N. GAOR, Doc. A/48/40 (vol. I), at 43, para. 184, regarding United Republic of Tanzania. *See* also U.N. GAOR, Doc. A/53/40 (vol. I), at 39, relating to Uruguay; also, U.N. GAOR, Doc. A/52/40 (vol. I), at 36 regarding Bolivia.

42 For a good overview, see C. Warbrick, *Emergency Powers and Human Rights: The UK Experience*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 361 (C. Fijnaut, J. Wouters & F. Naert eds. 2004).

43 U.N. GAOR, Doc. A/50/40 (vol. I), at 69, paras. 429-430.

44 *See* General Comment 29, *supra* note 37, at 206, para. 16.

lated in circumstances of public emergencies and in the fight against hard crime and terrorism. Let us briefly consider some of these rights, relevant to the object of this study.

The right to life being declared non-derogable also means that there is a legal duty of the state to take effective measures to protect this right even in times of public emergency, requiring a stricter control and further safeguards against possible abuses by the state. Above all, in such circumstances, states must neither participate in, nor condone, arbitrary or extrajudicial killings. On the contrary, even in states of emergencies which threaten the life of the nation, states are legally duty-bound to take preventive measures, as well as to investigate, prosecute, punish and where necessary redress violations of the right to life.

The right to freedom from torture or other forms of ill-treatment prohibits states from resorting to torture or to cruel, inhuman or degrading treatment or punishment in order to punish or to extract confessions or information from suspected terrorists or other alleged offenders. A safeguard against this non-derogable right is also the non-alteration of the law of evidence. Sometimes, in times of emergency, there is a tendency for a change in the application of the law of evidence, encouraging a greater reliance on confessions and limiting the opportunity of the detained to challenge evidence collected during the investigation. This leaves ample room for the admission of evidence gathered under duress. The condemnation of torture as a constitutional principle, rather than a mere rule of evidence, however, is essential for the process to be fair. As Sir William Holdsworth wrote: "Once torture has become acclimatized in a legal system, it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it."[45]

Closely related to freedom from torture, though not listed as a non-derogable right, is the guarantee provided for in Article 10(1) which states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The HRC considers it a norm of general international law and thus not subject to derogation either,[46] including in emergency situations. *Inter alia*, the right to be treated humanely requires that those deprived of their liberty, either convicted prisoners or those kept under administrative detention, should be held in conditions respectful of their human dignity. The HRC has found violations of Article 10(1) when conditions of detention were deplorable.[47]

45 Sir William Holdsworth, A History of English Law, 194-195 (Vol 5, 3rd ed., 1945), referring to the use of torture in England, which was justified by virtue of the extraordinary power of the crown which could, in times of emergency, override the common law, which, in turn, had rendered torture illegal.

46 U.N. GAOR, Doc. A/56/40 (vol. I), at 205, para. 13(a). *See also* Theodor Meron, Human Rights and Humanitarian Norms As Customary Law (1989) at 96, who considers this right part of customary international law.

47 *See* Communication No. 818/1998, S. Sextus v. Trinidad and Tobago, Views adopted on 16 July 2001, in U.N. GAOR, Doc. A/56/40 (vol. II), p. 117, para. 7.4, read in conjunction with p. 112, paras. 2.2 and 2.4. See also Communication No. 625/1995, M. Freemantle v.

Article 15(1) of the International Covenant, protects from the imposition of *ex post facto* laws (*nullum crimen, nulla poena sine lege*), just as it prohibits giving a heavier penalty than what was applicable at the time when the offence was committed and it allows for the benefit of the guilty from a lighter penalty introduced after the commission of the offence. This is a most important guarantee, particularly in emergency situations, where the governments could be tempted to enact laws that could retroactively criminalize an act.[48] This strict prohibition in international law guarantees the legal security and the principle of foreseeability of laws in a democratic society of the rule of law. However, in Article 15(2) the Covenant provides for "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". As regards the protection from double jeopardy (*ne bis in idem*) contained in Article 14(7) of the Covenant, it applies to both convictions and acquittals.

The Covenant in its Article 16 and Article 4(2) guarantees every person's non-derogable right to juridical personality, *i.e.* the right to recognition as a person before the law, and thus capable of bringing complaints before the courts. However, these non-derogable rights would only make sense and enjoy full and effective protection if the domestic law ensures at all times, including in emergencies, the effective remedies, and also make available judicial recourse for any alleged violations. The HRC took up this issue in its General Comment 29 on Article 4, issued in 2001, where it stated that it is inherent in non-derogable rights to have effective procedural and judicial protection.[49] In this General Comment, the HRC indicated that a number of rights remain non-derogable in times of emergency in order to give effect to customary law, humanitarian law or to the principles of non-discrimination. Such a list includes the prohibition on taking hostages, prohibition on forced displacement of persons, rights of all detained persons to be treated with respect for their human dignity, arbitrary deprivation of liberty, presumption of innocence etc. In its most recent General Comment No. 32 on Article 14, published on August 23, 2007, and replacing General Comment No. 13 of 1984, the HRC makes clear that states derogat-

Jamaica, Views adopted on 24 March 2000, in U.N. GAOR, Doc. A/55/40 (II), at 19, para. 7.3.

48 The HRC found a violation in the case of *Weinberger v. Uruguay*, where the penal law (Military Penal Code) was applied retroactively for conspiracy against constitution. *See* Communication No. R.7/28, Weinberger v. Uruguay, Views adopted on 29 October 1978, in U.N. GAOR, Doc. A/36/40, at 118-119, paras. 12 and 16.

49 "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. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15." General Comment 29, *supra* note 37, at 206, para. 15.

ing from "normal procedures required under Article 14, though this guarantee of a fair trial is not listed as a non-derogable right,[50] should "ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation." Furthermore, fair trial guarantees "may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights." For example, "as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14. Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency… Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times." [51]

Referring to humanitarian law,[52] the HRC, in its 2001 General Comment on Article 4, reasons as follows: "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law[53] during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations."[54] The argument that such guarantees were already included in the Geneva Conventions, which had been approved shortly before, was used by Eleanor Roosevelt during the drafting process of Article 4, when she opposed the inclusion of

50 Referring to the *travaux préparatoires* of the ICCPR, it can be seen that the French proposal included Article 14 as non-derogable in Article 4. However, the French delegation withdrew this article, together with articles 9 and 12, before putting them to a vote. Also, Israel, during the Seventh Session, proposed that Article 14 with all its judicial guarantees be included as a non-derogable right, as, according to them, there was no need to derogate from such guarantees even in times of emergency. For more on the history of non-derogable rights and the rationale behind them in the main treaties *see* Oraá, *supra* note 2, at 85-96.

51 General Comment No. 32, CCPR/C/GC/32 (23 August 2007), para. 6.

52 For insights on the relations between humanitarian law and human rights, see Denise Plattner, *International Humanitarian Law and Inalienable or Non-Derogable Human Rights*, in Non-Derogable Rights and States of Emergency 349 (Daniel Premont ed., 1996); Theodor Meron, Human Rights in Internal Strife (1987); Theodor Meron, *Human Rights in Time of Peace and in Time of Armed Strife: Selected Problems*, in Contemporary Issues in International Law: Essays in Honor of L. B. Sohn (Thomas Buergenthal ed., 1984).

53 Such guarantees based on Article 75 of Protocol I and Article 6 of Protocol II to the Geneva Conventions are the following: -the right to be informed promptly and in detail of charges; -the right to all rights and means of defense necessary; -the right to be present at one's trial; -the presumption of innocence; -the right not to be forced to give incriminatory evidence or to confess; -the right to a tribunal which offers the essential guarantees of independence and impartiality; -the right to appeal; -the principle of non-retroactivity of penal laws; the right to obtain the attendance and examination of defense witnesses; -the protection from double jeopardy after a final judgment; -the right to a lawyer of one's choice; -the right to free legal assistance if necessary.

54 General Comment 29, *supra* note 37, at 206, para. 16.

due process rights in the non-derogable list of rights.[55] The HRC further continues to explicitly enumerate the some of the international fair standards during trial, applicable even in times of emergencies stating that "the principles of legality and the rule of law require that fundamental *requirements of fair trial must be respected during a state of emergency*. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."[56] A number of due process guarantees offered during normalcy are considered to be as derogable during times of emergency. Such rights are the right to a public trial, the right to a trial without undue delay, the right to examine prosecution witnesses. The right to have a lawyer of one's choice has sometimes been considered to be derogable as well, particularly in cases that have to do with terrorism in order to avoid any communication between the detained and the terrorist organization.[57]

The right to a fair trial by *a competent, independent and impartial tribunal* is another controversial right particularly as it relates to the independence of tribunals from the executive. This right brings forth an important issue which surfaces in states of emergency: the issue of establishment of *ad hoc* tribunals to try emergency cases, and transferring of jurisdiction to try civilians in military court, though Article 14 does not *per se* make mention of such tribunals. First and foremost, the HRC has noted trial by a competent, independent and impartial tribunal is "an absolute right

55 *See* Oraá, *supra* note 2, at 89. Eleanor Roosevelt insisted that only *habeas corpus* be listed as non-derogable, but this right too remained off the list as it was opposed by Mr. Leroy Beaulieu who succeeded René Cassin.

56 General Comment 29, *supra* note 37, at 206, para. 16. *Emphasis added.*

57 For a reasoning on why derogation of such rights could be justified in emergency situations, see Oraá, at 116-117. Another example would be the "Kontaktsperregesetz" in Germany. The fight against the terrorist Baader-Meinhof gang, the self-styled "Red Army Faction" (RAF), in particular, the kidnapping and ultimate killing of the President of the German Employers' Association, Dr. Hanns Martin Schleyer, yielded the September 30, 1977 federal statute, termed the "Kontaktsperregesetz," which allows the blocking of all contacts between prisoners accused or convicted of membership in a terrorist organization and their lawyers, if concrete facts justify the conclusion that an imminent danger for life, limb or liberty of a person, emanating from a terrorist organization, exists. Section 31, Introductory Act to the Act on the Organization of the Courts (Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz vom 30. September 1977, BGBl. I S. 1877). In a decision of August 1, 1978, the German Federal Constitutional Court held this law to be constitutional (BVerfGE 49, 24). This law has never been repealed; it also has never been applied after the initial measures of termination of contacts between incarcerated members of the Baader-Meinhof gang and their attorneys had been lifted upon the death of Dr. Schleyer on October 20, 1977. Wolfgang Janisch, *Rechtsstaat im Zeichen des Terrors*, Oct. 10, 2002, at http://www.stern.de/politik/historie/316838.html?eid=501091.

that may suffer no exception."[58] It seems that the HRC offers a broad interpretation on this issue and it does consider *this element* of the fair trial guarantee as non-derogable even in times of emergency.

Military courts as such have come under the scrutiny of the HRC. While the present jurisprudence of the Committee does not appear to consider military tribunals outside the realm of acceptable "courts" to which ICCPR Article 14 applies,[59] the HRC is particularly sensitive to the danger of possible impunity[60] resulting from military tribunals' jurisdiction over serious human rights abuses allegedly committed by military personnel, and military courts' jurisdiction over civilians.

In paragraph 22 of its General Comment No. 32 on Article 14, issued in 2007, it stated:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14.[61]

58 Communication No. 263/1987, M. González del Río v. Peru, Views adopted on 28 October 1992, U.N. GAOR, Doc. A/48/40 (vol. II), at 20, para. 5.2.

59 Jeanine Bucherer, Die Vereinbarkeit von Militärgerichten mit dem Recht auf ein faires Verfahren gemäss Art. 6 Abs. 1 EMRK, Art. 8 Abs. 1 AMRK und Art. 14 Abs. 1 des UN-Paktes über bürgerliche und politische Rechte 94 (2005).

60 For details on this issue, see Report of the Independent Expert on Impunity (Ms. Diana F. Orentlicher), UN Doc. E/CN.4/2005/102 (18 February 2005).

61 General Comment No. 32, *supra* note 51, para. 22. *See also* Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, *available at* http://www.unhchr.ch/html/menu3/ b/h_comp50.htm, which states that: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

Similarly, a number of HRC views primarily rendered in individual cases in the 1980s,[62] particularly, the case of *Borda et al. v. Colombia,*[63] stated that, while particular structural and procedural setups of military courts may violate the ICCPR, the trying of civilians before such a special court *per se* was not necessarily contrary to Article 14 of the Covenant. However, in more recent concluding observations on country reports, the HRC has consistently argued in a more blanket fashion against military tribunals' jurisdiction to try civilians.[64] Even in cases dealing with the offense of terrorism, the HRC preferred the jurisdiction of the ordinary criminal courts over such offenses, rather than that of military courts.[65] This transition from a case-by-case approach to military courts' jurisdiction over civilians to more of a blanket objection to this practice is illustrated in the case of Peru: In its Views adopted on January 9, 1998 in the case of *Polay Campos v. Peru*,[66] the HRC had dealt exclusively with the issue of the independence and impartiality of these Peruvian special tribunals and the problem of "faceless judges" (*jueces sin rostro*).[67] In its November 1, 2000 concluding observations on the country report of Peru, the Committee welcomed "with satisfaction" the abolition of "faceless" courts in the country, while deploring the fact "that the military courts continue to have jurisdiction over civilians accused of treason, who are tried without the guarantees provided for in article 14 of the Covenant."[68] In what appeared to be a broadening of its stance, however, the Committee deplored the fact that military courts still had jurisdiction over civilians accused of the crime of treason and "referred in this context to its General Comment No. 13 on article 14

62 Listed in Bucherer, *supra* note 59, at 136-143.

63 Communication No. 46/1978, Views adopted on 27 July 1982, CCPR/C/OP/1, at 139, 142, para. 9.2, considering the argument that military courts, in their jurisdiction over civilians, are "neither competent, independent nor impartial" of a constitutional nature, rather than one of international law under Article 14 ICCPR. *See* Bucherer, at 141-142.

64 The HRC recommended to Slovakia "that the Criminal Code be amended so as to prohibit the trial of civilians by military tribunals in any circumstances." The Slovakian law prescribed that "civilians may be tried by military courts in certain cases, including betrayal of State secrets, espionage and State security." *See* U.N. GAOR, Doc. A/52/40 (vol. I) (1997), at 60, para. 381. It also recommended to Uzbekistan and to Guatemala "to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences." *See* U.N. GAOR, Doc. A/56/40 (vol. I) (2001), at 61-62, para. 15 (re Uzbekistan, arguing that the Committee "is concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of articles 14 and 26 of the Covenant") and at 96, para. 20 (re Guatemala).

65 In the case of Peru, the HRC "welcome[d] with satisfaction … the fact that the offence of terrorism has been transferred from the jurisdiction of the military courts to that of the ordinary criminal courts." U.N. GAOR, Doc. A/56/40 (vol. I) (2001), at 45, para. 4.

66 Communication No. 577/1994, Views adopted on 9 January 1998, CCPR/C/61/D/577/1994.

67 *Id.* at para. 8.8. *Compare* Bucherer, *supra* note 59, at 143.

68 U.N. GAOR, Doc. A/56/40 (vol. I) (2001), at 45, para. 4.

emphasizing that the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice."[69]

A recent treatise advises caution regarding the assumption of a blanket outlawing of military courts' jurisdiction over civilians by the HRC,[70] while the 2007 General Comment No. 32 on Article 14 notes that the Covenant does not prohibit the trial of civilians in special or military courts, but requires that the guarantees of Article 14 not be limited or modified because of the character of the court concerned. It further asks that such trials be "exceptional, *i.e.* limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials."[71] However, it is of interest to note that Mr. Emmanuel Decaux, UN Special Rapporteur on the administration of justice through military tribunals, in 2005 submitted a report in which he advocated the adoption of pertinent principles.[72] Principle No. 4 states:

> Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.[73]

In his comment on this principle, he interprets the jurisprudence of the HRC the following way:

> The Human Rights Committee's practice over the past 20 years, particularly in its views concerning individual communications or its concluding observations on national reports, has only increased its vigilance, in order to ensure that the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel.[74]

In another suggested restriction in the jurisdiction of military tribunals, Mr. Decaux postulates, in Principle No. 7:

> The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.[75]

69 *Id*. at 47, para. 12 *(emphasis added).*

70 Bucherer, *supra* note 59, at 96.

71 General Comment No. 32, *supra* note 51, para. 22.

72 Working paper by Mr. Decaux containing an updated version of the draft principles governing the administration of justice through military tribunals, U.N. Doc. E/CN.4/Sub.2/2005/9 (2 June 2005).

73 *Id.* at 9.

74 *Id.* at 9, para. 16.

75 *Id.* at 11.

Principle No. 8 would exclude serious human rights abuses from the jurisdiction of military courts:

> In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.[76]

These principles would appear to indicate at least a trend in the jurisprudence of the HRC as well.

In its most recent work while preparing the General Comment No. 32,[77] which replaced the General Comment No. 13 on the right to a fair trial, the HRC focused some of its discussion on measures taken by some countries to fight terrorist activities. It brought to the fore the *ad hoc* tribunals composed of "faceless judges". While the resort to anonymous judges is generally incompatible with Article 14, however, in light of terrorist activities, several experts suggested that the revised general comment should not contain "a blanket condemnation of the practice."[78] According to these experts, such faceless tribunals should only be enacted in "states of emergency." Distinction was made between terms like "terrorism" and specific "terrorist acts," suggesting that such tribunals deal only with the latter category and thus avoid

76 *Id.* at 12.

77 General Comment No. 32, *supra* note 51.

78 *See* Information for Media, General Assembly, HR/CT/679: *Human Rights Committee Continues Discussion on Draft General Comment on Covenant Article Concerning Right to Fair Trial*, 29 March 2006, *available at* http://www.un.org/News/Press/docs/2006/hrct679.doc.htm:

> Much of the discussion focused on measures taken by some countries to fight terrorist activities and the resort to special tribunals of so-called "faceless judges". While the use of anonymous judges was incompatible with article 14, several of the experts said they understood why some courts needed to use faceless jurists and believed that the general comment should not contain a blanket condemnation of the practice.
>
> One expert said that such faceless tribunals should only be enacted in "states of emergency", perhaps they could be used to deal with specific "terrorist acts", rather than "terrorism", while another added that States must make sure that such courts were not permanent. Another speaker reminded the Committee, however, that, in some cases, judges might be present in the room, but would adjudicate from behind darkened screens.
>
> Perhaps there were some circumstances that required judicial anonymity, he said, adding that judges must not be scared off certain cases. Another expert said that, in some instances, particularly in major drug cases, many countries allowed anonymous jurors. Saying that drafting language on the matter was a "delicate balancing act" – ensuring the Committee remained consistent in its jurisprudence, while making clear that the comment did not invite the creation or permanence of such tribunals – Committee Chairperson Christine Chanet, expert from France, asked Mr. Kälin to consider the views of the other experts, and come up with another formula for the Committee's consideration.

their own permanency.[79] The final product of such discussions resulted in enumerating a number of unacceptable irregularities[80] associated with the special tribunals of "faceless judges," in addition to the fact that "the identity and status of the judges is not made known to the accused persons." It concluded that tribunals suffering from such irregularities did not satisfy the basic standards of fair trial, particularly the requirement of impartiality and independence of the tribunal.[81]

Perhaps the most challenged right during states of emergency is the right to be free from the arbitrary deprivation of liberty. The findings of the Working Group on Arbitrary Detention have shown that arbitrary detentions, without reasonable cause, are commonplace during states of emergency.[82] For this reason, the HRC has been unambiguously clear in stating that governments may "in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance … through arbitrary deprivations of liberty."[83] In addition, the right to an effective remedy, provided for in Article 2 (3), specifies a basic principle for the enjoyment of rights. It constitutes a treaty obligation inherent in the Covenant as a whole; consequently, it remains a responsibility of the states in emergency situations as well. In times of emergency the state remains legally bound to provide effective remedies for human rights violations,[84] including violations resulting from an unwarranted or unlawful use of emergency measures. As such, persons deprived of their liberty have an unquestionable right to an effective remedy to challenge the lawfulness of the arrest and detention, through habeas

79 *Id.*

80 General Comment No. 32, *supra* note 51, para. 23. Referring to its case law particularly to a number cases involving Peru, but also Algeria and Colombia, the HRC mentioned irregularities such as: "exclusion of the public or even the accused or their representatives from the proceedings; restrictions of the right to a lawyer of their own choice; severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado; threats to the lawyers; inadequate time for preparation of the case; or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant." *Ibid.*

81 *Ibid*.

82 *See* U.N. Doc. E/CN.4/1996/ 40, Report of the Working Group on Arbitrary Detention, para. 106.

83 General Comment 29, *supra* note 37, at 205, para. 11.

84 In General Comment No. 29, referring to Article 2(3), the HRC clarifies: "This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of their procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant, to provide a remedy that is effective." The HRC further asked states to "establish effective remedies in legislation that are applicable during a state of emergency," wherever they are lacking. *Id.* at 206, para. 14, and at 43, para. 10.

corpus or similar relief,[85] which has to be available at all times, including in states of emergency. The same goes for the right to enjoy these rights without discrimination, provided for in Article 26.

Interestingly, the concern for the protection of detained persons during states of emergency became a topic during the discussions of the HRC of a draft Third Optional Protocol to the ICCPR, regarding the right to a fair trial. Its hesitation to back up such a draft was explained in the following terms:

> The Committee is satisfied that States parties generally understand that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3[86] and 4,[87] read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite State 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.[88]

Lastly, it is important to note that states are allowed to take emergency measures "provided that such measures are not inconsistent with their other obligations under international law." That means that states retain their obligations under customary international law, other international treaty law and humanitarian international law.[89] Consequently, a number of due process guarantees, though not listed in Article 4, are

85 In drafting the ICCPR, Mrs. Eleanor Roosevelt had considered that among all guarantees against arbitrary detention, the writ of *habeas corpus* should be made non-derogable, while she opposed the inclusion as non-derogable of the rest of guarantees of Article 9. She based her arguments on the fact that such guarantees were already included in the Geneva Conventions, which had been recently approved. The successor of René Cassin, Mr. Leroy Beaulieu, taking a more radical approach, opposed altogether the inclusion as non-derogable of Article 9, on the same grounds used by Roosevelt. Hence, *habeas corpus,* too, remained off the list. *See* Oraá, *supra* note 2, at 89.

86 This paragraph recognizes the right of anyone "arrested or detained on a criminal charge [to] be brought promptly before a judge or other officer authorized by law to exercise judicial power."

87 Paragraph 4 recognizes the right of anyone "who is deprived of his liberty by arrest or detention…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."

88 U.N. GAOR, Doc. A/49/40 (vol. I) (1994), annex XI, at 120.

89 Such obligations might be included under certain articles of Geneva Conventions and its Protocols; the ILO Conventions on Forced Labor, Freedom of Association, Equal Rights of Workers (that are ratified by overwhelming majority of states and also lack emergency clauses); 1951 Geneva Refugees Convention and its 1967 Protocol; African Charter of Human and Peoples' Rights that does not contain an emergency clause; the Inter-American Convention on Human Rights that has a longer list of non-derogable rights, etc.

nevertheless non-derogable because of their being entrenched either in customary international law or humanitarian law. We will pick up this discussion in later sections, but it is worth mentioning here that in its most recent General Comment No. 32 on Article 14, as noted above, the HRC stated that: "While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights."[90] Most importantly, Article 5 of the ICCPR also prohibits the abuse of rights and bars acts of the state that would intend to destroy the core of the rights ingrained in the Covenant.[91] This article holds particular significance in conditions of states of emergency, where an empowered state stands *vis-à-vis* a most vulnerable individual.

2. *The European Convention on Human Rights and Fundamental Freedoms, Article 15, and the Jurisprudence of the European Commission and Court of Human Rights*

The derogation clause of the European Convention on Human Rights, Article 15, with the exception of the formal statement of the requirement of an official proclamation, has virtually the same wording as Article 4 of the ICCPR. Its paragraph 1 stipulates:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[92]

Interestingly, the overwhelming majority of cases examining Article 15 by the European Court of Human Rights deal with a State's counterterrorism policy. This clause was actually adopted from the draft ICCPR, though the latter was signed and came to force decades much later than the European Convention. It was again the United

90 General Comment 32, *supra* note 51, para 6.

91 For a detailed analysis of Article 5 and its implications on the exercise of rights as well as on the state obligations, see Eckart Klein, *Reflections on Article 5 of the International Covenant on Civil and Political Rights*, in Towards Implementing Universal Human Rights 127 (Nisuke Ando ed., 2004).

92 Within the European System, Article 30 of the 1961 European Social Charter states that:

> In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Article F of the 1996 European Social Charter as revised is in substance identical to this provision.

Kingdom[93] that proposed to the Committee of Experts to include in the draft European Convention a clause similar to Article 4 of the ICCPR draft,[94] which according to the *travaux préparatoires* was adopted without much discussion.

While the phrase "threatening the life of the nation" creates certain problems due to its rather loose wording, the European Court of Human Rights has developed a detailed interpretation. Like with any other issue of limitations, the Court applies its doctrine of the margin of appreciation to the states' judgment on the pressing need for an emergency situation and consequently on the nature and scope of derogations they have to resort to in order to avert such crisis. However, it cautions states to act only to the extent strictly required by the exigencies of the situation,[95] and reminds them that there is always a ultimately a European Court review of such acts.

In a number of cases regarding states of emergency as related to terrorism in Ireland and the United Kingdom, the Court amply clarified the phrase "threatening the life of the nation."[96] In the *Lawless case*,[97] the Court stated that Article 15 cannot be invoked to justify derogations in the event of a remote or hypothetical menace to the life of the nation; such an exceptional danger must be imminent. In July 1957, the Republic of Ireland declared a public emergency, and the Minister of Justice resorted to extrajudicial detention of persons suspected of engaging in activities prejudicial to the State. The Court found a public emergency in Ireland as threatening the life of the nation in the presence of several factors: – the existence in its territory "of a secret army engaged in unconstitutional activities and using violence to attain its purpose;" – "the fact that this army was also operating outside the territory of the State, thus seriously jeopardizing the relations of the Republic of Ireland with its neighbor;" – "the steady and alarming increase in terrorist activities from the autumn 1956 and throughout the first half of 1957."[98] What convinced the Court of the existence of an imminent danger to the life of the nation was the homicidal ambush carried out in early July 1957 in Northern Ireland close to the border with the Republic, which proved continuous "unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland."[99]

93 It seems that the UK had the most of experiences with emergency laws dealing with terrorist acts, and thus obviously was most seriously concerned about the issue. *See generally* Colm Campbell, Emergency Law in Ireland: 1918-1925 (1994).

94 Oraá, *supra* note 2, at 8.

95 Ireland v. United Kingdom, ECtHR, Judgment of 18 January 1978, Series A, No. 25, at 78-79, para. 207.

96 Cases regarding human rights of suspects and defendants during "public emergencies threatening the life of a nation" in the United Kingdom have played a major role in the European Court's interpretation of the Convention and establishment of standards. *See* C. Warbrick, *Emergency Powers and Human Rights: The UK Experience*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 361, 362 (C. Fijnaut, J. Wouters and F. Naert eds. 2004).

97 Lawless Case (Merits), ECtHR, Judgment of 1 July 1961, Series A, No. 3, at 56.

98 *Id.* para. 28.

99 *Id.* at 56, para. 29.

In the case of *Ireland v. United Kingdom*,[100] the Court was concerned, *inter alia*, with the anti-terrorist legislation used by the United Kingdom in Northern Ireland. Based on the facts of the case the Court found the emergency situation as threatening the life of the nation particularly since at that time in Northern Ireland, "over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed. This violence found its expression in part in civil disorders, in part in terrorism, that is organized violence for political ends."[101] The Court based its judgment on the *extent and impact of terrorist violence* in Northern Ireland and elsewhere in the United Kingdom to approve of the existence of a life-threatening danger for the nation in the case of *Brannigan and McBride v. United Kingdom.*[102]

In all circumstances the Court asks that the exceptional nature of derogations requires that they must be limited in time and space within the territories mentioned in the derogation notices, and they must serve the goal of restoration of the constitutional order with full application of human rights. Any such derogatory measures have to be tailored to the *exigencies of the situation* as far as territorial application, material content and duration is concerned.

The states parties do not have an unlimited power of discretion when choosing such measures in emergencies, particularly their special powers of arrest and detention, as one of the most frequent measures of emergencies. However, in contrast with the HRC and the Inter-American Court, the European Court has accepted far-reaching extraordinary powers of arrest and detention, including internment, without the possibility of judicial review, particularly in connection with the situation in Northern Ireland.

For the purposes of this study, it is necessary to see how the Court reasoned regarding this issue, in the *Lawless Case*,[103] where the author of the communication was detained for five months without being brought before a judge. According to the Court, Ireland had no other means available in order to deal with the situation, consequently, "the administrative detention…of individuals suspected of intending to take part in terrorist activities appeared, despite its gravity, to be a measure required

100 Ireland v. United Kingdom, *supra* note 95, at 78, para. 205.

101 *Id*. at 10, para. 12.

102 Brannigan and McBride v. United Kingdom, ECtHR, Judgment of 26 May 1993, Series A, No. 258-B, at 50, para. 47. The Court also accepted the U.K. government's argument in the case of *Marshall v. United Kingdom*, noting that "the authorities continued to be confronted with the threat of terrorist violence notwithstanding a reduction in its incidence," and it expressed its support by noting "[t]his of itself confirms that there had been no return to normality since the date of the *Brannigan and McBride* judgment such as to lead the Court to controvert the authorities' assessment of the situation in the province in terms of threats which organized violence posed for the life of the community and the search for a peaceful settlement." Marshall v. United Kingdom, ECtHR, Decision of 10 July 2001 on Admissibility, at 6-9.

103 Lawless Case (Merits), s*upra* note 97. For historical background, see John Maguire, *Internment, the IRA and the Lawless Case 1957-61*, 2 J. Oxford History Soc'y 1 (2004), *available at* http://users.ox.ac.uk/~jouhs/michaelmas2004/maguire02.pdf.

by the circumstances."[104] In the Court's view, *inter alia*, the following means that were available could not be efficient to handle the crisis: – "the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland;" – "the ordinary criminal courts, or even the special criminal courts or military courts;" – "the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups," a process that met with great difficulties "caused by the military, secret and terrorist character of those groups and the fear they created among the population."[105] On the other hand, the Court analyzed the Offences against the State (Amendment) Act of 1940, and found it to be subject to a number of safeguards which would prevent potential abuses in the system of administrative detention. These safeguards were: (1) the constant supervision thereof by the Parliament and the establishment of a Detention Commission consisting of one member of the Defense Forces and two judges; (2) a person detained under the 1940 Act "could refer his case to that Commission whose opinion, if favorable to the release of the person concerned, was binding upon the Government;" (3) the ordinary courts could "compel the Detention Commission to carry out its functions."[106] Then the Court noticed that the Government had publicly announced that it would release any person detained under the Act "who gave an undertaking to respect the Constitution and the Law and not to engage in any illegal activity."[107] This was sufficient for the Court to conclude the detention without trial was a measure satisfying the principle of strict necessity and required by the exigencies of the situation, thus, compatible with the meaning of Article 15 of the Convention.[108]

Emergency powers, particularly those having to do with extrajudicial deprivation of liberty in the context of terrorist acts, were the object of the Courts' interpretation in the case of *Ireland v. United Kingdom*. United Kingdom had introduced certain regulations and orders regarding arrest, detention, internment, interim custody and detention. *Inter alia,* such regulations provided for arrest of persons in the absence of "suspicion" of an offence merely "for the preservation of the peace and maintenance of order" or "to interrogate the person concerned about the activities of others."[109] The Terrorists Order and the Emergency Provisions Act "were applicable only to individuals suspected of having been concerned in the commission or attempted commission of any act of terrorism, that is the use of violence for political ends, or in the organisation of persons for the purpose of terrorism."[110] As per the Court, such acts did violate the provisions of Article 5(1)(c), 5(2), 5(3) and 5(4), because the detentions were not effected for the purpose of bringing the detainees before the competent legal authority, nor was their lawfulness of the detention decided speedily by a court;

104 Lawless Case, s*upra* note 97, at 58, para. 36.

105 *Id.* at 58, para. 36.

106 *Id.* at 58, para. 37.

107 *Id.* at 58, para. 37.

108 *Id.* at 58-59, paras. 37-38.

109 Ireland v. United Kingdom, *supra* note 95, at 74-75, para. 196.

110 *Id.* at 75, para. 196.

the detainees were not normally informed of the reasons for their arrest; they were not brought "promptly" before "the competent legal authority;" and they were not entitled to "trial within a reasonable time" or to "release pending trial."[111] However, the Court had to examine whether these could be justified under the emergency clause of Article 15, and it concluded that

> the limits of the margin of appreciation left to the Contracting States by Article 15 § 1 were not overstepped by the United Kingdom when it formed the opinion that extrajudicial deprivation of liberty was necessary from August 1971 to March 1975.... [and it was] directed against the IRA as an underground military force ... which was creating ...a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom. ... Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and... the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for.[112]

The Court took the same stance in the *Brannigan and McBride Case,*[113] related to anti-terrorist legislation in the United Kingdom, where the issue was the lack of judicial intervention in the exercise of the power to detain suspected terrorists for up to seven days. The Court concluded that the Government had not "exceeded their margin of appreciation in deciding, in the prevailing circumstances, against judicial control."[114] It nevertheless backed up its conclusion[115] by expressing its satisfaction at the existence of safeguards against such abuse as arbitrary behavior and *incommunicado* detention. Such guarantees were: – "the remedy of habeas corpus ... to test the lawfulness of the original arrest and detention;" – the fact that "detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest;" – the fact that "within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear ... that ... the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld;"

111 *Id.* at 74-77, paras. 194-201.

112 *Id.* at 80-82, para. 212-214.

113 Brannigan and McBride v. United Kingdom (A 258-B), 17 Eur. H.R. Rep. 539 (1993).

114 *Id.* at 575-576 , para. 60. The Court noted: "[I]n the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the government attaches great importance." *Id.* para. 59. *See also* Brogan v. United Kingdom, (A 145-B) 11 Eur. H.R. Rep. 117, 131-36, paras. 55-62 (1988).

115 For more on this issue, see Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 Hum. Rts. Q. 625 (2001).

– and the fact that "detainees are entitled to inform a relative or friend about their detention and to have access to a doctor." In all these cases, it seems that the Court would nevertheless look for a desirable alternative to the lack of judicial review of detention, mostly in the form of certain safeguards as noted above.

Article 15(2) of the European Convention states:

> No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

In addition, Article 3 of Protocol No. 6 to the Convention regarding the abolition of the death penalty expressly states that no derogation is allowed from the provisions of this Protocol under Article 15 of the Convention. The principle of *ne bis in idem* proclaimed in Article 4 of Protocol No. 7 to the Convention is likewise non-derogable under Article 4(3) thereof.

To summarize, the non-derogable rights under the European Convention are as follows: the right to life, Article 2; the right to freedom from torture and from inhuman or degrading treatment or punishment, Article 3; the right to freedom from slavery and servitude, Article 4(1); the right not to be subjected to retroactive penal legislation, Article 7; the right not to be subjected to the death penalty, Article 3 of Protocol No. 6; prohibition of double jeopardy, Article 4 of Protocol No. 7. Three of these rights, the right to life, freedom from torture, and freedom from slavery and servitude constitute *jus cogens* norms.[116] As stated elsewhere, "[t]he only limitations on the scope of non-derogable rights are intrinsic to each right, which is protected within its own definition and its internal range of application. The range of non-derogable rights differs from one instrument to another. The ECHR, which is the oldest of the conventions, contains the shortest list of non-derogable rights. The enumeration of the four common non-derogable rights in the ECHR reflects existing conventional and customary international law."[117]

The European Court has in many cases dealt with alleged violations of non-derogable rights, clarifying in this way many concepts. Thus, for instance, in the case of *Ireland v. United Kingdom*[118] the Court dealt with the issue of certain techniques (like wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink) which were used in many interrogation centers in Northern Ireland. The Court found that the combined and premeditated use "for hours at a stretch" of those "disorientation" or "sensory deprivation" techniques "amounted to a practice of inhuman and degrading treatment," and violates the Convention.[119] In the Court's

116 Daphna Shraga, *Human Rights in Emergency Situations under the European Convention on Human Rights*, 16 Isr. Y.B. Hum. Rts. 217, 232-234 (1986); *see also* Ronald St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 Colum. J. Transnat'l L. 225, 230-231 (1997).

117 Pati, *supra* note 4, at 260 (2005). *See also* Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 Harv. Int'l L.J. 1, 2 (1981).

118 Ireland v. United Kingdom, *supra* note 95.

119 *Id.* at 41, para. 96. and at 66-67, paras. 167-168.

view, even the difficult investigation into a crime such as terrorism does not justify impairing the physical integrity of individuals. A police interrogation of forty-odd hours of a detainee who was "slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back," and then "he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on,"[120] constituted an inhuman and degrading treatment contrary to Article 3 of the Convention.

The independence of courts and, particularly, the trial of civilians by military courts is another problem often relating to emergency situations within the European system of human rights protection.

To start with, the Strasbourg authorities accord states parties wide latitude in designating what constitutes a court.[121] In particular, military tribunals are recognized as such, albeit as special courts.[122] Early decisions involving such tribunals referred mostly to disciplinary sanctions obviating the need to engage in a detailed discussion of the independence and impartiality of these entities.[123] The European Commission of Human Rights treated the issue of the independence of those tribunals in a few cases of a mostly penal character,[124] and concluded that judges appointed for a limited period of time and who remained active members of the military during their service on the court did not lose their independence as long as their service had a "certain stability," and they were not subject to instructions from their military superiors regarding the exercise of their judicial functions.[125]

In the late 1990s, however, the British system of courts-martial, however, did not survive the scrutiny of the European Court of Human Rights under the standard of the court's required independence. Courts-martial in the United Kingdom were convened in individual cases of proscribed criminal conduct by the military commander. He determined the charges, nominated the members of the bench, none of which had a prior legal education, while all of them were subordinate in rank to the convening officer. He also nominated the members of the prosecution team, who were not

120 Tomasi v. France, ECtHR, Judgment of 27 August 1992, Series A, No. 241-A, at 40, para. 108, and at 42, para. 115. The Court described as torture the treatment of Aksoy, also detained on suspicion of involvement in terrorist activities. He was "stripped naked, with his arms tied together behind his back, and suspended by his arms," in the case of *Aksoy v. Turkey*, ECtHR, Judgment of 18 December 1996, Reports 1996-VI, at 2279, para. 64.

121 Bucherer, *supra* note 59, at 29-30.

122 *Id.* at 30-31.

123 *See, e.g.,* Eur. Comm'n HR, Engel v. Netherlands, (A/22), 1 Eur. H.R. Rep. 647, 669 (1979-80) (stating that the existence of "a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians" does not in itself run counter to their obligations).

124 Sutter v. Switzerland, Eur. Comm'n HR, Complaint No. 8209/78, D.R. 16 (1979), at 166 *et seq.*; *see also* Dupuis v. Belgium, Eur. Comm'n HR, Complaint No. 1271/87, D.R. 57 (1988), at 196.

125 For details, see Bucherer, *supra* note 59, at 46-51.

allowed to drop charges or include lesser charges without his consent. Also, the convening officer had to ensure that the defendant had sufficient opportunity to prepare his defense. He had to appoint an experienced civilian barrister as "judge advocate" to advise him on legal issues and to supervise the procedural correctness of the proceeding. Both the decisions of the tribunal on guilt or innocence and the sentence needed the confirmation by the convening officer or a military official higher in rank than him in order to enter into legal effect. The convening officer also could change the tribunal's decision at will.[126]

The European Court of Human Rights found a violation of the independence requirement of Article 6 in the following aspects of this arrangement:

- the fact that all of the judges were subject to the command authority of the convening officer;[127]
- the convening officer's power to dissolve the tribunal;[128]
- the need to give legal effect to the judgment through confirmation by the convening officer;[129]
- the fact that these weaknesses were not balanced by sufficient safeguards, given the very weak role of the "judge advocate" and the oath of independence sworn by the members of the court;[130]
- and the appearance of dependence and partiality of the court arising from the fact that the judges were all subject to the command authority of the convening officer and subordinate in rank to him.[131]

Upon this decision, the United Kingdom, through the Armed Forces Act of 1996,[132] abolished the institution of the convening officer and allocated its powers to various other organs.[133] Still, under this new arrangement, the European Court of Human Rights found a violation of Article 6(1) in the fact that even under this new regime the military associate judges were not sufficiently protected against outside influences.[134]

Another system of special courts was invalidated by the European Court of Human Rights in the late 1990s: the system of National Security Courts set up pursuant

126 *Id.* at 51-53.

127 Findlay v. United Kingdom, ECtHR, Reports of Judgments and Decisions (RJD) No. 30 (1997-I), at 263.

128 *Id.* at 282, para. 75.

129 *Id.* at 282, para. 77.

130 *Id.* at 282, para. 78, and 293, paras. 103, 105.

131 *Id.* at 282, para. 76. For a critical analysis of this leading decision and its various elements, see Bucherer, *supra* note 59, at 55-61.

132 For details, see R. Bedard, *The right to a fair trial in the services*, in ELRC Hum. Rts. Survey 1998, HR/49, at 58 *et seq.*

133 Bucherer, *supra* note 59, at 55.

134 Morris v. United Kingdom, ECtHR, Complaint No. 38784/97, Press Release 106, at 3, cited *ibid.*

to the Constitution to deal with offences affecting Turkey's territorial integrity and national unity, its democratic regime and its State security in particular. They sat as three-judge benches, of whom one member was a regular officer belonging to the Military Legal Service. The military judges enjoyed certain guarantees of independence and impartiality placing them in a similar position to their civilian counterparts. Both had identical constitutional safeguards. On other hand, during their four-years, renewable term of office, they continued to belong to the army, were subject to military discipline and had assessment reports compiled on them by the army, which, with the administrative authorities, played an important role in decisions pertaining to their appointment. These courts were mostly used to combat Kurdish separatist activities.[135] In *Incal v. Turkey*, a case decided on June 9, 1998, the European Court of Human Rights declared these courts violative of the independence and impartiality guarantee of Article 6(1).[136] According to Bucherer, this setup of courts was abolished in 1999 in the context of the proceeding against Abdullah Öcalan.[137]

In the case of *Yalgin and Others v. Turkey,*[138] the Court had to assess whether the applicants' fears as to a similar Martial Law Court's lack of independence and impartiality could be regarded as objectively justified. The Martial Law Courts had been "set up to deal with offences aimed at undermining the constitutional order and its democratic regime. They enjoyed emergency powers and were required to function in a period of martial law, during which the armed forces were given the task of overseeing the 'internal security' of the country and the regional military commander used police powers to repress acts of violence in his area."[139] They were comprised of five members: two civilian judges, two military judges and an army officer. The military judges chosen "were appointed with the approval of the Chief of Staff and by a decree signed by the Minister of Defense, the Prime Minister and the President of the Republic. The army officer, a senior colonel … was appointed on the proposal of the Chief of Staff and in accordance with the rules governing the appointment of military judges. This officer [was] removable on the expiry of one year after his appointment."[140]

Under these facts, the Court observed that "even appearances may be of some importance…[because] what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused."[141] The Court, finding a violation of Article 6 (1), concluded that the accused's doubts that the court lacked independence and impartiality

135 Bucherer, *supra* note 59, at 63.

136 For a detailed discussion of this case and related Turkish cases, see Bucherer, *supra* note 59, at 61-82.

137 *Id.* at 64.

138 Yalgin and Others v. Turkey, ECtHR, Judgment of 25 September 2001, *available at* http://www.hri.ca/ fortherecord2001/euro2001/documentation/judgments/applno31892-96.htm.

139 *Id.* at para. 44.

140 *Id.* at para. 41.

141 *Id.* at para. 46.

were objectively justified,[142] mainly because of the following aspects which called into question the independence and impartiality of the court:

- "the military judges are servicemen who still belong to the army, which in turn takes orders from the executive;"
- "they remain subject to military discipline and assessment reports are compiled on them for that purpose. They therefore need favorable reports both from their administrative superiors and their judicial superiors in order to obtain promotion;"
- "decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army;"
- and the army officer on the Martial Law Court was "subordinate in the hierarchy to the commander of the martial law and/or the commander of the army corps concerned" and was "not in any way independent of these authorities."[143]

In the Court's view, also "great importance" is attached to the fact that civilians are tried by a court which is composed, even if only in part, of members of the armed forces.[144]

The right not to be held guilty of an act or omission which did not constitute a criminal offence when it was committed is guaranteed by Article 7(1) of the Convention. Regarding this issue, the Court has clarified that "… an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[145] Thus, the law cannot be interpreted extensively to the accused person's disadvantage either. The same provision protects the guilty from a heavier penalty than the one applicable at the time of the offence, but different from the ICCPR it does not give the benefit of a lighter penalty introduced after the commission of the offence.[146] In its paragraph 2, the same article provides for "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the civilized nations."

The principle of *ne bis in idem* (protection form double jeopardy) is expressly non-derogable only under the European Convention and only regards the criminal proceedings taking place in one and the same country.[147]

142 *Id.* at para. 49.

143 *Id.* at para. 43.

144 *Id.* at para. 47.

145 Kokkinakis v. Greece, ECtHR, Judgment of 25 May 1993, Series A, No. 260-A, at 22, para. 52.

146 However, whenever the retroactive application of criminal law is to the accused person's advantage rather than to his or her disadvantage, the Court has found no violation of Article 7(1); *see* G. v. France, ECtHR, Judgment of 27 September 1995, Series A, No. 325-B, at 38, paras. 24-27.

147 *See* Article 4 of Protocol No. 7 to the Convention: (1) "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an of-

3. *The Inter-American Convention on Human Rights, Article 27, and the Jurisprudence of the Inter-American Commission and Court of Human Rights*

> *Since establishment of the State of National Emergency, the number of detentions in the Atlantic Coast Region has increased considerably. These detentions are made on the basis of allegations or vague accusations that the detainee is involved in counterrevolutionary activities. Detention involves violations of the person, and destruction of his home. The detainee is usually kept incommunicado from two to three months, while interrogated in prisons of the State Security forces, while the family remains uninformed of his whereabouts and the reasons for his detention. The State of Emergency has nullified the habeas corpus remedy, the only legal mechanism to prevent incommunicado imprisonment, to require a hearing before a Judge, and above all to demonstrate the physical and emotional condition of the defendant. Abuse of prisoners is frequent in rural zones, and there are many complaints of rape, beatings, harassment and other illegal proceedings in the prison.*[148]

Article 27 of the American Convention on Human Rights was drafted after the model of the derogation clauses contained in the European Convention and the Covenant. Its paragraph 1 reads:

> In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

As discussed in the first chapter,[149] the emergency concept contained in this provision is worded differently from its universal and European counterparts. It is the result of discussions during the Specialized Inter-American Conference on Human Rights held in San José, Costa Rica, in 1969, where El Salvador proposed to add the terms "or other public calamity" ("*u otra calamidad pública*" later refined into "*de peligro público*," public danger) since such natural public calamities like flooding or earthquakes were "situation[s] that [were] not necessarily a threat to internal or external security,

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fence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State." But such proceedings can be reopened "if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case" (Article 4(2) of Protocol No. 7).

148 Description of detentions during a state of emergency in Nicaragua according to a complaint received by the Inter-American Commission of Human Rights. *Available at* http://www1.umn.edu/humanrts/iachr/ country-reports/nicaragua1983-ch2.html.

149 *Supra* at Chapter I, Delimitation of the Problem, note 73.

but which could nevertheless arise."[150] In addition, the title of Article 27 is "Suspension of Guarantees." In line with the international law of human rights and in order to avoid any misinterpretation of the Convention, the Inter-American Court of Human Rights has concluded that the Convention does not allow for a suspension in an absolute sense, because the rights protected by the provisions of the Convention are inherent to the dignity of man. The only limitations or suspensions allowed have to do with the scale and effectiveness of the exercise of such rights;[151] but they cannot be invoked to annihilate the substance of the rights, which should remain untouched.

The Court and the Commission have made it clear that Article 27 applies to *exceptional situations only* which by nature are a temporary measure. For instance, the Commission found Bolivia in violation of the principle of exceptional threat when its authorities exceeded "the limits of state action by disregarding the restrictions on the use of such measures stipulated in the American Convention both with respect to the gravity of the situation and the period of time such measures should remain in effect."[152] It also criticizes systematic extensions of states of emergency.[153] In its most revered advisory opinion on the writ of habeas corpus, the Court cautioned against such emergency measures which cannot be objectively justified in the light of the prescribed requirements of Article 27 and focused on *an inseparable bond between the principle of legality, democratic institutions and the rule of law*. The Court also advised that "the measures that may be taken in any of these emergencies must be tailored to 'the exigencies of the situation,' [and] what might be permissible in one type of emergency would not be lawful in another,"[154] thus, the Court asks for "proportionality and reasonableness of the measures,"[155] which will have to be precise because they would be rendered unlawful if going above the strict necessity to deal

150 OAS Doc. OEA/Ser.K/XVI/1.2, Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos, OAS, Washington D.C., at 319.

151 IACtHR, Advisory Opinion OC-8-87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8, at 37, para. 18.

152 IACHR, Report on Bolivia, 1981, at 23.

153 *See* IACHR, Report on Colombia, 1981, at 40; IACHR, Report on Paraguay, 1978, at 14; IACHR, Report on Bolivia, 1981, at 23; IACHR, Report on Chile, 1985,at 44.

154 IACtHR, Advisory Opinion OC-8/87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8, at 39, para. 22.

155 *Id.* at 39, para. 22. *Ibid.*

with the emergency.[156] The Commission has also found many states of emergency to be in non-compliance with the principle of proportionality.[157]

The emergency powers cannot be invoked to install an authoritarian regime. "The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. That system establishes limits that may not be transgressed, thus ensuring that certain fundamental human rights remain permanently protected… The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times."[158] The Court has also held that it is the duty of the state not only to respect rights but also to guarantee the security of the person,[159] and like any other entity the State is subject to law and morality.

Article 27(2) of the American Convention on Human Rights stipulates:

> The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to a Nationality), and Article 23 (Right to Participate in Government) or of the judicial guarantees essential for the protection of such rights.[160]

156 The Court further exemplified such violations that would occur "if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them there was a misuse or abuse of power. … If this is so, it follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance." Advisory Opinion on Habeas Corpus, *supra* note 154, at 46, paras. 39-40.

157 IACHR, Annual Report, 1986, Nicaragua, where many measures were considered out of proportions, at 165 *et seq.* IACHR, Report on Colombia, 1981, at 219, in relation to the right of personal liberty.

158 IACtHR, Advisory Opinion , *supra* note 154, at 38-40, paras. 20-24.

159 Velásquez Rodríguez Case, IACtHR, Judgment of July 29, 1988, Series C, No. 4, at 146, para. 154.

160 Though the American Convention, compared with other treaties, includes the longest list of non-derogable rights, nevertheless, the Commission has found violations of many states of emergency because of non-compliance with the fundamental principle of non-derogability of certain rights. *See* IACHR, Report on Guatemala, 1983, at 18-19; IACHR, Report on Argentina, 1980, at 26; IACHR, Report on Suriname, 1985, at 17.

As it can be seen, this article includes one of the most important guarantees, the judicial ones, which are essential for the protection of rights. This inclusion came thanks to a proposal from the U.S. delegation in the Second Plenary Session of the San José Conference. In the context of this study, it is also important to note that, during the *travaux préparatoires*, the U.S. delegation had proposed and insisted several times that the list of non-derogable rights should include fundamental guarantees of Articles 6 and 7 that deal with freedom from arbitrary detention and the right to a fair trial, which were nevertheless not accepted by the conference.[161] The Inter-American Court of Human Rights has specified that even in times of emergency the State remains the guarantor of human rights for all people, even for those deprived of liberty, and holds the state accountable for the conditions in detention facilities.[162] The Court has also condemned *incommunicado* detention[163] for thirty-six and thirty-seven days and the appearance in Peruvian courts of the arrested "either blindfolded or hooded, and either in restraints or handcuffs"[164] and has found it to be in itself a violation of article 5(2) of the Convention. A violation is also found in the rulings of the military courts, whose terms of incarceration were "continuous confinement to cell for the first year … and then forced labor, which sentences they [the alleged victims] are to serve in solitary-confinement cells chosen by the Director of the National Bureau of Prisons."[165] Neither the emergency situations nor the fight against terrorism could justify torture or any form of ill-treatment which is prohibited at all times, war or peace.

Within the realm of this study it is important to note another non-derogable right: the right to humane treatment protected by Article 27(2) of the American Convention and read in the light of article 5(2) according to which "all persons deprived of

161 *See* Oraá, *supra* note 2, at 93-94. While the U.S. contributed a great deal to the compilation of the Convention, it nevertheless has not yet ratified the IACHR not only because of considerations such as Article 4 dealing with the right to life, and Article 28, the Federal Clause, but also because of the potential incompatibility of U.S. laws with the provisions of the convention dealing with criminal justice and penal administration. *Cf.* Nadia Ezzelarab & Brian Tittemore, *Round Table Discusses U.S. Ratification of Inter-American Convention on Human Rights,* 2 (1) Human Rights Brief (1994), *available at* http://www.wcl.american.edu/hrbrief/v2i1/iaconv21.htm.

162 *See* Castillo Petruzzi et al. v. Peru, IACtHR, Judgment of May 30, 1999, Series C, No. 52, at 219, para. 195.

163 In *Castillo Petruzzi*, the Court has reasoned that "incommunicado detention is considered to be an exceptional method of confinement because of the grave effects it has on persons so confined. 'Isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prison.'" The Court further stated: "*incommunicado* detention, … solitary confinement in a tiny cell with no natural light, … a restrictive visiting schedule … all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2) of the American Convention." *Id*. at 219, para. 195 and at 220, para. 197.

164 *Id.* at 218, para. 192.

165 *Id.* at 219, para. 193.

their liberty shall be treated with respect for the inherent dignity of the human person." This is the only treaty where this right is explicitly made non-derogable including times of emergency.

The prohibition of *ex post facto* laws is guaranteed by Article 9 of the American Convention. The same provision prohibits the imposition of a heavier penalty than the one which was applicable at the time when the offence was committed, while it also guarantees the right of the guilty to benefit from a lighter penalty which might be introduced after the offence was committed. The principle of *ne bis in idem* is provided by Article 8(4) of the Convention and it concerns only acquittals "by a non-appealable judgment."

Another non-derogable right under the Convention is the right to recognition as a legal person guaranteed by Article 3 and Article 27(2), which warrants entitlement of every person to have his rights and freedoms vindicated before national courts and other competent organs, as well as international bodies. Interestingly, the American Convention places the right to juridical personality above all rights, as it actually is a precondition to enjoy and meaningfully exercise the rest of rights. In the same vogue, the Court places utmost importance to *the trial by competent, independent and impartial tribunals,* and considers them the *essentials of due process*, while condemning the jurisdiction of special or military courts to try civilians in times of emergency.

In a lengthy reasoning in the case of *Castillo Petruzzi et al. v. Peru,* the Court stated:

> 128. … Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process is violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.
>
> 129. A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create "(t)ribunals that do not use the duly established procedures of the legal process … to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."
>
> 130. Under Article 8(1) of the American Convention, a presiding judge must be competent, independent and impartial. In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their

> subordinates will be promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question.
>
> 131. This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. "Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency."[166]

In the Inter-American context, there is a prohibition of suspension of the right to a nationality. Article 20(3) stipulates that "no one shall be *arbitrarily* deprived of his nationality or of the right to change it," which nevertheless does not prohibit deprivation of one's nationality, if this is not done arbitrarily. However, this is an important right, because, as the Court has also confirmed, nationality entitles a person, *inter alia,* to diplomatic protection from that state,[167] even in states of emergency, where deprivation of nationality should not be used as a penalty. In the same line, the Commission while disagreeing with the exceptional powers of the Chilean President to strip Chileans of their nationality in emergency situations during the military junta of the 1970s, stated that given the fact that all emergencies are temporary by nature, it could not see how "it is possible or necessary to take measures of an irreversible nature, that will affect a citizen and his family for the rest of their lives."[168] The Commission referred to Article 19 of the American Declaration, which also recognizes the right to nationality, because Chile was not a party to the Convention. Applying the same standards as with the Convention, the Commission found the deprivation of nationality to be arbitrary and an expression of political intolerance used against political opponents who had no effective right to appeal.[169]

It seems that the real bulwark for the defense of non-derogable rights in times of emergency is Article 27(2) of Convention which provides for "the judicial guarantees *essential* for the protection of such rights." This is the only treaty expressly providing sound grounds for measuring the lawfulness of emergency measures. Obviously, as seen in previous sections, the right to protection from arbitrary detention, *incommunicado* detention and indefinite detention remain the most vulnerable rights in times of emergency. Most studies in this field converge into the necessity of bolstering guarantees related to administrative detention by making them non-derogable

166 *Id.* at 196-197, paras. 128-131. The Court found it to be problematic that the judges presiding over the treason trial were "faceless," and the defendants had "no way of knowing the identity of their judge" nor were they able to assess their competence. *Id.* at 197, paras. 132-133.

167 *Id.* at 182, para. 99.

168 OAS Doc. OEA/Ser.L/V/II.40, Doc. 10, Inter-American Commission on Human Rights – Third Report on the Situation of Human Rights in Chile (1977), at 80, para. 8.

169 The 1961 United Nations Convention on the Reduction of Statelessness, in its Article 8 (4) provides for the right to a fair hearing by a court or other independent body in cases of the deprivation of nationality.

in times of emergency.[170] The measure of administrative detention, lawfully resorted to in some emergencies, should immediately cease with the termination of the state of emergency and all administrative detainees should be freed. The Constitution or some other pertinent legislation should also detail the grounds for administrative detention.[171] The Inter-American Commission has early on expressed itself against indefinite detention as a violation of human rights even in states of emergency, by noting that: "no domestic or international legal norm justifies, merely by invoking this special power, the holding of detainees in prison for long and unspecified periods, without any charges being brought against them for violation of…[a] criminal law, and without their being brought to trial so that they may exercise the right to a fair trial and to due process of law."[172] It has also encouraged states "to limit detentions carried out in states of emergency to a brief period of time and always subject to judicial review."[173]

The Court would advance this view by noting that the judicial review, the judicial "[g]uarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof,"[174] and in times of emergency the non-derogable rights are such rights in need of judicial protection. The Court further dwells on the essential judicial guarantees that cannot ever be suspended because customarily they "will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment."[175] Additionally, the Court explains that the term "*judicial* "can only refer to those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency."[176]

170 *Cf.* Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, *supra* Chapter II.A, note 10; and pertinent studies by U.N. Sub-Commission Special Rapporteur, Mme. Nicole Questiaux, *supra* Chapter I, notes 80-83; and the International Law Association, *supra* Chapter I, notes 69, 76, 78, 87, etc. For a detailed analysis of doctrine and jurisprudence on administrative detention, and its application in countering terrorism, see *ICJ Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism,* December 2005, *available at* http://www.icj.org/IMG/ pdf/Administrative_detent_78BDB.pdf (last visited Nov. 2, 2007).

171 *See* International Commission of Jurists, States of Emergency: Their Impact on Human Rights (1983), at 461, Nos. 16-20.

172 OAS, The IACHR: Ten Years of Activities (1971-1981), (1982), at 337.

173 *Id*. at 318.

174 The Court further states: "The States Parties not only have the obligation to recognize and to respect the rights and freedoms of the persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms." IACtHR, Advisory Opinion, *supra* note 154, at 40-41, para. 25.

175 *Id.* at 42, para. 29.

176 *Id.* at 42, para. 30.

Article 25(1)[177] and Article 7(6)[178] of the Convention were also discussed by the Court and deemed to be essential judicial guarantees indispensable for the protection of the non-derogable rights. Respectively, the Court concluded that Article 25(1) "gives expression to the procedural institution known as '*amparo*', which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention," consequently, "it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations."[179] The same goes for Article 7(6), the right to challenge the lawfulness of detention, which in Court's view is just one component of "*amparo*."[180] The Court is adamant that "the concept of due process of law expressed in Article 8 of the Convention should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention,"[181] and it concludes that "the principles of due process of law cannot be suspended in states of exception" and finds them "necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees."[182]

In many Latin American countries, the writ of habeas corpus had been completely suspended without ensuring any other procedure to challenge the lawfulness of detention.[183] In response the Court finds *habeas corpus* and *amparo* "indispensable for the protection of the human rights that are not subject to derogation,"[184] and also most important "to preserve legality in a democratic society."[185] As regards the fundamental importance of the writ of habeas corpus in the protection of life and physical integrity

177 "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties." Article 25(1) of the American Convention on Human Rights.

178 "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." Article 7(6) of the American Convention on Human Rights.

179 IACtHR, Advisory Opinion on Habeas Corpus, *supra* note 154, at 42-43, para. 32.

180 *Id.* at 44, para. 34.

181 IACtHR, Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights), Series A, No. 9, at 35, para. 29.

182 *Id.* at 35, para. 30.

183 Oraá, *supra* note 2, at 111.

184 Advisory Opinion, Judicial Guarantees in States of Emergency, *supra* note 181, at 35, para. 30.

185 Advisory Opinion, Habeas Corpus, *supra* note 154, at 48, para. 42.

of a person, the Court interprets as follows: "In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment... 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."[186] Later, the Court found violations of the right to habeas corpus guaranteed by Article 7(6) in relation to the prohibition in Article 27(2) of the Convention, on the part of Peru on the grounds that "the control and jurisdiction of the armed forces over the San Juan Bautista Prison translated into an implicit suspension of the habeas corpus action, by virtue of the application of the Supreme Decrees that imposed the state of emergency and the Restricted Military Zone status."[187]

The Commission has also held the position that due process is a fundamental guarantee which cannot be derogated form even in states of emergency. In a report on Argentina, though Argentina was not a party to the Convention, the Commission wrote: "certain fundamental rights can never be suspended, as in the case, among others, of the right to life, the right to personal safety, or the right to due process…in other words, under no circumstances, may governments employ…the denial of certain minimum conditions of justice as the means to restore public order."[188] The same stand is expressed in a report on Guatemala, which is a party to the Convention. Criticizing the deficiencies of the Courts of Special Jurisdiction the Commission suggested that the law creating these courts should be modified in order to comply with "the judicial guarantees indispensable to due process included in the ACHR, which should not be suspended even in emergency situations."[189]

4. The African Convention on Human and Peoples' Rights and the Jurisprudence of the African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights positions itself against derogations by containing no such provision. Interpreting the Charter, the African Commission on Human and Peoples' Rights has stated that the states parties cannot dero-

186 *Id.* at 44, paras. 35-36. In the same paragraphs the Court explains that "[t]his conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments."

187 Neira Alegría et al. v. Peru, IACtHR, Judgment of January 19, 1995, OAS Doc. OAS/Ser. L/V/III.33, Doc. 4, Annual Report of the Inter-American Court of Human Rights 1995, at 60, para. 84.

188 IACHR, Report on Argentina (1985), at 26.

189 IACHR, Report on Guatemala (1983), at 18.

gate from their treaty obligations even in emergency situations. In a case dealing with killings and disappearances during a civil war, the Commission reiterated that no circumstances, not even a civil war, can "be used as an excuse by the state (for) violating or permitting violations of rights in the African Charter."[190] Even if the perpetrator is not a government agent, "the government [has] a responsibility to secure the safety and the liberty of its citizens,"[191] and also it is under the obligation to conduct investigations into crimes, such as assassination and killing, committed during such a time. The Commission has further added that Article 27(2) of the African Charter asks that the rights "be exercised with due regard to the rights of others, collective security, morality and common interest," and its limitations most be interpreted "strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation must not erode a right such that the right itself becomes illusory."[192]

B. Customary International Law

The rights listed in the non-derogation provisions could very well be considered customary international law, as by default they are not to be deviated from at any time and since there is a very widespread and representative participation of states in those treaties. Particularly, the four common rights listed in them, namely the right to life, the prohibition on torture and cruel and degrading treatment or punishment, the prohibition on slavery, and the prohibition on *ex post facto* criminal laws might be considered to have attained the status of *jus cogens*.

The right to a fair trial, which does not find itself in the non-derogable list, could nevertheless be considered, in the majority of its components, to also constitute part of customary law, and thus could be applicable in emergency situations as well. There is particularly a core of procedural rights which are essential to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation, and the suspension of such set of guarantees cannot be *strictly necessary* in any emergency.[193]

It is important to note that the non-derogation provisions *per se*[194] forbid derogations that are incompatible with other obligations under international law. In this respect we can consider, *inter alia,* international humanitarian law, which has the

190 *See* Commission Nationale des Droits de l'Homme et des Libertés v. Chad, Communication No. 74/92, ACHPR, Decision adopted during the 18th Ordinary session, October 1995, para. 40, *available at* http://www.up.ac.za/chr/.

191 *Id*. at para. 41.

192 Constitutional Rights Project v. Nigeria, ACHPR, Communication Nos. 140/94, 141/94, 145/95, 26th Ordinary Session, Kigali, 1-15 November 1999, para. 41-42.

193 For an enumeration of such procedural rights, also considered functionally non-derogable, except, maybe, in the most unusual emergency, see Principle 70 of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* U.N. Doc. E/CN.4/1985/4.

194 *See* Article 4(1) of the ICCPR, Article 15(1) of the ECHR and Article 27(1) of the ACHR.

broadest consent of the states, *jus cogens* as peremptory norm of international law, etc.

It is generally understood that international humanitarian law, both customary and codified, is highly relevant in protecting human rights during states of emergency, since it is designed to be fully applicable in armed conflicts, which, in any event, do constitute the hardest of the emergency situations. International humanitarian law, namely, the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, provide a number of fundamental fair trial guarantees, which are to be respected at all times during war. They can also be considered to be part of customary law, first for the reason that "collected practice appears to indicate" that these guarantees apply equally outside armed conflict, and second, because "the human rights case law has treated them as largely non-derogable."[195] The Geneva Conventions and its Protocols governing the law of war prescribe due process guarantees to be applicable to armed conflicts. *A fortiori*, such guarantees must govern the actions taken by the states when resorting to emergency situations, which most of the time are of a less severe nature.[196] Particularly, "the substance of common Article 3, based on customary law, is part of *jus cogens* … binding on all states. Consequently, the obligations stated under Article 3 transcend that article's field of application; they are valid for all forms of armed conflict. The International Court of Justice…confirmed this in its judgment in the case of *Nicaragua versus the United States*…[where] it reached the conclusion that Article 3 as part of customary law, constitutes a 'minimum yardstick' applicable to all armed conflicts."[197]

The humane treatment of persons deprived of their liberty and also of prisoners of war, is guaranteed under international human rights law, as discussed above, and also

195 1 Customary International Humanitarian Law 299, 301 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

196 *See also* the Human Rights Committee's understanding on this issue in General Comment No. 29, *supra* note 37. Some scholars might be more skeptical of such an application. For Fitzgerald, seeing the bottle half empty, "the restricted scope of international humanitarian law *ratione materiae* limits the usefulness of customary humanitarian law as a source of comprehensive norms for protecting human rights during all types of emergency," whereas for Meron, who sees the same bottle half full, the fact that certain human rights protection norms in states of emergency have gained customary law status "would strengthen the moral claim of international community for their observance." Joan Fitzpatrick , Human Rights in Crisis: The International System for Protecting Rights During States of Emergency 67 (1994).

197 Hans Peter Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct,* 28 Int'l Rev. Red Cross, Jan.-Feb. 1988, at 38, 44-45. Other scholars have also joined the opinion that the core of Article 3 might has attained the status of *jus cogens,* though not agreeing with the methodology used by the International Court of Justice in arriving to the conclusion that Article 3 constitutes customary law. *See* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348, 357-358 (1987).

under international humanitarian law.[198] It has also been reaffirmed in national and international case law; consequently it is already a rule of customary international law binding on all states.[199]

The prohibition of enforced disappearances is also established as a rule of customary international law by state practice. Enforced disappearances *per se* violate a number of rules of customary international law, *inter alia,* prohibition of arbitrary deprivation of liberty and prohibition of torture and other cruel or inhuman treatment, as well as a number of human rights generally such as the right to life, freedom and personal safety, the right to a just and public trial.[200] As such, it has been expressly prohibited by the legislation of many countries, and no official contrary practice is found to exist.[201] It has also been constantly condemned in resolutions of the UN General Assembly, the UN Security Council and the UN Human Rights Commission adopted by consensus.[202] Additionally, it is deemed a crime against humanity under the Statute of the International Criminal Court Article 7(1)(i), and its definition is delineated in Article 7 (2)(i) as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them form the protection of the law for a prolonged period of time." Though not entered into force yet, the International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the UN General Assembly on December 20, 2006. Its Article 1 mandates that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance." Its Article 2 provides for the definition of enforced disappearances, while Article 6 classifies it as a crime against humanity.[203]

198 *See* Common Article 3 of Geneva Conventions, Article 12(1) of the First Geneva Convention, Article 12(1) of the Second Geneva Convention, Article 13 of the Third Geneva Convention, and Articles 5 and 27(1) of the Fourth Geneva Convention.

199 Customary International Humanitarian Law, *supra* note 195, at 306-308.

200 24th International Conference of the Red Cross (1981).

201 For a list of the states having established such legislation *see* Customary International Humanitarian Law, s*upra* note 195, at 341, n. 251.

202 *Ibid.* n. 256 and 257.

203 In the context of this study, it should be noted that the United States, who is not a signatory to the Convention, expressed disappointment regarding the text of the Convention, conveying major issues of concern such as lack of "intentionality" requirement in Article 2, or making reservations on issues such as the right to truth, the criminalization of enforced disappearances as an autonomous offense, *non-refoulement*, statute of limitations, unavailability of defense of obedience to superior orders etc. For more information on the U.S. position, see *U.S. Statement on the Draft Convention on Enforced Disappearances*, Geneva, June 27, 2006, available at http://www.usmission.ch/Press2006/0627U.S.StatementonForced Disappearances.html.

Both international human rights law and humanitarian law provide for the prohibition of arbitrary detention, and they mandate detailed procedures for initial and continued detention, which is only to be imposed to meet utmost security needs. Not only does the law on the books prohibit arbitrary detention both in human rights treaties and in the Geneva Conventions and its Protocols, but arbitrary detentions have been constantly condemned by UN organs, human rights monitoring bodies and courts. The UN Security Council in Resolutions 1019, 1034, and 1072 has denounced the arbitrary detentions in Bosnia and Herzegovina and Burundi;[204] the UN General Assembly in Resolution 50/193 has expressed its concern and disapproval regarding unlawful detention in Yugoslavia.[205] These resolutions have been mostly adopted without a vote. Even in cases when a vote has been against the resolution it had not been against the concept of arbitrary detention, which they condemned anyway, but rather for political reasons.[206] The HRC in its General Comment 29 on Article 4 of the ICCPR regarding states of emergency notes that under no circumstances can such an emergency be invoked "as a justification for acting in violation of humanitarian law, peremptory norms of international law, for instance … through arbitrary deprivation of liberty." As discussed in previous sections, a number of established procedural requirements to prevent arbitrary deprivation of liberty have been found by case law to be functionally non-derogable though not listed in the non-derogable rights provisions. Such procedural guarantees include the right of a person to be informed promptly of the reasons for his arrest, the right of the person deprived of his liberty to be brought promptly before a judge or other officer authorized to exercise judicial power, and the right of a person deprived of liberty to challenge to lawfulness of detention.

Furthermore, humanitarian law has established as a rule of customary law the guarantee that "no one can be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees."[207] Though these judicial guarantees differ from treaty to treaty, nevertheless, some of the most important aspects of a fair trial included in them are the following:

– the right to be tried by a regularly constituted court offering the essential guarantees of independence and impartiality;
– the right to be presumed innocent until proven guilty;
– the right of the accused to be informed without delay of the nature and cause of the accusation against him;

204 SC Res. 1019 (1995) on violations of international humanitarian law in the former Yugoslavia; SC Res. 1034 (1995) on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, available at http://www.un.org/Docs/scres/1995/scres95.htm. *See also* Res. 1072 (1996) on the situation in Burundi, *available at* http://www.un.org/Docs/scres/1996/scres96.htm.

205 *Available at* http://www.un.org/documents/ga/res/50/ares50-193.htm.

206 *See* Russia's vote against U.N. General Assembly Resolution 50/193 regarding Yugoslavia.

207 Customary International Humanitarian Law, *supra* note 195, at 352-371.

- the right before as well as during the trial to all necessary rights and means of defense, including sufficient time and facilities to prepare the defense;
- the right to defend oneself or to be assisted by a lawyer; the right to free legal assistance if the interests of justice so require; the right to communicate freely with the lawyer;
- the right to assistance of an interpreter;
- the right not to be convicted of an offence except on the basis of individual penal responsibility;
- the right to be tried in one's presence;
- the right not to be compelled to testify against oneself, or to confess guilt;
- the right to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- the right to have the judgment pronounced publicly;
- the right to an appeal; right to trial without undue delay.[208]

C. The Community of Nations' Responses to Terrorism

In surfing through the case law dealing with alleged violations of due process rights in times of emergency, the context of terrorism turned out to be quite a familiar term. While many states have grappled with the issue of internal terrorism as ground for a state of emergency, the international community has also been constantly engaged with the issue. Though this discussion will focus on due process rights, where visible in such engagement, a cursory look to the overall reaction of international community to terrorism is also deemed appropriate. Let us first observe any such reactions before September 11, 2001, followed by the response of the international community to measures reacting to this horrific event.

The following section views the responses of the international community from two angles: its reactions as a whole, and also as individual states.

1. The Response of the International Community as a Whole

a. Before September 11, 2001

The United Nations is no doubt the most significant intergovernmental organization representing the international community as a whole. Moreover, since the basic

208 *See* Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; Article 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; Articles 105-108 of the Geneva Convention Relative to the Treatment of Prisoners of War; Articles 71-73 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949; common Article 3 of the four Geneva Conventions; Article 75(4) of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and Article 6 of Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

source of international law is treaty law, the UN through treaties and conventions bears great responsibility for producing the legal framework for the suppression of terrorist acts across borders and for the apprehension and prosecution of perpetrators of such terrorism. This legal framework also delineates ways and means to prevent easy access of terrorists to financial, human and material resources. There is a variety of UN anti-terrorism treaties predating September 11. Actually the UN's predecessor, the League of Nations, intending to be more effective in the "prevention and punishment of terrorism of an international character" drafted a pertinent convention in 1937.[209] Though it never entered into force for lack of the necessary number of ratifications, its historical relevance bears mentioning it. An annex to the above convention included the Convention for the Creation of an International Criminal Court with the view to bringing to trial "persons accused of an offence dealt with in the Convention for the Prevention and Punishment of Terrorism."[210] The United Nations followed suit since early on with the Convention on the High Seas,[211] dealing with the crime of piracy, considered by some as an act of terrorism,[212] and drafted fifteen such conventions that dealt with various forms and manifestations of non-state actors' terror-violence.[213] Such treaties range from the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft,[214] to the International Convention for the Suppression of the Financing of Terrorism, of 9 December 1999.[215] Since the year 2000, the UN has worked to finalize a comprehensive convention on international terrorism.[216] Additionally, the UN General Assembly has made numerous policy recommendations on measures needed to prevent and fight international terrorism, including state terrorism.[217] Its resolutions and declarations against international terrorism can be traced back to 1972.[218] More thorough studies were entrusted later to the Sub-Commission on Prevention of Discrimination and

209 Convention for the Prevention and Punishment of Terrorism, 19 League of Nations O.J. 23 (1938), League of Nations Doc. C.546(I).M.383(I).1937.V (1938) (16 November 1937). League of Nations Doc. C.546(I).M.383(I).1937.V (1938) (16 November 1937), Annex.

210 Article 1 of the Convention for the Creation of an International Criminal Court.

211 U.N. Doc. A/Conf/13/L.52-55 & 56 & 58 (29 April 1958).

212 M. Cherif Bassiouni, International Terrorism: Multilateral Conventions (1937-2001) 91 (2001).

213 *Id.* at 3. Text of these conventions at 91-231.

214 U.N. Doc. A/C.6/418/Corr.1, Annex II, (14 September 1963).

215 U.N. Doc. A/54/109 (9 December 1999).

216 *See* Draft Comprehensive Convention on International Terrorism, U.N. Doc. A/C.6/55/1 (28 August 2000).

217 Bassiouni, *supra* note 212, at 325-369.

218 *See* General Assembly Resolution 3034 (XXVII) of 18 December 1972, on "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes."

Protection of Minorities starting with a Working Paper of Professor Kalliopi K. Koufa pursuant to Sub-Commission resolution 1996/20.[219] Koufa continued for many years to serve in the position of the Special Rapporteur on human rights and terrorism, and wrote several reports on this issue.[220]

Furthermore, the UN Security Council has been very much concerned with the fight against international terrorism. Its Resolution 1267 of October 15, 1999[221] insisted and demanded that the Taliban regime of Afghanistan "cease the provision of sanctuary and training for international terrorists and their organizations … and cooperate with efforts to bring indicted terrorists to justice," as well as "turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted [*i.e.*, the United States]."[222] The Resolution also established a subsidiary body that came to be known as "the Al-Qaida and Taliban Sanctions Committee."[223] After September 11, the Security Council established two additional subsidiary bodies in order to deal with terrorism related issues: the Counter-Terrorism Committee (the "CTC")[224] and the 1540 Committee.[225] Resolution 1267, enhanced by a number of other resolutions after September 11, has resonated around the world, causing waves of potentially unlawful measures regarding the freezing of funds and economic resources. The most recent *Kadi* case before the European Court of Justice displayed problems with the Security Council mechanisms and the implementing European Community regulations, which in the present case had infringed on Kadi's and Al Barakaat's right to be heard, and on the principle of effective judicial protection.[226]

219 *See* UN Economic and Social Council, E/CN.4/Sub.2/1997/28, 26 June 1997.

220 Such reports submitted by the Special Rapporteur on Human Rights and Terrorism, Ms. Kalliopi Koufa from 1997-2004 can be accessed at http://www2.ohchr.org/english/issues/terrorism/rapporteur/index.htm.

221 United Nations S/RES/1267 (1999), October 15, 1999.

222 *Ibid*. The Resolution further *decided* that all States shall "[d]eny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban … [and they also shall] freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban."

223 The sanctions regime introduced by Resolution 1267 (1999) has been amended and strengthened by a number of resolutions, such as 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005) and the most recent one that Resolution 1735 (2006). Such sanctions now cover individuals and entities associated with Al-Qaida, Osama bin Laden and/or the Taliban wherever they are located. *See* http://www.un.org/sc/ committees/1267/index.shtml . To assist in the implementation of this sanctions regime, the Committee maintains a list of individuals and entities known as "the Consolidated List." For the July 27, 2007 updated list and a guideline of how to search the list, *see* http://www.un.org/sc/committees/1267/consolist.shtm.

224 Established by S/RES/1373 (2001), September 28, 2001.

225 Established by S/RES/1540 (2004), April 28, 2004.

226 Yassin Abdullah Kadi, and Al Barakaat International Foundation *v.* Council of the European Union and Commission of the European Communities, Case C-402/05 P and C-415/05 P, Judgment of the Court (Grand Chamber) 3 September 2008. The European

The international community has also cooperated regionally through multilateral treaties and through other means and modalities of cooperation.[227] Deeply concerned with the rise of terrorist acts, these regional conventions put emphasis on the collaborative efforts to prevent and punish such crimes, mostly through penalizing such acts in their domestic legal systems, through extraditing or prosecuting, and other modalities of international collaboration in penal matters related to terrorism. The only treaty that also takes care to add the guarantees of due process is the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance,[228] ratified by the U.S. on October 20, 1976.[229] Such protection is extended in its Article 4: "Any person deprived of his freedom through the application of this convention shall enjoy the legal guarantees of due process."

Court of Justice annulled the EU Council's Regulation of 2002 insofar as it froze Mr. Kadi and Al Barakaat's assets in conformity with the UN Security Council's Sanctions Committee's designation of them, on October 19, 2001, as being "associated with Usama bin Laden, Al-Qaeda or the Taliban." It found that the "rights of the defence, in particular, the right to be heard, and the right to effective judicial review of those rights, were patently not respected," as "the regulation at issue provides no procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the list, either at the same time as, or after, that inclusion. At no time did the Council inform Mr. Kadi and Al Barakaat of the evidence adduced against them in order to justify the initial inclusion of their names in the list. That infringement of Mr. Kadi and Al Barakaat's rights of defence also gives rise to a breach of the right to a legal remedy, inasmuch as the appellants were also unable to defend their rights in satisfactory conditions before the Community courts." The freezing of their funds also constituted, in the Court's view, an "unjustified restriction of Mr. Kadi's right to property." The Court, however, maintained the effects of the regulation for a period of three months, to "allow the Council to remedy the infringements found." *The Court Annuls the Council Regulation Freezing Mr. Kadi and Al Barakaat's Funds*, Court of Justice of the European Communities, Press Release No. 60/08, 3 September 2008, *available at* http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080060en.pdf.

227 *See* OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, concluded at Washington, D.C. on 2 February 1971, OAS T.S. No. 37; European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977; SAARC Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987; Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999; Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999; OAU Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14 July 1999.

228 *Id.* at http://www.oas.org/juridico/english/Treaties/a-49.html.

229 List of Ratifications, at http://www.oas.org/juridico/english/sigs/a-49.html (last visited October 2, 2007).

b. After September 11, 2001

The horrendous terrorist attack against the United States on September 11, 2001 produced not only an exceptional and world-wide reaction of sympathy and solidarity, but also an unprecedented institutional response and assertion of power by the United Nations through its Security Council. The Security Council had been seized of the matter since September 12, 2001, while smoke was still billowing from the ruins of the Twin Towers. Its Resolution 1368 (2001) of the same day regarded and condemned the attack "as a threat to international peace and security," and called "on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks," also stressing that "those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable."[230] However, it is its Resolution 1373 of September 28, 2001[231] which sent out a powerful message to *all states*, members and non-members of the United Nations. By reaffirming the individual and the collective right to self-defense, the Security Council invoked its enforcement powers of the Chapter VII and *decided, inter alia*, that *all states shall* "[prevent and suppress the financing of terrorist acts," and that they shall "[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;" furthermore, it decided that states "refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts" and that they "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens." The "decision" language was backed up by the establishment of a Committee of the Security Council (Counter Terrorism Committee, CTC), a body to monitor the implementation of this resolution, and it gave states 90 days to report to the Committee regarding such implementation. While this resolution ordered states to add to their domestic legislation of penal laws[232] and asks them to ensure that "terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts," there is not a word that refers to the observance of human rights while apprehending and prosecuting the perpetrators.

The other committee active at present is the Security Council Committee established pursuant to resolution 1540 (2004),[233] that deals with the measures to be taken by states against the proliferation of nuclear, chemical and biological weapons, and weapons of mass destruction as a serious threat to international peace and security, as well as their illicit trafficking.

230 United Nations S/RES/1368 (2001) of September 12, 2001.

231 S/RES/1373 (2001) of September 28, 2001.

232 A scholar referred to this item of the resolution as the "Security Council's expanding authority" which, according to him, is incompatible with democratic theory because "states that signed the United Nations Charter did not foresee that the Security Council would venture into legislating domestic criminal law." *See* L. Ali Khan, A Theory of International Terrorism: Understanding Islamic Militancy 266 (2006).

233 S/RES/1540 (2004) of April 28, 2004.

Since September 11, the condemnation of, and the design of proper measures addressing, terrorism has been a centerpiece of the activities of the United Nations. From setting up the office of a Special Rapporteur on the promotion and protection of human rights while countering terrorism,[234] to the dedication to coordinate and strive for coherent efforts through the Counter-Terrorism Implementation Task Force (CTITF) established by the Secretary-General in July 2005, and further to the 2005 World Summit of 14–16 September 2005, the General Assembly has remained seized of the fight against terrorism. In the outcome document of the 2005 World Summit, the international community reiterated that it "strongly condemn[s] terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security."[235] It also cautions that "international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law."[236] The General Assembly's initiatives are numerous and ongoing. The ambit of this paper warrants highlighting two such activities.

First, Resolution 60/158[237] on the "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" deals with the important issue of the compatibility of counter-terrorism measures with human rights obligations. While the instrument stresses the need to continue the fight against terrorism,[238] it reminds states that they are under an obligation "to protect *all human rights* and fundamental freedoms of *all persons*," and that the States "must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular inter-

234 Commission on Human Rights, Resolution 2005/80 of 21 April 2005. His mandate includes, *inter alia*: "[t]o make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, including, at the request of States, for the provision of advisory services or technical assistance on such matters." In his latest report, the Special Rapporteur, Professor Martin Scheinin, highlights a number of issues that relate to the right to a fair trial in the fight against terrorism, and he concludes with basic principles as elements of best practice in securing the right to a fair trial in terrorism-related cases. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/63/223, 6 August 2008.

235 Report on the 2005 World Summit Outcome, para. 81, *available at* http://www.un.org/terrorism/ makingadifference.html .

236 *Id.* at para. 85.

237 A/RES/60/158 of December 16, 2005.

238 "*Reaffirming* that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism." *Id.*

national human rights, refugee and humanitarian law."[239] The resolution makes particular mention of the necessity of compliance with Article 4 of the ICCPR and that states, at all times must "respect certain rights as nonderogable in any circumstances" while requiring that "any measures derogating from the provisions of the Covenant must be in accordance with that article in all cases," underlining particularly "the exceptional and temporary nature of any such derogations."[240] Additionally, it requires that states cooperate fully with the Special Rapporteur on the promotion and protection of human rights while countering terrorism.

The second initiative is the adoption by the General Assembly of the United Nations Global Counter-Terrorism Strategy,[241] on September 8, 2006, based on many elements proposed by the Secretary-General in his May 2, 2006 report, entitled *Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy.* This strategy is now considered to be "a unique global instrument that will enhance national, regional and international efforts to counter terrorism."[242] First and foremost, all states resolved to "make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism."[243] In discussing measures that would address conditions conducive to the spread of terrorism, the strategy aims, *inter alia*, at addressing issues of "prolonged unresolved conflicts, [and] dehumanization of victims of terrorism in all its forms and manifestations," while simultaneously seeking to "promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions" and launch an Alliance of Civilizations initiative.

Special attention is focused on combating terrorism through states resolving to "refrain from organizing, instigating, facilitating, participating in , financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that [their] respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens...,[to] deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens…. [and also to] ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts…"

While resolving to take such measures to prevent, control and suppress terrorism, the states also noted that it was important to ensure respect for human rights for all and the rule of law as the basis of the fight against terrorism and to observe compliance with their obligations under international law, in particular human rights law, refugee law and international humanitarian law. The Plan of Action had states in

239 *Ibid.*

240 *Id.* at para. 3.

241 *See United Nations General Assembly Adopts Global Counter-Terrorism Strategy*, at http://www.un. org/terrorism/strategy-counter-terrorism.html. This Strategy consists of a Resolution and an Annexed Plan of Action.

242 *Ibid.*

243 *Id.* at Plan of Action.

agreement to "consider becoming parties without delay to the core international instruments on human rights law, refugee law and international humanitarian law, and implementing them, as well as to consider accepting the competence of international and relevant regional human rights monitoring bodies." Additionally, states would strive "to develop and maintain an effective and rule of law-based national criminal justice system that can ensure … that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations."[244]

Regional cooperation, particularly through inter-governmental organizations and their legal response to terrorism was also magnified after September 11. This section provides a glance at two regions: the Americas and Europe.

The Hemisphere's Ministers of Foreign Affairs of the Organization of American States, on September 21, 2001 declared: "Individually and collectively, we will deny terrorists the capacity to operate in this Hemisphere. This American family stands united."[245] Following such resolve, the Inter-American Convention against Terrorism[246] was drafted. It entered into force in July 2003. The Convention covers measures to prevent, combat, and eradicate the financing of terrorism, seizure and confiscation of funds or other assets, cooperation among law enforcement authorities, mutual legal assistance, transfer of persons in custody, denial of refugee status and asylum, etc. Its Article 15, Human Rights, sets that such measures "shall take place with full respect for the rule of law, human rights, and fundamental freedoms."[247] It further accepts that the Convention cannot be "interpreted as affecting other rights and obligations of states and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law."[248] In its third paragraph, in quite vague and general language, it mandates that "[a]ny person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed *fair treatment*, including the enjoyment of all rights and guarantees *in conformity with the law of the state* in the territory of which that person is present and *applicable provisions of international law*."[249] Furthermore, the Inter-American Committee against Terrorism, known by its Spanish acronym as CICTE,[250] has a strong presence in the

244 Global Counter-Terrorism Strategy, at http://www.un.org/terrorism/strategy-counter-terrorism.html.

245 Hemisphere's Ministers of Foreign Affairs, September 21, 2001, *available at* http://www.oas.org/ key_issues/eng/KeyIssue_Detail.asp?kis_sec=10.

246 OAS, AG/RES. 1840 (XXXII-O/02), adopted on June 3, 2002.The treaty has been signed by all 34 active member states and ratified by 17.

247 *Id*. art. 15(1).

248 *Id*. art. 15(2).

249 *Id*. art. 15(3) (*emphasis added*).

250 Established by OAS, AG/RES. 1650 (XXIX-O/99) (1999).

region mostly through technical assistance and specialized training in port, airport, customs and border security, as well as through offering legislation and legal assistance.

In Europe, the Council of Europe Convention on the Prevention of Terrorism[251] entered into force on June 1, 2007. As of May 10, 2008, it has been ratified by fourteen member states, while twenty-nine member states have signed it.[252] The Convention is the first international treaty which criminalizes certain actions that could lead to acts of terrorism, such as incitement,[253] recruitment for terrorism[254] and training for terrorism.[255] While it criminalizes such acts, it also mandates conditions and safeguards that the convention be carried out "respecting human rights obligations" and also "subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society" as always excluding "any form of arbitrariness or discriminatory or racist treatment."[256]

251 Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005 (CETS No. 196).

252 http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=196&CM=0&DF=&CL=ENG.

253 *See* Council of Europe Convention on the Prevention of Terrorism, Article 5 – Public provocation to commit a terrorist offence: (1) For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed. (2) Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

254 Council of Europe Convention on the Prevention of Terrorism, Article 6 – Recruitment for terrorism: (1) For the purposes of this Convention, "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group. (2) Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

255 Council of Europe Convention on the Prevention of Terrorism, Article 7 – Training for terrorism: (1) For the purposes of this Convention, "training for terrorism" means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose. (2) Each Party shall adopt such measures as may be necessary to establish training for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

256 Council of Europe Convention on the Prevention of Terrorism, Article 12.

Another front of concern is the improvement of national prevention policies, and the reinforcement of international cooperation in the prevention of terrorism, particularly in the field of extradition and mutual assistance.

Finally, one more document warrants reference: the Council of Europe Guidelines on Human Rights and the Fight against Terrorism.[257] These guidelines are based on the guarantees of the European Convention on Human Rights and Fundamental Freedoms and on the case-law of the European Court of Human Rights. They constitute the primary source for the content of these guidelines. The protections under the UN Covenant on Civil and Political Rights and the observations and views of the United Nations Human Rights Committee are another such source. Within the realm of this study, this document provides a set of guiding principles to be considered by states while they carry out their "obligation to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life" and this "positive obligation fully justifies States' fight against terrorism."[258] In paragraph II, any form of arbitrariness, or discriminatory or racist treatment are prohibited. Lawfulness must characterize all measures taken to combat terrorism and any restriction to human rights "must be defined as precisely as possible and be necessary and proportionate to the aim pursued."[259]

Paragraph IV restates the absolute prohibition of torture or of inhuman or degrading treatment or punishment "in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted." Also, while fighting against terrorism, "States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable."[260] Any measures that interfere with privacy[261] must be provided for by law, and a challenge of the lawfulness of such measures before a court must be available. Any person suspected of terrorist activity can be arrested on reasonable suspicion. He or she must be informed of the reasons for the arrest, and also be brought promptly before a judge. The suspect must have access to a court to challenge the legality of the arrest and police custody. A reasonable period of time in police custody must be provided for by law.[262]

If detained pending trial, the suspect is "entitled to regular supervision of the lawfulness of his or her detention by a court."[263]

257 Council of Europe Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies.

258 *Id.* at para. I.

259 *Id.* at para. III.

260 *Id.* at para. XVI.

261 Such as body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents. *Id*. at para.VI.

262 COE Guidelines, *supra* note 257, para. VII.

263 *Id.* at para. VIII.

A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law and is presumed innocent until proven guilty. However, in the context of terrorism, "certain restrictions to the right of defence, in particular with regard to: (i) the arrangements for access to and contacts with counsel; (ii) the arrangements for access to the case-file; (iii) the use of anonymous testimony," can be justified when strictly proportionate to their purpose. Such restriction also asks for "compensatory measures to protect the interests of the accused… so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance."[264] Also, the penalties must be provided for by law.

When deprived of liberty for terrorist activities, the detainee must be treated with due respect for human dignity, though he could "be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to: (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client; (ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters; (iii) the separation of such persons within a prison or among different prisons, on condition that the measure taken is proportionate to the aim to be achieved."[265]

Paragraph XV provides for derogations when the fight against terrorism happens in a situation of war or public emergency which threatens the life of the nation. Temporary derogation from certain international obligations, to the extent strictly required by the exigencies of the situation, and within the limits and under the conditions fixed by international law, are justified, upon notifying the competent authorities of such derogations. However, under no circumstance can states "derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law," no matter how grave are the acts of the person suspected or convicted of terrorist activities. The States are obliged to reassess on regular basis "the circumstances which led to the adoption of such derogations …with the purpose of lifting these derogations as soon as these circumstances no longer exist."[266]

2. The Response of the International Community as Individual States

It was not only the United States that has been victimized by terrorism, although the enormity of September 11, 2001 was unparalleled. Acts of terror have plagued many other countries as well. The ETA in Spain, the Baader-Meinhof Gang, the self-styled Red Army Faction, in Germany, the Brigate Rosse in Italy, the Sendero Luminoso in Peru, the various terrorist groups in the Middle East – they all tested the limits of the rule of law. It is beyond the reach of this study to analyze the responses given by target countries and governments on a global or even representative basis. Many

264 COE Guidelines, *supra* note 257, para. IX.

265 *Id.* at para. XI.

266 *Id.* at para. XV.

of these responses have been analyzed by the various universal and regional human rights bodies, and have been analyzed *supra* in the review of their jurisprudence.

One of the countries hit particularly hard was the United Kingdom of Great Britain and Northern Ireland. The Irish Republican Army, dedicated to the goal of uniting Northern Ireland with the Irish Republic of its Catholic co-religionists, committed acts of terrorism in Northern Ireland and on the British mainland over a long period of time. In the 1970s, the United Kingdom responded by invoking the Civil Authorities Act (Special Powers) of 1922 to transfer extraordinary powers to the Executive Branch, including the power of internment.[267] As stated above, in contrast with the HRC and the Inter-American Court, the European Court has accepted far-reaching extraordinary powers of arrest and detention, including internment, without the possibility of judicial review, particularly in connection with the situation in Northern Ireland.[268] Still, it was backing up its conclusion by expressing its satisfaction at the existence of safeguards against such abuse as arbitrary behavior and *incommunicado* detention.[269] Such guarantees were: – "the remedy of habeas corpus … to test the lawfulness of the original arrest and detention;" – the fact that "detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest;" – the fact that "within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear … that … the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld;" – and the fact that "detainees are entitled to inform a relative or friend about their detention and to have access to a doctor."[270]

After September 11, a new British law, the Anti-terrorism, Crime and Security Act of 2001[271] allowed for indefinite detention of non-citizen terrorist suspects who could not be deported because of concerns they would be tortured upon their return. The House of Lords declared this law to be both disproportionate and discriminatory given the limits of deportation as an anti-terrorism device and the fact that the extraordinary and draconian powers of indefinite detention only apply to non-citizens.[272] This was an important decision under Human Rights Act of 1998, but did not strike down relevant provisions of the Act. In accordance with the Human Rights Act, the decision only declared their incompatibility with the rights and derogation provisions of the Act and, by implication, the fair trial rights and derogation provi-

267 *See* Warbrick, *supra* note 96, at 370-371.

268 Particularly with reference to the case of *Ireland v. United Kingdom*, *supra* note 95, at 74-75, para. 196, and especially 212-214.

269 Brannigan and McBride v. United Kingdom, *supra* note 102, at 575-576.

270 *Id.*

271 Anti-terrorism, Crime and Security Act of 2001, c. 24 (Eng.).

272 A (FC) and others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56.

sions in Articles 5 and 15 of the ECHR.[273] The British government allowed the indefinite detention to lapse.[274] The majority of Lords considered it decisive that the indefinite detention only addressed aliens.[275] The British Parliament repealed these provisions on March 16, 2005.[276] In their place, it enacted new legislation providing for "control orders" that could apply to terrorist suspects who are both non-citizens and citizens, via the Prevention of Terrorism Act of 2005.[277] This practice has been criticized.[278] In a new decision, the House of Lords has also held that the government cannot use evidence based on torture.[279] Present law allows authorities to hold terrorist suspects without charges for twenty eight days, one of the longest such periods in the world. On October 13, 2008, the House of Lords, by a vote of 309 to 118, rejected a Labor Government proposal, passed in June in the House of Commons by only nine votes, to extend that period to forty two days.[280] The opposition was "widespread, across the political spectrum and even among high counterterrorism officials."[281] In Europe, some of the longest periods of detention without charges were seven and a half days in Turkey, six days in France and five days in Russia.[282] Under federal law in the U.S., the maximum period a citizen can be held without charges is forty eight hours, while non-citizens under the PATRIOT Act can be held for up to seven days without charges.[283]

Germany's first bout with terrorism occurred in the 1970s, when a self-styled urban guerrilla group, the Baader Meinhof Gang, which called itself the "Red Army Faction," targeted and killed leaders of the economic and political elite of the country. At that time, legislation was discussed that would have allowed plea bargaining with

273 Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 Penn State L. Rev. 967, 970, n. 8 (2005).

274 Christian Maierhöfer, *"dem man nichts beweisen kann": Terrorismus, präventiver Freiheitsentzug und die Rolle des Völkerrechts*, EuGRZ 2005, 460, 461.

275 *Id.*

276 *Id.* n. 15.

277 Prevention of Terrorism Act of 2005, c. 2 (Eng.). Roach & Trotter, *supra* note 1485, at 970.

278 Maierhöfer, for example, concludes that legal systems which deprive those who cannot be proven to have acted illegally for years of their liberty, don't fight terrorism effectively, but support, involuntarily, its most important goal: the discrediting and weakening of longstanding principles of the rule of law. Maierhöfer, *supra* note 274, at 463.

279 BBC News, *Lords reject torture evidence use. Secret evidence that might have been obtained by torture cannot be used against terror suspects in UK courts, the law lords have ruled*, 8 December 2005, *available at* http://news.bbc.co.uk/1/hi/uk_politics/4509530.stm.

280 Raymond Bonner, *British Parliament Rejects Lengthening Detention*, Oct. 13, 2008, *available at* http://www.nytimes.com/2008/10/14/world/europe/14britain.html.

281 *Id.*

282 *Id.*, referring to a study by Liberty, a British human rights organization, *available at* www.liberty-humanrights.org.uk.

283 *Id.*

a "star witness" (*Kronzeugenregelung*), but this measure derogating from the principle of legality was never enacted. What was established, however, was a severe limitation of outside contacts by terrorists in detention (*Kontaktsperre*) – first by simple practice, later sanctioned by law. Germany thus took care of this domestic terrorist problem with very few adjustments to its criminal law and procedure.

After September 11, 2001, other measures were taken to address the new threat of global terrorism: hidden observation of terrorism suspects, increased electronic surveillance, a high maximum penalty for membership in terrorist organization,[284] possibly, also, a heightened pressure in interrogation, still limited, though, by section 136a of the German Criminal Procedure Code (StPO),[285] and detention for months on end – due to the danger of the tainting of evidence (*Verdunkelungsgefahr*) or the danger of recurrence (*Wiederholungsgefahr*).[286] Government was not alone in encountering terrorism. This issue became the focus of discussion for academics as well, who got involved through analyzing the problem and bringing forth different conclusions and ideas.

Professor Jakobs has advanced a policy argument that would allow harsher measures against terrorists than those taken against regular citizens.[287] He argues that the rule of law in its full complement applies only to non-terrorist members of the community. When regular citizens commit crimes, he argues, they might violate particular aspects of its law, but they would generally abide by it, be and remain part of the community, or civil society.[288] For the members of the community who have gone

284 Ten years of imprisonment, according to section 129a of the German Criminal Code (StGB).

285 Section 136(1) reads as follows:

(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited."

2) Measures which impair the accused's memory or his ability to understand shall not be permitted.

(3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use.

Translation in Matthias Mittag, *A Legal Theoretical Approach to Criminal Procedure Law: The Structure of Rules in the German Code of Criminal Procedure*, 7 German L.J. 637, 644 (2006).

286 Sections 112 and 112a of the German Criminal Procedure Code (StPO).

287 Günther Jakobs, *Terroristen als Personen im Recht?*, 117 ZStW 839 (2005).

288 *Id.* at 841, reminding one of Ernest Renan's definition of a nation through the *plébiscite de tous les jours.*

astray in this limited way, he proposes to continue to apply the full complement of substantive and procedure guarantees of the criminal law ("*Bürgerstrafrecht*").[289]

Terrorists, however, according to Jakobs, have put themselves into a different category: by their own choice, they have excluded themselves from the community,[290] they have become its enemy.[291] For the enemies of the community, all aspects of the rule of law do not apply, as these provisions are limited by the imperative of preventing dangers to the community.[292] He calls the complement of the law applicable to those enemies of the community "enemy criminal law" ("*Feindstrafrecht*").[293]

Professor Jakobs remains deliberately unclear about the definition of the enemies[294] and limitations of their treatment, if any.[295] He suggests that his proposal does not immediately translate into "*kurzer Prozess*," "punishment upon suspicion," or "public quartering for deterrence purposes."[296] He states that the danger of abuse may be too great.[297] He suggests, however, that persons convicted of planning terrorist activities (section 129a of the German Criminal Court (StGB)) must be forced to reveal their information, since the government, due to its duty to protect, has to use all means to elicit that information – beyond the constrictions of section 136a of the German Criminal Procedure Code (StPO).[298] Similarly, detention would be justified for the purposes of preventing future dangers. The argument for such enemy criminal law provisions is the need for self-preservation of the community.

Beyond the area of criminal law, Professor Otto Depenheuer has recently pushed this discussion, quite controversially, into the field of the general theory of the state, considering the terrorist, particularly the one of Islamic fundamentalist provenance, not only the implacable enemy of the state committed to the rule of law (*Rechtsstaat*), but a *hostis humani generis* outside the bounds and protections of the law.[299]

289 *Id.* at 845.

290 *Id.* at 849.

291 *Cf.* Howard Ball, Bush, the Detainees and the Constitution: The Battle over Presidential Power in the War on Terror (2007), quoting Mourad Benchellali, a prisoner held in Guantánamo for three years and released in July 2004: "In Guantánamo, I did see some people for whom *jihad* is life itself, people whose minds are distorted by extremism and whose souls are full of hatred." *Id*. at 72.

292 Jakobs, *supra* note 1495, at 845 (*Gefahrenabwehr*).

293 *Id*. at 845-846. Jakobs had coined the term "Feindstrafrecht" as early as in 1985, in his article entitled *Kriminalisierung im Vorfeld einer Rechtsgutsverletzung*, 97 ZStW 751 (1985). *See also* his article *Bürgerstrafrecht und Feindstrafrecht*, in HRRS 3/2004, at 88-95, and an application to the context of Colombia: Alejandro Aponte, Krieg und Feindstrafrecht: Überlegungen zum "effizienten" Feindstrafrecht anhand der Situation in Kolumbien (2004).

294 *Id.* at 850.

295 *Id.* at 846.

296 *Ibid.*

297 *Id.* at 849.

298 *Ibid.*

299 Otto Depenheuer, Selbstbehauptung des Rechtsstaates (2007).

Legislative proposals about enhanced surveillance, etc. to address the global terrorist threat are being debated in Germany, but no action has yet been finalized.

The program of extraordinary rendition of terrorist suspects has been subjected to criticism, and measures taken in its pursuit as well as the alleged cooperation of Western governments have led to sometimes more than political embarrassment. In Italy, the criminal prosecution of CIA agents allegedly involved in kidnapping of terrorism suspects is underway. In Germany, a parliamentary inquiry was undertaken, and in Canada, it led to a self-critical report by the government. The Council of Europe had Mr. Marty investigate and report about the program,[300] as did the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin.[301]

Perhaps the most blatant criticism remains the one on slacking on the universal prohibition of torture. The international community *per se* was partially involved in acts that ran counter to international law, as traditionally understood. So Sweden sent two terrorist suspects to Egypt, a country that is well known to use torture. The same was done and attempted to be done by Germany, Netherlands, Austria and the United Kingdom. They all used the card of diplomatic assurances from countries that may in fact engage in systematic torture, to maintain appearances. The British courts randomly accepted evidence extracted through torture, while the Government purported not to commission torture – until the House of Lords ruled, in December 2005, that secret evidence that might have been obtained by torture cannot be used against terror suspects in U.K. courts.[302] Undoubtedly, however, the epicenter of the war on terror, and also of the controversy that accompanies it, remains the United States of America.

300 *See infra*, Chapter V, at notes 479-483; 486-487.

301 *See* Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum, Mission to the United States of America, U.N. Doc. A/HRC/6/17/Add.3 (22 November 2007), *available at* http://daccessdds.un.org/doc/ UNDOC/GEN/ G07/149/55/PDF/ G0714955.pdf?OpenElement.

302 *See supra* note 279; as to the practice before that decision, *see* Kenneth Roth, *Justifying Torture*, in Torture 184, 199-200 (Kenneth Roth & Minky Worden eds., 2005).

CHAPTER V Domestic Criminal Due Process in Times of Emergency and Terrorism: The United States of America

After discussing the international law due process guarantees in times of emergency both as a matter of the law on the books and of the law in action, this study focuses once more on the United States of America – as a domestic case study of the respective laws and their application in a state of emergency, particularly, in countering global threats of terrorism. This section will briefly review the history of states of emergency in the U.S., the main issues encountered during such emergencies, and the ways in which those problems were dealt with by the courts. As this is a common law system, albeit under a quite laconic Constitution, certain landmark decisions of the Supreme Court will be discussed. This section will then proceed with a focus on the U.S. anti-terrorism measures after the traumatic events of September 11, 2001, the controversy that accompanied such measures and the response by the courts.

A. States of Emergency and the Constitution Prior to 9/11: *Ex parte Milligan* (Civil War), *Ex parte Quirin* (World War II), and *Youngstown Steel* (Korea)

Once mention is made of the history of states of emergency as they relate to the United States, the first thing that comes to one's mind is the concept of civil liberties under fire. Although, as some scholars would hold, in retrospect, it is not sure whether any resulting gain for national security from such restrictions is discernable,[1] nevertheless, history has shown that slacking in the adherence to standards of rights is part and parcel of war and emergency times; it is often the collateral result of the "state of exception."

In the vast array of the lowering of standards of rights and liberties in American legal history, or, as Cuéllar calls it, "lack of fidelity to procedural due process …[through applying]… constitutional rights variation,"[2] the suspension of *habeas*

1 Aryeh Neier, *Introduction*, in Lost Liberties: Ashcroft and the Assault on Personal Freedom 1, 2 (Cynthia Brown ed., 2003).

2 Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Anti-Treaty Discourse*, 55 Stan. L. Rev. 1597, 1611-1612 (2002-2003).

corpus[3] is probably the most disreputable one. Before the September 11, 2001 terrorist attacks, Lincoln was known to be the first and only president who had "practically suspended"[4] the writ of habeas corpus[5] and detained suspected persons in custody without trial. Such an authority on the part of the President was questioned, as "Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested."[6] Almost two years had to pass before the President's claim to such authority was endorsed by the Congress which passed a statute officially authorizing the suspension. Many believe that it was only at that time that there existed a genuine emergency[7] that threatened the very existence of the United States, "[a]n armed rebellion against the national authority, of greater proportions than history affords an example of,"[8] providing the factual predicate under which "the framers did not intend for the president to sit idly by (with Congress adjourned) and allow the nation to be torn to pieces by rebellion."[9] Lincoln's extensive suspensions of the writ and the authorization of military to arrest and try civilians in military courts faced some criticism and condemnation after the war.[10]

The legitimizing Act of March 3, 1863, entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases,"[11] was passed in the middle of the rebellion. In its first section, the Act authorized the suspension by the President,

3 The sanctity of the Great Writ of habeas corpus under the common law was confirmed by Article I, section 9, clause 2 of the U.S. Constitution: "The 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."

4 Ex Parte Milligan, 71 U.S. 2, 115 (1866).

5 The Judiciary Act of 1789 provided that the courts "Shall have power to issue writs of habeas corpus. And that either of the justices of the Supreme Court, as well as judges of the District Court, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment." 1 Stat. at Large, 81.

6 *Id.* Such Congressional authority could be inferred from the placement of the suspension clause in Article I of the Constitution, which delimits the powers of the legislative branch.

7 And that in such an "unanticipated emergency, the President *can* do what Abraham Lincoln did…" George Anastaplo, Reflections on Constitutional Law 76 (2006).

8 Milligan, *supra* note 4, at 115.

9 An engaging discussion of Lincoln's war powers is to be found in James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers 282 (2006).

10 Reflected in *Ex parte Milligan*, *supra* note 4. However, in retrospect, Justice O'Connor in her review of Lincoln's exercise of his war executive powers and suspension of the writ of the habeas corpus, commented this way: "To his immense credit, Lincoln did not use this authority to trample on civil liberties that the writ was meant to protect … He appreciated that the strength of the Union lay not only in the force of arms but in the liberties that were guaranteed by the open, and sometimes heated, exchange of ideas." *See* Simon, *supra* note 9, at 286.

11 12 Stat. at Large, 755.

during the Rebellion, of the writ of habeas corpus throughout the United States. The two sections that followed limited this authority.[12] Pursuant to this act, on March 15, the President proclaimed that "the writ of habeas corpus [was] suspended in respect to all persons arrested, or who now, or hereafter during the Rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission"[13] in the cases where, by his authority, military, naval, and civil officers of the United States "hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval force of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service."[14]

Ex parte Milligan[15] is the landmark case which put this assertion of Congressional and Presidential power to the test of the Constitution. In this case, Lamdin P. Milligan, citizen and resident of the State of Indiana was arrested and charged with:

1. Conspiracy against the Government of the United States;
2. Affording aid and comfort to rebels against the authority of the United States;
3. Inciting insurrection;
4. Disloyal practices;
5. Violation of the laws of war.

He was tried by a military commission and sentenced to death by hanging. Nine days before his scheduled day of execution, on May 10, 1865, Milligan petitioned the Circuit Court of the United States for the District of Indiana that he "might be brought before the court, and either turned over to the proper civil tribunal to be proceeded with according to the law of the land, or discharged from custody altogether."[16] The court grappled with three questions: whether a writ of habeas corpus ought to be issued; whether Milligan ought to be discharged from custody; and whether the military commission had jurisdiction to legally try and sentence Milligan. The judges of the Circuit Court were of different opinion on the above three questions which were certified to decision by the Supreme Court. More questions were raised before the Supreme Court, as to whether the Circuit Court had jurisdiction to hear the case at all, which the Court answered in the affirmative, and whether the Supreme Court had

12 The second section required that "lists of all persons, being citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished by the Secretary of State and Secretary of War to the judges of the Circuit and District Courts." *Id.*

13 13 Stat. at Large, 734.

14 *Id.*

15 *Supra* note 4.

16 *Id.* at 5.

jurisdiction to decide on the issues brought before the court, since, according to the Government, this case was not a *cause*, a legal action between two parties, but only an *ex parte* proceeding. The Court rejected this last argument right from the start,[17] considering the case a *cause* the moment it went to the Circuit Court, and the only remedy that the law afforded to Milligan.[18]

In delivering the opinion of the Court, Justice Davis first noted that "[d]uring the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question."[19] He considered it a "birthright of every American citizen when charged with crime, to be tried and punished according to law,"[20] and thus the question regarding Milligan's trial by the military commission was "one of the gravest" ever considered by the court.[21]

As to the military commissions organized during the Civil War in a State like Indiana, which was not invaded and not engaged in rebellion, where "the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances,"[22] the Court reasoned that "no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service."[23] Justice Davis, writing for the Court, was adamant that "Congress could grant no such power,"[24] never did so, and concluded that "[o]ne of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."[25] In their concurring opinion, however, the Chief Justice and three other justices observed that actually "Congress had power, though not exercised, to authorize the military commission which was held in Indiana," though this state was not in war and its courts were functioning properly.[26] Since the Supreme Court, at that time, only consisted of five justices, their opinion actually constituted the holding of the Court in this respect, *i.e.* the Court only spoke with binding authority to the violation of the 1863 statute limiting habeas corpus by the treatment of the petitioner.

The constitutionality of the Act was not questioned nor was it doubted.[27] Actually, for Justice Davis, "not one of [the] safeguards [of civil liberty] can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas cor-

17 *Id.* at 112.
18 *Id,* at 113.
19 *Id.* at 109.
20 *Id.* at 119.
21 *Id.* at 118.
22 *Id.* at 121.
23 *Id.* at 121-122.
24 *Id,* at 122.
25 *Ibid.*
26 *Id.* at 137.
27 *Id.* at 133.

pus." The founding fathers "limited the suspension to one great right, and left the rest to remain forever inviolable."[28] In particular, Justice Davis writes: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[29] The Chief Justice's and his three colleagues' concurring opinion appears to have a less sweeping view of the applicability of these safeguards: "We think … that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."[30] This possible difference of opinion may just be left to the netherworld of *obiter dicta*, since resolving this issue was not necessary to decide this case.

For Justice Davis, "[m]artial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."[31] He goes on to provide a reasoned structure as to when military law can actually apply. "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."[32]

The Court also frames the length for the existence of such rule, which is created by necessity and which also limits its duration. When regular courts are reinstated, and in the proper and unobstructed exercise of their jurisdiction there is no more room for martial rule otherwise it would be "a gross usurpation of power." Another limitation that the Court brings out is the confinement of military rule only to the locality of actual war. Deciding in favor of the petitioner, the Court found the military commission not to have had jurisdiction to try and convict Milligan, and that he was entitled to habeas corpus, as no indictment or other proceeding against him was made by the grand jury. As stated, however, the opinion was based on the aforementioned Act of 1863.

World War I came with other kinds of restrictions on civil liberties. Congress criminalized acts of articulating "any disloyal, profane, scurrilous, or abusive language … as regards the form of government of the United States, or the Constitution,

28 *Id*. at 126. The Court justifies this as follows: "In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the period [*sic*, probably meant: peril] to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus." *Id.* at 125-126.

29 *Id.* at 120-121.

30 *Id*. at 138.

31 *Id,* at 127.

32 *Id.*

or the flag."[33] The Espionage Act of June 15, 1917 made it a crime, *inter alia*, to cause and attempt to cause insubordination in the military and naval forces of the U.S., and to obstruct the recruiting and enlistment service of the country.[34] Such laws were used to crack down on pacifists, anarchists, socialists, and sundry other opponents of the war. Again, the Supreme Court maintained the position it had acquired during the civil war: it upheld President Wilson's acts under the Espionage Act of 1917 and the Sedition Act of 1918.[35]

In the leading case of *Schenck v. U.S.*,[36] the defendant, the general secretary of the Socialist Party, printed, distributed and mailed 15,000 leaflets which first stated that the draft was an "involuntary servitude" prohibited by the Thirteenth Amendment, and then urged the readers to "Assert Your Rights." The key passage of the Court's opinion written by Justice Oliver Wendell Holmes upholding the application of the Espionage Act to these facts reads as follows:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. [The] question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight.[37]

Under this reasoning, the judgment against Schenck was affirmed, as the Court opined that "[o]f course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected

33 *See* Sedition Act of 1918, ch.75, 40 Stat. 553. This Act was later repealed in 1921.

34 Ch. 30, tit. 1, § 3, 40 Stat. 219. Beyond the traditional understanding of espionage as a clandestine, intelligence-gathering activity, three new offenses were created by the 1917 Act: "[1] Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and [2] whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or [3] shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." *Id.*

35 *Cf.* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1920).

36 249 U.S. 47 (1919).

37 *Id.* at 52.

to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[38] Similar charges and constitutional arguments were used against a Mr. Frohwerk, who prepared and circulated, from July to December 1917, twelve articles in the *Missouri Staats-Zeitung*, which declared it, *inter alia*, a "monumental and inexcusable mistake to send our soldiers to France, and later that it appears to be outright murder without serving anything practical; speaks of the unconquerable spirit and undiminished strength of the German nation, and characterizes its own discourse as words of warning to the American people."[39] Justice Holmes, in upholding the judgment against Frohwerk, found it "impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[40]

Finally, as in *Frohwerk,* one week after *Schenck*, Justice Holmes, again speaking for the Court, upheld the conviction under the Espionage Act and the sentencing to ten year's imprisonment of the most prominent of all war critics, Mr. Eugene V. Debs, long-time leader and frequent presidential candidate of the Socialist Party.[41] Debs had given a speech on June 16, 1918 at Canton, Ohio where he had mostly elaborated upon socialism, its growth and ultimate success, a theme the Court deemed constitutionally "immune." At the beginning of the speech, however, he had said that "he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class – [persons] who had been convicted of aiding and abetting another in failing to register for the draft. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them."[42] The Espionage Act was considered to have been properly applied since "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and … the defendant had the specific intent to do so in his mind."[43]

The Espionage Act was amended in 1918 to, *inter alia,* add the offense of urging inciting or advocating curtailment of the production of materials necessary to prosecute the war.[44] The Court sustained the conviction of a Mr. Abrams in part of that new crime, since he and his co-defendants, immigrants from Russia and self-described "rebels," "revolutionaries," and "anarchists," had written, printed and distributed in the City of New York 5000 copies of two leaflets opposing U.S. intervention

38 *Id.* at 51.

39 Frohwerk v. United States, 249 U.S. 204, 207 (1919).

40 *Id.* at 209.

41 Debs v. United States, 249 U.S. 211 (1919).

42 *Id*. at 212-213.

43 *Id.* at 216.

44 Sedition Act of 1918, ch.75, 40 Stat. 553.

in Russia against the Bolsheviks. The first leaflet intimated that "German militarism combined with allied capitalism to crush the Russian revolution," and that it is "a crime for workers of America, etc. to fight the workers' republic of Russia," ending with the call: "Awake! Awake you Workers of the World! Revolutionists."[45] The second leaflet is entitled "Workers – Wake Up." It uses "abusive language," and tells the Russian emigrants "that they must now spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend 'they will make bullets not only for the Germans but also for the Workers Soviets of Russia,' and, further, 'Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.'" It ends by saying, "Workers, our reply to this barbaric intervention has to be a general strike! … Woe unto those who will be in the way of progress. Let solidarity live! The Rebels."[46] Interestingly, Justice Holmes dissented from the opinion of the majority of the Court, which applied the original *Schenck* standard. In his dissent, written half a year after the original *Schenck* group of cases, he found the ringing words of the marketplace of ideas that proved ultimately the winning formula for the interpretation of the First Amendment:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[47]

He sharpens his "clear and present danger" concept by saying: "I do not doubt … that … the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times."[48] In this case, he writes "[n]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[49] Also, he does not find the intent required by the statute in the leaflets' words.

In the 1927 case of *Whitney v. California*,[50] a conviction under the Criminal Syndicalism Act of the State of California was upheld. Justice Brandeis, there joined by

45 Abrams v. United States, 250 U.S. 616, 625 (1919).

46 *Id.* at 625-626.

47 *Id.* at 630.

48 *Id.* at 627.

49 *Id*. at 628.

50 274 U.S. 357 (1927).

Justice Holmes, reinforced the broad reading of the First Amendment of the earlier Holmes opinions:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. Only an emergency can justify repression.[51]

This emergency exception to the First Amendment was later further narrowed by the *Brandenburg v. Ohio*[52] version of the "clear and present danger" doctrine. Overruling *Whitney*, the Court stated that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[53] *Brandenburg* is still the law of the land in the First Amendment field.

However, the concept of emergencies as relativizing Constitutional guarantees has remained salient in other parts of the Constitution as well.

Historically, it became critical again in World War II. One example was President Roosevelt's executive order[54] that allowed the military to chase numerous Japanese-

51 *Id*. at 377. "Moreover," Brandeis wrote, "even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious." *Id.*

52 395 U.S. 444 (1969).

53 *Id*. at 447.

54 "On December 8, 1941, one day after the bombing of Pearl Harbor by the Japanese air force, Congress declared war against Japan. 55 Stat. 795, 50 U.S.C.A. Appendix, preceding section 1 note. On February 19, 1942, the President promulgated Executive Order No. 9066. 7 Federal Register 1407. The Order recited that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (50 U.S.C.A. 104)." By virtue of the authority vested [320 U.S. 81, 86] in him as President and as Commander in Chief of the Army and Navy, the President purported to "authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."… The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066…. Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act

Americans out of their homes on the West Coast.[55] The Supreme Court first upheld the nightlong curfews of people of Japanese descent in the *Hirabayashi*[56] case of 1943, and later their relocation in the case of *Korematsu* in 1944.[57] "Military necessity" was the accepted *raison d'être* for such drastic measures. Destruction of most of the Pacific Fleet overnight by an ally of Germany that had occupied most of Europe was no laughing matter, and a good enough motive for not second-guessing the existence of such a necessity.[58] What some, including the President of the United States, Franklin Delano Roosevelt,[59] had labeled as internment in "concentration camps," the Supreme Court considered "nothing but an exclusion order,"[60] which applied a "detention program in both assembly and relocation centers."[61] Moreover, the Court confirmed that

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of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution." Kiyoshi Hirabayashi v. United States, 320 U.S. 81 (1943).

55 For historical background, see Greg Robinson, By Order of the President: FDR and the Internment of Japanese Americans (2001). *Cf.* the United Kingdom invoking the Civil Authorities Act (Special Powers) of 1922 as the source of all emergency legislation in Northern Ireland until it was replaced by the 1973 Act. Containing catch-all provisions, the Act had provided for transfer of immense power to the executive government, including internment. *See* C. Warbrick, *Emergency Powers and Human Rights: The UK Experience*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 361, 370-371 (C. Fijnaut, J. Wouters & F. Naert eds., 2004). *See also, generally,* K. D. Ewing & C.A. Gearty, The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945 (2000).

56 Kiyoshi Hirabayashi v. United States, 320 U.S. 81 (1943). The Court stated: "The Constitution as a continuously operating charter of government does not demand the impossible or the impractical. The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government…. The present statute, which authorized curfew orders to be made pursuant to Executive Order No. 9066 for the protection of war resources from espionage and sabotage, satisfies those requirements."

57 Korematsu v. United States, 323 U.S. 214 (1944).

58 Anastaplo, *supra* note 7, at 114-115.

59 *Id.* at 116.

60 Such orders included requirements "that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. … The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid." Korematsu, *supra* note 57, at 222-223.

61 *Id.* at 221. The Court added more to this point: "Regardless of the true nature of the assembly and relocation centers – and we deem it unjustifiable to call them concentration

Congress reposes its confidence in the military leaders during wartime,[62] "as inevitably it must," and considered that "by availing ourselves of the calm perspective of hindsight [we cannot] now say that at that time these actions were unjustified."[63]

Aware of the difficulties presented in such time of turmoil,[64] even the dissent by Justice Jackson noted that it "would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution."[65] Despite this full backing of such operations, at the same time Justice Jackson, future Chief Prosecutor at Nuremberg, cautioned, in his dissent, that "the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty."[66]

The issue of *habeas corpus* emerges again, in this war, in the *Ex Parte Quirin*[67] case. There, eight petitioners, all originally German citizens, born in Germany and former residents of the U.S., one of them a naturalized U.S. citizen, landed on U.S. shores wearing German Reich Marine Infantry uniforms or parts of uniforms and carrying explosives with the aim of destroying war industries and war facilities in the United States. They were all arrested. As President and Commander-in-Chief of the Army and Navy, the President issued the Order of July 2, 1942,[68] by which he appointed a Military Commission to try the petitioners for offenses against the law of war and the Articles of War. He also prescribed regulations for trial procedures and for review of the trial and of any judgment or sentence resulting from such a commission. By

camps with all the ugly connotations that term implies – we are dealing specifically with nothing but an exclusion order." *Id.* at 223.

62 *Id.* at 223. But see that "it is essential that there be definite limits to military discretion, especially where martial law has not been declared.… whether or not they have been overstepped in a particular case, [is a] judicial question. … The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger." *Id*. at 234, Justice Murphy, dissenting.

63 *Id*. at 224.

64 The Court "could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group." *Id*. at 219.

65 *Id*. at 244, Justice Jackson dissenting. He added: "But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient." *Ibid.*

66 *Id*. at 248, Justice Jackson dissenting.

67 Ex Parte Quirin, 317 U.S. 1 (1942).

68 Federal Register 5103, as cited in *Quirin*, at 22.

Proclamation,[69] the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States … through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."[70] The proclamation also denied these individuals access to courts.

Within two weeks, the arrested were charged with the following offenses:

1. Violation of the law of war;
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy;
3. Violation of Article 82, defining the offense of spying;
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

They were tried by the Military Commission though "the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally."[71] The petitioners contended that the President's order that the petitioners be tried by military tribunal for offenses with which they are charged was unconstitutional, and that they were entitled to be tried in the civil courts protected by all the safeguards which are due to all persons charged in such courts with criminal offenses.

Once more the Supreme Court confirmed "the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty…"[72] In discussing the war powers of the President, the Court observed that the Constitution "invests the President as Commander-in-Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."[73] The Court further summarizes the Articles of War,[74] as they relate to this case by noting that they provide "for the trial and punishment, by courts martial [articles 1, 2] … [and that they] also recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial [articles 12, 15]… Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commis-

69 No. 2561, 7 Federal Register 5101.

70 *Quirin*, *supra* note 67, at 23.

71 *Id.* at 23-24.

72 *Id*. at 19.

73 *Id.* at 26.

74 10 U.S.C. §§ 1471-1593, 10 U.S.C.A. §§ 1471-1593.

sions."[75] The Court finds it "unnecessary…to determine" the extent at which the President as Commander-in-Chief has constitutional authority to create military commissions without Congressional legislation. So, the Court concerns itself "only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged." For the Court, the fact that the petitioners were charged with an offense against the law of war does not mandate trial by jury: "Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts."[76] Nor it is necessary for the Congress to "enumerate or define by statute all the acts which that law condemns."[77]

The distinction between lawful and unlawful combatants also comes into play. Resorting to foreign law, traditions antedating the U.S. Constitution as well as to scholarly articles, the Court delineates that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[78] The Court makes several references to the use of military commissions during the Civil War for trying and condemning spies, those who came in disguise to capture vessels, or without uniform to destroy or damage life or property, etc.[79] These are all stripped of the prisoner of war status because the "Government … has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear 'fixed and distinctive emblems.' And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to 'the law of war.'"[80]

75 *Quirin*, *supra* note 67, at 26-27. The Court further referred to the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, stating that it does not to "limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial." 50 U.S.C. § 38, 50 U.S.C.A. § 38.

76 *Quirin*, *supra* note 67, at 40.

77 *Id.* at 29. Actually, the Court stated that "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course." *Id*. at 30.

78 *Id*. at 31.

79 *Id.* at 31-34.

80 *Id.* at 35. Thus, according the Court "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law…that we think it must be regarded

The Courts resolves that charging of all the petitioners with the offense of unlawful belligerency was correct, and that their trial was within the jurisdiction of the Commission.[81] It also takes up an important issue: that of U.S. citizenship of one these unlawful belligerents, Mr. Haupt. The Courts holds in that respect that "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens, who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents…. Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused."[82]

The Court asserted that it had "no occasion … to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war… We hold only that those particular acts [entering and remaining in our territory without uniform and with the purpose of destroying war materials and utilities] constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."[83] On those grounds, according to Court leave to file petitions for habeas corpus in that Court had to be denied.[84]

Another most pertinent case related to national emergency and measures taken under it is *Johnson v. Eisentrager*.[85] In this decision, the Supreme Court held that twenty-one German nationals, convicted by military commission of having engaged militarily against the United States in China after the surrender of Germany, and held in the custody of the United States Army in Landsberg, Germany, had no right to the writ of habeas corpus to test the legality of their detention in American court.[86] The

as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War." *Ibid*. *See also* text at 36.

81 *Id.* at 36. "…entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States." *Id.* at 37.

82 *Id*. at 37-38.

83 *Id*. at 46.

84 "…we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied." *Id*. at 48.

85 339 U.S. 763 (1950).

86 Thus upholding the decision of the District Court, which had dismissed the case, and overturning the decision of the Court of Appeals which had reversed it, reinstating the petition and remanding for further proceedings. The Court of Appeals had concluded

Court discussed the jurisdiction of the civil courts of the United States, and consequently the guarantees that come with it, *vis-à-vis* the powers of military authorities in dealing with enemy aliens overseas. The Court made it clear that, although alien enemy litigation had been "beating upon [its] doors" for years as regards such questions as the writ of habeas corpus, it was not going to receive any answer different from the previous ones. The reason was obvious: neither legislative nor judicial sources indicate that at any time had the writ been issued "on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."[87] That seemed to be the Achilles heel of Eisentrager's argument: the alien had not been within the territorial jurisdiction of the U.S. On the other hand, the Court also confirmed that security in war-time requires that the Executive hold power over enemy aliens; litigation can neither delay nor impede such security.[88] A "resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists."[89]

The Court goes on to confirm that U.S. law does not "abolish inherent distinctions recognized throughout the civilized world between … resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments."[90] Even mere lawful presence in the U.S. is accompanied with assurance of safe treatment and certain rights, including the right of due process, which in turn extends further and becomes more secure when one has declared one's intention to become a citizen,[91] as could potentially be the case of resident aliens. But in times of war the relative vulnerability of the alien's status comes to the fore.[92] Citizenship, on the other hand, remains a highly privileged status and carries with it full rights and protections.

Resident aliens enjoy the privilege of litigation because their lawful presence in the country implies protection.[93] But this case offered a totally different scenario for the

that "any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his cases of any constitutional rights or limitations would show his imprisonment illegal;…" *Id.* at 767, referring to 84 U.S.App.D.C. 396, 174 F.2d 961. Its reasoning was that despite the fact that there is no statutory jurisdiction given in this case, the courts posses it inherently as part of their judicial power in the U.S., and when "deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer," which in this case was the Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States. *Ibid.*

87 *Id.* at 768.

88 *Id.* at 774.

89 *Id.* at 775.

90 *Id*. at 769.

91 *Id.* at 770.

92 *Id.* at 771.

93 *Id*. at 777.

Court. In order to support the petitioner's claim, the Court would have had to "hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States."[94] That it was not prepared to do.

In addition, the Court foresees that granting the writ to the petitioners would bring about trials that "would hamper the war effort and bring aid and comfort to the enemy. They *would diminish the prestige of our commanders, not only with enemies but with wavering neutrals*. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness *would be a conflict between judicial and military opinion* highly comforting to enemies of the United States."[95]

In the dissent which followed the opinion of the Court, Justice Black, Justice Douglas and Justice Burton emphasized that the writ of habeas corpus is there to check abuses of executive power and to liberate any person illegally detained or imprisoned. They could not accept that "the Constitution is wholly inapplicable" in the foreign territories that the U.S. occupies and governs.[96] They observed that actually, in *Ex parte Quirin,* the Court had upheld jurisdiction of the courts to consider such habeas corpus petitions, but had denied granting the writ "upon a finding that the prisoners had been convicted by a military tribunal of competent jurisdiction for conduct that we found constituted an actual violation of the law of war."[97] The same had happened in *Yamashita*.[98] The decision denied the requested writ but it clearly held that "habeas corpus jurisdiction is available even to belligerent aliens convicted by a military tribunal for an offense committed in actual acts of warfare."[99] This dissenting opinion, presented by Justices Black, Douglas and Burton, warns that the majority opinion is adopting a "broad and dangerous principle": a prisoner's right to test legality of a sentence depends on where the Government chooses to imprison him. But according

94 *Ibid*.

95 *Id.* at 779 (*emphasis added*).

96 *Id.* at 797. "Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice." *Id.* at 798.

97 *Id*. at 794.

98 In re Yamashita, 327 U.S. 1, 26 (1946). The majority opinion of the Court had noted that the present petitioners bore no comparison with Yamashita. "Yamashita's offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within the territory of the United States. None of these heads of jurisdiction can be invoked by these prisoners." Eisentrager, at 780.

99 *Eisentrager*, *supra* note 85, at 795.

to them, the *Quirin* and *Yamashita* opinions placed "no reliance whatever on territorial location."[100] Then what is left is the Court's fashioning of a "wholly indefensible doctrine" which permits the "executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations."[101] But for Justice Black "[h]abeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in [his] judgment be constitutionally abridged by Executive or by Congress. [He] would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern."[102]

Experience also has shown that when national security was perceived to be at risk, the Supreme Court, and the Congress as well, were disinclined to rein in the President's powers from the start. Most of the corrective action, if any, comes after the fact. Somewhat of an exception is the 1952 *Steel Seizure case*, *Youngstown Sheet & Tube Co. et al. v. Sawyer*.[103] The Congress had passed the Taft-Hartley Act of 1947 that prohibited governmental interference in labor disputes. In 1952, while Congress did not legislate nor take any measures so as to avoid interruption of steel production at a time when a war in Korea was going on, a national strike in the steel industry was imminent. In reaction, President Truman ordered the seizure of the steel mills and appointed the steel companies' managers as representatives of the government to continue their operation under the oversight of the Secretary of Commerce, Sawyer. For Truman, the supra-Constitutional setting of war was the justification for such seizure: in the context of an armed conflict, his lawyers claimed, the President as the Commander-in-Chief assesses the needs of the extraordinary situation and takes the appropriate measures at his discretion.[104] While Congress was silent, the Supreme Court concluded that this seizure was not a justifiable act. The reasoning for this outcome varied with the justices. Justice Black's opinion for the Court in that case found that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[105] He did not find any such authority, since he would not see express authority in either Congressional legislation or the Constitution. This opinion, in its reasoning, was expressly joined by Justice

100 Moreover, according to the dissenting opinion, "We control that part of Germany we occupy. These prisoners were convicted by our own military tribunals under our own Articles of War, years after hostilities had ceased. However illegal their sentences might be, they can expect no relief from German courts or any other branch of the German Government we permit to function. Only our own courts can inquire into the legality of their imprisonment." *Id.* at 797.

101 *Id.* at 795.

102 *Id.* at 798.

103 Youngstown Sheet & Tube Co. et al. v. Sawyer, 343 U.S. 579 (1952).

104 *Id.* Nos. 744, 745, *Brief for Armco Steel Corporation and Sheffield Steel Corporation*, at 12-17, quoting Assistant Attorney General Baldridge, reprinted in 48 Landmark Briefs and Arguments of the Supreme Court of the United States, 538-543 (Philip Kurland & Gerhard Casper eds., 1975).

105 *Id.* at 585.

Frankfurter,[106] who offered, however, his own additional rationale of "a systematic, unbroken practice"[107] of Congressional toleration of Presidential action as possibly allowing for Presidential powers outside the text of the Constitution.

The holding of the Court, however, could arguably be cobbled together from the opinions of two justices in the majority and the opinion of the three dissenters: all of them would appear to allow for inherent Presidential powers "in times of grave and imperative national emergency."[108]

In his concurring opinion, Justice Robert Jackson,[109] developed an influential[110] three-prong balancing test for Presidential powers asserted domestically in his role as Commander-in-Chief. According to him, the President's powers are at their highest if exercised in conformity with the express or implied intent of the Congress; there is concurrent power of both President and Congress if Congress has remained silent; and the President's powers would be at their "lowest ebb" if exercised against the express or implied will of Congress.[111] Under these circumstances, Justice Jackson could not but find illegal the President's seizure of the steel mills:[112] regarding the issue on point, the Congress had made its intent clear with the Taft-Hartley Act; it

106 *Id.* at 589.

107 "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by s 1 of Art. II. *Id.* at 610-611, Justice Frankfurter, concurring.

108 "In my view, the Constitution does grant to the President extensive authority in times of grave and imperative national emergency." *Id.* at 662, Justice Clark, concurring, but, in this case, feeling bound by Congressional legislation addressing the fact pattern at issue. *See*, similarly, Justice Burton: "We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war." *Id.* at 659. Compare Chief Justice Vinson's dissent, joined by Justices Reed and Minton: "A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to 'take Care that the Laws be faithfully executed.' With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval." *Id.* at 683.

109 *Youngstown*, at 635-638, Justice Jackson concurring.

110 His test was used later to decide a challenge to President Reagan's suspension of U.S. litigation of U.S. companies' claims against the Iranian government in *Dames & Moore v. Regan*, 453 U.S. 654, 668-669 (1981).

111 *Youngstown*, *supra* note 103, at 635-638.

112 *Id.* at 637 (Justice Jackson concurring).

had established the proper procedures to be followed, which President Truman had ignored. Justice Jackson's opinion is important also for his rejection of inherent, or implied, emergency powers:

> The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.[113]

Later, in the 1964 Gulf of Tonkin Resolution, the Congress gave President Johnson "virtual carte blanche power to prosecute war" in Vietnam.[114] However, after the war had ended, the Congress passed the War Powers Act of 1973[115] restraining the President's powers to wage war unilaterally. President Nixon considered this Act an unconstitutional infringement on his powers.[116] His veto of the legislation was, however, overridden by Congress; the Supreme Court has yet to speak as to its constitutionality.[117]

After September 11, 2001, a Joint Resolution[118] by Congress gave President Bush unrestricted authority to wage war on terror by any means within and outside of

113 *Id.* at 649-650. Building on his experience as Chief Prosecutor in the Nuremberg Trial, Justice Jackson based his cautionary remarks on the history of other nations, *id*. at 650-652, particularly Germany: "Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg [*sic*] to suspend all such rights, and they were never restored." *Id.* at 651.

114 Simon, *supra* note 9, at 284.

115 Pub. L. 93-148, 93rd Congress, H. J. Res. 542, November 7, 1973.

116 Arguing, *inter alia*, that the legislation would "attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years." He also stated to be "particularly disturbed by the fact that certain of the President's constitutional powers as Commander-in-Chief of the Armed Forces would terminate automatically" without "overt congressional action." Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 361 (15th ed. 2004).

117 For details of the discussion, see Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 Va. L. Rev. 101 (1984); John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993); Abraham D. Sofaer, *The Power Over War*, 50 U. Miami L. Rev. 33 (1995).

118 Authorization for the Use of Military Force, Pub.L. 107-40, 50 U.S.C. §1541, 2 (a); S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001). The Resolution was signed by the President on September 18, 2001.

the United States. This brings us to our discussion of the next section: the measures taken by the U.S. to fight terrorism after September 11, 2001.

B. U.S. Anti-Terrorism Measures After September 11, 2001

1. Overview

The U.S. measures against terrorism did not start in September 2001. Major terrorist acts within U.S. borders as well as direct attacks on U.S. personnel and property abroad had already triggered legislative responses before the marker date of September 11. One such legislative reaction was the Antiterrorism and Effective Death Penalty Act of 1996 which responded to the World Trade Center Bombing of 1993 and the Oklahoma City Bombing of 1995. More terrorist attacks preceded September 11, such as the bombing and destruction of the American Embassies in Kenya and Tanzania in 1998, the bombing of the U.S.S. Cole in a Yemen harbor in 2000, and other smaller-scale acts or attempts. However, as a reaction to the September 11 bombing of the Twin Towers and the Pentagon, the legislative battle against terrorism shook the foundations of the existing paradigm by authorizing and passing such actions and laws that would bear legal consequences characteristic of a formal war.

As mentioned above, Congress's Joint Resolution[119] authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[120] Without formally declaring it, this "Authorization for the Use of Military Force" (AUMF) practically invoked a state of war and the President's authority as Commander-in-Chief. That in turn gave the government free hand in designing and reaching consensus on laws related to law enforcement, immigration, and even military that would in no way have been considered constitutional in other circumstances.

The U.S.A. PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act of 2001[121] was prepared, passed and signed into law within six weeks of the attacks with the aim of ensuring a more enhanced investigation of terrorist activity, and above all its preemption. The Act complements and also changes about a dozen or more federal statutes. Following the U.S.A. PATRIOT Act, another legislative package was introduced to and passed by the Congress: the Homeland Security Act of 2002, which brought about major changes in immigration law and procedures, as well as in other federal statutes such as the Foreign Intelligence Surveillance Act (FISA). Later on, in 2004, as a response to the 9/11 Commission Report, the Congress passed another statute:

119 *Ibid.*

120 *Ibid.*

121 Pub. L. 107-56, 115 Stat. 272 (2001). The U.S.A. PATRIOT Act was signed into law on October 26, 2001.

the Intelligence Reform and Terrorism Prevention Act,[122] which like the others mentioned above made amendments and complemented earlier pertinent legislation.

The controversy that surrounded most of these acts, particularly the U.S.A. PATRIOT Act, as arguably constituting the fulfillment of a "long-standing executive branch wish-list of aggressive law enforcement tools,"[123] has been their co-traveler to date. The assumption of unrestrained Executive power underlying and emanating from the above legislation did come to clashes with constitutional guarantees of individual rights. Indefinite detention of enemy combatants without judicial review, the trial of "unlawful enemy combatants" by military commissions, and the National Security Agency's eavesdropping without a court warrant represent only some of the host of issues involved. The measures taken did bring about some clarifications in the Supreme Court's position towards such allegedly uncheckable power. So, in *Rasul v. Bush,* the Court held that the federal courts retain jurisdiction over Guantánamo detainees. *Hamdi v. Rumsfeld* confirmed that U.S. citizens who were enemy combatants do enjoy their due process rights. Justice Sandra Day O'Connor emphasized for the Court: "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Judicial review, in this case, could not be done away with, particularly in times of a war that "has no discernible end."[124] In 2006, the Supreme Court revisited Guantánamo issues. This time, in *Hamdan v. Rumsfeld*, the Court held that the trial of detainees before military commissions as ordered by the President was not authorized by federal statute, and that it violated international law. The Military Commissions Act of 2006, in essence, put the military commissions on a statutory basis, declared the pertinent Geneva Conventions non-self-executing, and denied unlawful enemy combatants as defined by the statute access to habeas corpus. The latter provision was declared unconstitutional in 2008, in a case styled *Boumediene v. Bush*.

Under these circumstances, a number of questions loom large: Are these laws taking away the traditional and lofty cherished civil liberties so emblematic of America? Is the "war on terror" a real war, and when will it end? What rules are applicable during this claimed war? Who has the authority to do what and how in these uncertain times? To what extent can certain actions be legal, and where is the threshold of crossing the line? What are the rights of non-citizens? Did some of the Supreme Court's decisions go to the heart of the problem? Or, were they just delaying the outcome previously reached or desired by the Executive Branch?

The perplexity that reigns within various branches of government about the prosecution of this war is not absent in the rest of society either. Thus, such questions cannot but bring about a diversity of answers, which, more often than not, contradict one another. In any event, the section below will briefly review some aspects of actual decisions made, as deemed important by the author, in the context of this study.

122 For a good analysis of the measures taken toward implementing this act, see Richard Posner, Countering Terrorism: Blurred Focus, Halting Steps (2007).

123 Nancy Chang, *How Democracy Dies: The War on Our Civil Liberties*, in Lost Liberties: Ashcroft and the Assault on Personal Freedom 33 (Cynthia Brown ed., 2003).

124 Simon, *supra* note 9, at 285.

2. The U.S.A. PATRIOT Act

When signing the U.S.A. PATRIOT Act into law, President George W. Bush affirmed: "These terrorists must be pursued; they must be defeated; and they must be brought to justice. And that is the purpose of this legislation."[125] This was the stated political agenda for the President of the country that had just been harshly hit in the heart by a shrewd and vicious terrorist attack. In "breathtaking speed,"[126] the Congress reacted by passing the 342-page, 150 provisions long U.S.A. PATRIOT Act. It has been labeled as rushed[127] and hasty legislation, product of the national trauma and the Congressional need to respond to the attacks, so much so that it received limited to no substantive consideration by the two houses of the Congress.[128] It was voted 356 to 66 in the House, while in the Senate there was only one opposing vote. Senator Russell Feingold explaining his *nay* vote stated: "Preserving our freedom is one of the main reasons that we are engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people."[129] He did not remain alone for long, though. The Act's controversy obliged Congress to add a sunset provision which would nullify a number of its key provisions by December 31, 2005, if not renewed. Most of the provisions of the Act were, however, renewed on time and mostly made permanent.[130]

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125 George W. Bush, *Remarks on Signing the USA Patriot Act of 2001*, 37 Weekly Comp. Press Doc. 1550, 1551 (Oct. 26, 2001).

126 Chang, *supra* note 123.

127 Orrin S. Kerr, *Internet Surveillance Law after the U.S.A. PATRIOT Act: The Big Brother that Isn't*, 97 Nw. U.L. Rev. 607, 607-608 (2003).

128 *See* Norman Abrams, Anti-Terrorism and Criminal Enforcement 4 (2005); Neier, *supra* note 1, at 7; *also* Chang, *supra* note 123, at 1.

129 Statement of U.S. Senator Russell Feingold, the only Senator to vote against the PATRIOT Act, *On the Anti-Terrorism Bill*, October 25, 2001, *quoted in* Nancy Chang, Silencing Political Dissent 14 (2002).

130 According to a Congressional Research Service Report to Congress, entitled *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis, Updated December 21, 2006,* and available at http://www.fas.org/sgp/crs/intel/RL33332.pdf,

> several sections of the USA PATRIOT Act and one section of the Intelligence Reform and Terrorism Prevention Act of 2004 were originally scheduled to expire on December 31, 2005. In July 2005, both Houses approved USA PATRIOT reauthorization acts, H.R. 3199 and S. 1389, and the conference committee filed a report, H.Rept. 109-333. A separate bill, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 (S. 2271), provided civil liberties safeguards not included in the conference report. Both H.R. 3199 and S. 2271 were signed into law (P.L. 109-177 and P.L. 109-178) by the President on March 9, 2006. … Consisting of seven titles, the Act, among other things:
>
> – Makes permanent 14 of the 16 expiring USA PATRIOT Act sections as well as the material support of terrorism amendments scheduled to expire on December 31, 2006.
> – Creates a new sunset of December 31, 2009, for USA PATRIOT Act sections 206 and 215 ('roving' FISA wiretaps and FISA orders for business records), and for the 'lone wolf' amendment to FISA.

The Act did not add much to the substance of already existing anti-terrorism crimes, although it modified definitions of terrorism in criminal law and immigration law, including, *inter alia*, the prohibition of "material support for terrorist organizations."[131] It concentrated mostly on expanding and toughening law enforcement tools and procedures directed against terrorists, as well as on improving the effectiveness and coordination of domestic agencies in their efforts to track terrorist elements, groups or organizations before they are able to perform their harmful deeds. In essence, the Act is meant to be a preventive mechanism to disrupt terrorist action. In this respect, its provisions create more legal leeway in the use of electronic surveillance,[132] in the seizure of tangible things such as books, library records, papers,

– Provides for greater congressional and judicial oversight of section 215 orders, section 206 roving wiretaps, and national security letters.
– Requires high-level approval for section 215 FISA orders for library, bookstore, firearm sale, medical, tax return, and educational records.
– Enhances procedural protections and oversight concerning delayed notice, or 'sneak and peek' search warrants.
– Expands the list of predicate offenses in which law enforcement may obtain wiretap orders to include more than 20 federal crimes.
– Revises criminal penalties and procedures concerning criminal and terrorist activities committed at seaports or aboard vessels.
– Reinforces federal money laundering and forfeiture authority, particularly in connection with terrorist offenses.
– Allows the Attorney General to determine whether a state qualifies for expedited habeas corpus procedures for state death row inmates.
– Establishes a new National Security Division within the Department of Justice (DOJ), supervised by a new Assistant Attorney General.
– Creates a new federal crime relating to misconduct at an event designated as a "special event of national significance," whether or not a Secret Service protectee is in attendance.

131 The definition of this crime has attracted criticism. *Cf.* the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Professor Martin Scheinin's findings on this issue: "The USA PATRIOT Act of 2001 amended provisions of the Immigration and Nationality Act, expanding the definition of terrorist activity beyond the bounds of conduct which is truly terrorist in nature, in particular in respect of the provision of 'material support to terrorist organizations'. The definition captures, for example, the payment of a ransom to have a family member released by a terrorist organization, or the providing of funds to a charity organization which at the time was not classified as a terrorist organization." Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum, Mission to the United States of America, U.N. Doc. A/HRC/6/17/Add.3 (22 November 2007), para. 47.

132 Increased electronic surveillance after enactment of the PATRIOT Act has attracted attention and controversy. For one example, see this report: "Secret international banking surveillance program tapped records of the Society for Worldwide Interbank Financial Telecommunications (a cooperative owned by nearly 8000 banks and widely known as SWIFT), searching for terrorist transactions. The disclosure of this program in New York Times, Los Angeles Times and Wall Street Journal brought about ardent criticism from

documents,[133] in "sneak and peek"[134] undisclosed searches, in search warrants;[135] it provides for more secrecy in grand jury deliberations, and the withholding of information and records; it adds to government's authority in addressing money laundering and in intervening with the financing of terrorist organizations, and to its power in immigration procedures, particularly as it relates to illegal immigrants and their freedom.[136] It also provides ways of better cooperation and exchange of information between government agencies that deal with intelligence gathering, investigation, arrest and prosecution, such as between public prosecutions departments, law enforcement and intelligence services, etc. It even gives the power to the government to ask for a stay of a civil suit that could challenge a violation of any of the provisions of the Act, if the courts concludes that discovery in the civil suit could hinder gov-

the government, as previously had the disclosure of the National Security Agency telephone surveillance program. Denying unlawful invasion of privacy, President Bush said: 'We're at war with a bunch of people who want to hurt the United States of America, and for people to leak that program, and for a newspaper to publish it, does great harm to the United States of America.'" Peter Baker, *Surveillance Disclosure Denounced: "Disgraceful," Says Bush of Reports*, Wash. Post, June 27, 2006, at A 01. For a review of the law and the problems associated with it, see Kerr, *supra* note 127.

133 Section 215 of the PATRIOT Act lowered the bar from "*specific and articulable facts*" to "*any tangible thing relevant to an investigation*" that could be seized under the authority of FISA (Foreign Intelligence Surveillance Act) from any third party record holder. This section reads: "The Director of the…[FBI] or a designee…may make an application for an order requiring the production of any tangible things…for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution." Moreover, FISA, which once only applied to foreign powers and their agents, now includes domestic law enforcement in so far it gathers foreign intelligence. *See generally* Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. Rev. 1619 (2004).

134 Section 213 of the PATRIOT Act expanded the reasons for delaying notice to homes and businesses that their premises had been searched. Such grounds as threat to life and safety, witness intimidation, interference with evidence, or flight from prosecution could have been previously invoked through a judge in order to delay such notice. The PATRIOT Act codified these grounds, and it also added one more very broad reason: "seriously jeopardizing an investigation or unduly delaying a trial."

135 For the purposes of facilitating investigations, Section 219, amending Rule 41 (a) of the Federal Rules of Criminal Procedure, allows a magistrate judge to issue *nationwide* search warrants related to terrorist activities that are not limited to his/her judicial district.

136 The Act had a wide range of implications. For a comment on its impact on immigrations proceedings, *see* Veronica Ascarrunz, *The Due Process Implications of Mandatory Immigration Detention: Mandatory Detention of Criminal and Suspected Terrorist Aliens*, 13 Geo. Mason U. Civ. Rts. L. J. 79 (2003). As to the use of "undisclosed" evidence in immigrations proceedings, particularly as it relates to any involvement of an alien with terrorism, *see* Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 Cornell Int'l L.J. 515 (2002).

ernment's investigation in a related matter. As mentioned above, the Act also deals with the definition of terrorism in respective criminal or immigration fields.[137] It also defines domestic terrorism, and its broad definition in the Act creates grounds for new powers for the government as regards information gathering. Section 216 allows the government to use pen/traps to monitor email and web browsing only by showing that the information that could be obtained is relevant to a criminal investigation. This standard is much lower and easier to meet than the previous *probable cause* or *reasonable suspicion*. Also, it is not required any more to list numbers that can be tapped, as the FISA court can authorize the interception of any numbers or computers that the target may use.[138] While we see a number of criticized changes brought about by the PATRIOT Act in several federal statutes, the question remains: what is actually done with the information gathered? Are the right inferences drawn from such bulk of information collected on a certain person?

It is not the subject of this study to analyze the PATRIOT Act in its complexity, but, within its realm, this section will briefly examine a few pertinent issues.

Under the heading "Mandatory Detention of Suspected Terrorists," the PATRIOT Act has authorized the preventive detention of suspected terrorist aliens,[139] insistently asked for by the government as a needed tool to confront an imminent terrorist threat. Most of the persons detained in the aftermath of September 11 were held in connection with violations of immigration laws. Some of these immigration law provisions, after the PATRIOT Act, establish procedures for the detention of suspected terrorists as well as their removal proceedings. The Attorney General may certify as a threat and take custody of any alien[140] he has reasonable grounds to believe could engage in activities that endanger the national security, until the alien is removed from the United States, or released. Procedurally, the Attorney General shall place the alien in removal proceedings or charge him with a criminal offence within seven days of his detention. If not charged or released, or if his removal is unlikely in the foreseeable future, under the certification of the Attorney General as a threat to national security, or to the safety of the community or any person, the alien can effectively be detained indefinitely upon recertification by the Attorney General every six months.

A slightly different reading of this provision had, however, been advanced by the Fourth Circuit Court of Appeals in its June 11, 2007 decision ordering the release

137 *See generally* Abrams, *supra* note 128, at 4-8.

138 *See* Chemerinsky, *supra* note 133, at 1625-1628. *See generally also* Kerr, *supra* note 127, stating, *inter alia,* that "…Internet Surveillance provisions that passed into law…reflected reasonable compromises that updated antiquated laws. Some of these changes advance law enforcement interests, but others advance privacy interests, and several do both at the same time…" *Id.* at 625.

139 Sec. 412, Pub. L. 107-56, 115 Stat. 272 (2001).

140 *Id.*

of designated enemy combatant Ali Saleh Kahlah Al-Marri from indefinite military detention at the Navy brig in Charleston, South Carolina:[141]

> [T]he Patriot Act, enacted shortly after the AUMF, provides the Executive with broad powers to deal with "terrorist aliens." But the Patriot Act explicitly prohibits their indefinite detention.
>
> Section 412 of the Patriot Act, entitled "Mandatory Detention of Suspected Terrorists," permits the short-term "[d]etention of [t]errorist [a]liens." Patriot Act § 412(a). The statute authorizes the Attorney General to detain any alien whom he "has reasonable grounds to believe" is "described in" certain sections of the United States Code. Id. These code sections, in turn, "describe" aliens who: (1) "seek[] to enter the United States" to "violate any law of the United States relating to espionage or sabotage" or to use "force, violence, or other unlawful means" in opposition to the government of the United States; or (2) have "engaged in a terrorist activity;" or (3) the Attorney General reasonably believes are "likely to engage after entry in any terrorist activity," have "incited terrorist activity," are "representative[s]" or "member[s]" of a "terrorist organization" or are "representative[s]" of a "group that endorses or espouses terrorist activity," or have "received military-type training" from a terrorist organization. 8 U.S.C.A. § 1182(a)(3)(A) and (B) (West 2007); see also 8 U.S.C. §§ 1227(a)(4)(A)(I), (iii); 1227(a)(4)(B) (West 2007). In addition, the Patriot Act authorizes the Attorney General to detain any other alien who "is engaged in any other activity that endangers the national security of the United States." Patriot Act § 412(a). In particular, the Patriot Act permits the Attorney General to "take into custody" any "terrorist aliens" based only on the Attorney General's "belie[fs]" as to the aliens' threat, with no process or evidentiary hearing, and judicial review only through petition for habeas corpus. Id. § 412(a).
>
> Recognizing the breadth of this grant of power, however, Congress also imposed strict limits in the Patriot Act on the duration of the detention of such "terrorist aliens" within the United States. Thus, the Patriot Act expressly prohibits unlimited "indefinite detention;" instead it requires the Attorney General either to begin "removal proceedings" or to "charge the alien with a criminal offense" "not later than 7 days after the commencement of such detention." Id. § 412(a). If a terrorist alien's removal "is unlikely for the reasonably foreseeable future," he "may be detained for additional periods of up to six months" if his release "will threaten the national security of the United States." Id. But no provision of the Patriot Act allows for unlimited indefinite detention. Moreover, the Attorney General must provide the legislature with reports on the use of this detention authority every six months, which must include the number of aliens detained, the grounds for their detention, and the length of the detention. Id. § 412(c).[142]

An argument could be made that this consecutive detention, if renewed every six months, runs counter to the decision of the Supreme Court in the case of *Zadvy-*

141 Al-Marri v. Wright, U.S. Court of Appeals for the Fourth Circuit, No. 06-7427, Decision of June 11, 2007, *available at:* http://writ.lp.findlaw.com/mariner/al-marrivwright-80806opn.pdf.

142 *Id.*, at 65-67.

das v. Davis[143] decided in the summer preceding the PATRIOT Act. In that case, in the Court's opinion, there wasn't any indication in the statutes of the Congressional intent to grant the Attorney General the power to hold indefinitely, perhaps even permanently, in confinement an alien ordered removed. However, it is important to point out that in its reasoning the Court refers to the fact that the case did not have to do with "say suspected terrorists;"[144] it also states that, in this particular case, the Court was not considering "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[145] In addition, in considering the government's arguments that "mandatory detention is the rule and discretionary release is the narrow exception in the statutes regarding criminal aliens," the Court reiterates that the statute "applies not only to terrorists and criminals."[146] From these statements of the Court, it may be deduced that under circumstances of suspected terrorists and overriding interests of national security, indefinite detention, when removal is no longer foreseeable, could come into play as a potential option. This could particularly apply in the circumstances of Article 33 (2) of the Refugee Convention which prohibits *refoulement* if there is a risk that the person would be subjected to torture or inhuman and degrading treatment or punishment, even in cases when there exists provable danger of the person to the national security or community of the country of refuge.[147] The recent critique of this provision by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, focused particularly on the potential detention of some persons accused of "material support for terrorist organizations," and the lack of transparency for a "duress waiver."[148]

143 Zadvydas v. Davis, 533 U.S. 678 (2001).

144 *Id*. at 691.

145 *Id.* at 696.

146 *Id.* at 697.

147 For a detailed international and comparative law analysis on the balancing of interests of national security of a state and the refugee protection, see generally Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-Refoulement*, 15 (1) Int'l. J. Refugee L. 5 (2003). For other considerations and implications of anti-terrorism measures on refugees, refer to Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of the "Material Support to Terrorism" Bar on Refugees*, 13 (3) Hum. Rts. Brief 28 (Spring 2006).

148 As to the critique of the definition of "material support," see the Special Rapporteur's Report, *supra* note 131. As to the immigration context, he writes: "The PATRIOT Act provides for the mandatory detention of those suspected of ['material support to terrorist organizations'] and the refusal of refugee status for such persons. However, the Secretary of Homeland Security has announced a policy of 'duress waiver'. The Special Rapporteur is troubled by the lack of transparency and judicial remedies in the application of such a waiver to persons, some of whom may themselves be victims of terrorist conduct." Scheinin, *supra* note 131, para. 47.

In fact, shortly after the enactment of the PATRIOT Act, hundreds and thousands of people were arrested and detained, and no information was given as to who had been arrested and what they were charged with.[149] The only information given was that they were held under criminal or immigration charges,[150] or as material witnesses.[151] A coalition of civil rights and human rights organizations brought a lawsuit against the Department of Justice regarding these secret arrests and detentions under the Freedom of Information Act and the First Amendment. In court, the Government's representative explained that such names could not be released as that could be useful information for Al Qaeda; also since such persons were held as terrorist suspects, releasing their names at that stage would jeopardize their privacy.[152] Federal

149 According to Professor David Cole, over 5,000 foreign nationals were detained and held without charges for much more than seven days, and some of them for months without judicial review. *See* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 Yale L.J. 1753, 1777 (2004). In note 2, he writes: "In the first seven weeks of the campaign, the government admitted to detaining 1182 suspected terrorists, and virtually every time Ashcroft made a public statement he would give an update on the number of 'suspected terrorists' detained. When people began to question why none of the 1182 persons had been charged with a terrorism-related crime, the Justice Department shifted gears and announced that it was too difficult to maintain a running total of detainees, so it would offer no further cumulative totals. Since then, however, the government has admitted to subjecting another 3900 people, virtually all foreign nationals, to preventive detention in antiterrorism initiatives in the United States, totaling more than 5000 in all. *See* David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 24-25 (2003)."

150 Cole writes that the arrests and detentions were based on immigration charges such as breaking visa deadlines etc., release on bond was denied, and "persons of interest" were kept detained until the FBI had "cleared" them. According to him, when no immigration violations could be found, the prosecutors searched for criminal charges such as lying to FBI agents or the grand jury, credit card fraud, trespassing, carrying knives longer than permitted, etc. In absence of any of the above, the material witness statute was invoked. *Id.,* at 1777-1778.

151 Kate Martin, *Secret Arrests and Preventive Detentions*, in Lost Liberties: Ashcroft and the Assault on Personal Freedom 75, 77 (Cynthia Brown ed., 2003). Material witness arrests were done in secrecy only for the purposes of potentially having them testify in an upcoming trial, though they were not charged with any crime. Government would build the case that the detained would not otherwise show up in trial. While this is allowed in law, doing that in secret is allegedly unlawful. *Id*. at 82-83. In this paper, citing several newspaper articles, Kate Martin, Director of the Center for National Security Studies, documents a number of cases of arrests made allegedly only based on ethnicity or religion. *Id.* at 77-78 and note 10. Also, she notes that pressure grew to release the names of those detained secretly, and, at the request of several senators, a hearing was scheduled before the Senate Judiciary Committee for the Attorney General to explain those detentions. One day before the hearing, the Attorney General released the names of ninety-three persons charged under federal criminal laws, but no word was given about nine-hundred other arrests. *Id.* at 78.

152 *Id.* at 79. Additionally, secret immigration hearings were held for about 611 persons and no one was allowed to attend. Challenged at courts for this unprecedented secrecy of im-

District Court Judge Gladys Kessler in her decision of August 2, 2002 ordered the Government to "disclose within fifteen days the names of those it has arrested and detained in connection with its September 11, 2001 terrorist investigation," excepting those the disclosure of whose names is barred by court orders, as well as those who do not want their names disclosed.[153] On June 17, 2003, the D.C. Circuit Court of Appeals, by a 2 to 1 decision, reversed this aspect of Judge Kessler's order, allowing the Justice Department to withhold the names of detainees and their attorneys.[154] The justification was found in Freedom of Information Act Exemption 7(A), which exempts law enforcement information that would interfere with enforcement proceedings if released.[155] Most of those arrested and detained for weeks and months were either cleared later and released on U.S. soil, or charged with minor violations such as document fraud, or violations of immigration laws. At all times, they were not afforded pre-trial bail, but they were detained for months without charges.[156]

As mentioned above, one of the legal reasons given for these detentions was detention as a "material witness." The federal statute that regulates detention on the material witness basis is 18 U.S.C. Section 3144 which, *inter alia,* requires that it must be shown that the testimony of a witness is material to a criminal proceeding, and that he can be detained if there is no other way of getting his deposition, and that his presence cannot be secured through a subpoena. After the PATRIOT Act, the Government arrested persons as "material witnesses" though there was no relevant criminal prosecution, but it claimed that as the grand jury was in session investigating criminal matters, material witnesses could be detained.[157] This extended detention could be a compelling tool for the law enforcement within the setting of the Government's overriding interest of fighting terrorism, particularly if we take into consideration that the grand jury witnesses are even normally not afforded the same procedural guarantees as trial witnesses. Additionally, the closed nature of grand jury deliberations and investigation does not give much opportunity to the courts to evaluate the materiality of the statement of a certain witness.[158] This could also give time to the prosecutor to prepare materials that could establish reasonable suspicion and later criminal charges,[159] while, in the meantime, it also keeps the person away from

migration hearings and them being called unconstitutional, the government insisted that grave national security harm could be brought about if such hearings were held openly. *Id.* at 80.

153 Center for National Security Studies et al. v. United States Department of Justice, 215 F.Supp.2d 94 (2002).

154 331 F.3d 918 (2003), *cert. denied,* 540 U.S. 1104 (2004).

155 *Id.* at 925 *et seq.*

156 Martin, *supra* note 151, at 81.

157 *See* Abrams, *supra* note 128, at 73-75; *see also* the case of United States v. Awadallah, 349 F. 3rd 42 (2nd Cir. 2003), cert. denied, Awadallah v. United States, 125 S.Ct. 861 (2005).

158 *See* grand jury, *supra* Chapter III.B.5, at notes 107-127.

159 Zacarias Moussaoui was initially detained as a material witness and later was charged as co-conspirator. Jose Padilla was also detained originally as a material witness and later his status had switched to "enemy combatant." Abrams, *supra* note 128, at 86.

being engaged in any terrorist acts, as seems to have been the case in some of the over one-thousand[160] post-September 11 detentions, some of which lasted months and even more than a year.

As discussed above, the PATRIOT Act focused on jurisdiction and methods and tools to advance the efficacy of domestic action against terrorist activities and terrorist organizations.[161] However, provisions like the ones amending FISA, which blur the distinction between foreign intelligence information gathering and the information gathered in order to criminally investigate and prosecute, *mutatis mutandis,* the sharing of information amongst the personnel of the foreign intelligence and law enforcement personnel, have tremendous impact on the guarantees provided in the Fourth Amendment. In particular, the 2001 PATRIOT Act allowed surveillance and searches if the government declared that "a significant purpose" of that activity was gathering foreign intelligence. Before, such searches and surveillance had been allowed if "the purpose" was to obtain foreign intelligence.[162] On September 26, 2007, Judge Anne L. Aiken of the Federal District Court in Portland, Oregon ruled these provisions of the USA PATRIOT Act unconstitutional because they allowed federal surveillance and searches of Americans without demonstrating probable cause.[163] The case involved a Portland attorney and convert to Islam, Mr. Brandon Mayfield, who had been mistakenly linked to the 2004 Madrid train bombings that killed 191 people. According to news reports, before arresting him, the FBI had put Mr. Mayfield "under 24-hour surveillance, listened to his phone calls and surreptitiously searched his home and law office."[164] The court recognized that "a difficult balance must be struck in a manner that preserves the peace and security of our nation while at the same time preserving the constitutional rights and civil liberties of all Americans."[165] Congress here intended "to break down barriers between criminal law enforcement and intelligence gathering," Judge Aiken said.[166] The judge wrote that the government, in this case, was

160 Abrams, *supra* note 128, at 73.

161 The issue of designation of an organization as a terrorist one and the corresponding consequences is another controversial matter that has engendered debate and judicial action.

162 For comments and opinions on this issue, see David Hardin, *The Fuss Over Two Small Words: The Unconstitutionality of the U.S.A. Patriot Act Amendments to FISA Under the Fourth Amendment*, 71 Geo. Wash. L. Rev. 291 (2003), and John E. Branch III, *Statutory Misinterpretation: The Foreign Intelligence Court of Review's Interpretation of the "Significant Purpose" Requirement of the Foreign Intelligence Surveillance Act*, 81 N. C. L. Rev. 2075 (2003).

163 Susan Jo Keller, *Judge Rules Provisions in Patriot Act to Be Illegal*, N.Y. Times, Sept. 27, 2007, *at* http://www.nytimes.com/2007/09/27/washington/27patriot.html.

164 William McCall, *Judge's Ruling Hits Patriot Act: Two Parts of Law Violate Constitution*, South Florida Sun-Sentinel, Sept. 27, 2007, at http://web2.westlaw.com/welcome/NewsAndBusiness/ default.wl?fn=_top&rs=WLW7.09&mt=NewsAndBusiness&vr=2.0&sv=Split.

165 Keller, *supra* note 163.

166 *Ibid.*

"asking this court to, in essence, amend the Bill of Rights, by giving it an interpretation that would deprive it of any real meaning." "In place of the Fourth Amendment," she wrote, "the people are expected to defer to the Executive Branch and its representation that it will authorize such surveillance only when appropriate."[167]

Controversy was further spurred by a secret National Security Agency eavesdropping program. As the New York Times reported in 2005, "under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible 'dirty numbers' linked to Al Qaeda, the officials said."[168] Later, the date of the order was corrected to 2001, weeks after September 11.[169]

In order to remove doubts about its legality, Congress passed a law, "The Protect America Act of 2007,"[170] signed by President Bush on August 5, 2007, that, according to the Administration, "modernizes the Foreign Intelligence Surveillance Act to give intelligence officials the tools they urgently need to gather information about our enemies, while protecting the civil liberties of Americans,"[171] and that, according to press reports, "broadly expanded the government's authority to eavesdrop on the international telephone calls and e-mail messages of American citizens without warrants."[172] Previously, the Government needed warrants issued by the FISA Court to listen in on phone conversations, e-mail messages, and other electronic communications between individuals in the U.S. and overseas, if the surveillance was conducted inside the U.S. Most phone calls between the U.S. and abroad are today conducted via fiber-optic cable using "giant telecommunication switches" located in the U.S.[173] By changing the definition of "electronic communications," relating it to those switches, the new legislation allows the Government to eavesdrop on such international calls as long as "the target of the government's surveillance is 'reasonably believed' to be overseas." The new law, which is to expire in six months, authorizes the Attorney General and the Director of National Intelligence to approve such international surveillance, rather than the FISA Court. It was said to be spurred by a still classified ruling by the FISA Court earlier in 2007 which said that the Government needed FISA Court-approved warrants to monitor international calls routed through U.S.

167 *Ibid.*

168 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005.

169 Peter Baker, *President Acknowledges Approving Secretive Eavesdropping: Bush Also Urges Congress to Extend Patriot Act*, Washington Post, Dec. 18, 2005, at A01.

170 Pub. L. 110- 55, S. 1927, text at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong _ bills&docid=f:s1927es.txt.pdf.

171 The White House, *Fact Sheet: The Protect America Act of 2007*, Aug. 6, 2007, *at* http://www. whitehouse.gov/ news/releases/2007/08/20070806-5.html.

172 James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. Times, Aug. 6, 2007, *at* http://www.nytimes.com/2007/08/06/washington/06nsa.html.

173 *Id.*

switches.[174] According to Administration background briefings, this had led to a drop in surveillances of foreign-based communications to about 25% of the number monitored before the ruling.[175] White House officials have denied that the legislation authorized "a driftnet" aimed at eavesdropping on large volumes of phone calls and e-mail messages inside the United States.[176] Still, experts maintain that by redefining "electronic surveillance," new additional governmental powers provided by the Act now "include the collection of business records, physical searches and so-called 'trap and trace' operations, analyzing specific calling patterns. For instance, the legislation would allow the government, under certain circumstances, to demand the business records of an American in Chicago without a warrant if it asserts that the search concerns its surveillance of a person who is in Paris."[177]

3. *Detention, Treatment and Adjudication of Persons Designated Enemy Combatants in the Global War on Terror*

> *The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people.*
>
> Justice Davis, Ex Parte Milligan, 71 U.S. 2, 119 (1866).

At a time when the U.S.A. PATRIOT Act was causing criticism among civil libertarians for some of its worrisome provisions, and for the numerous detentions that followed it throughout the U.S., preparations were being made to deal with another kind of detainees: the ones arrested as suspected terrorists during the armed conflict

174 *Id.*

175 Eric Lichtblau, James Risen & Mark Mazzetti, *Reported Drop in Surveillance Spurred a Law*, N.Y. Times, Aug. 6, 2007, at http://www.nytimes.com/2007/08/11/washington/11nsa.html?pagewanted=1&_ r=1&adxnnl=0&adxnnlx=1186945997-pjgT/kd2wrVXQO/+vV8JDg.

176 Eric Lichtblau, *White House Challenges Critics on Spying*, N.Y. Times, Aug. 7, 2007, *at* http://www.nytimes.com/2007/08/07/washington/07nsa.html. "But they declined to discuss in detail the N.S.A.'s broader efforts tracing and analyzing the patterns of American communications — who is calling and e-mailing whom — without actually listening to or reading the content of the conversations. Those broader data-mining activities were part of a heated dispute within the administration that led senior Justice Department officials in 2004 to refuse at first to certify the legality of the N.S.A. operations and to threaten to resign in protest over their continuation." *Ibid. See also* The White House, *Fact Sheet: The Protect America Act of 2007*, *supra* note 170.

177 James Risen & Eric Lichtblau, *Concern Over Wider Spying Under New Law*, N.Y. Times, Aug. 19, 2007, at http://www.nytimes.com/2007/08/19/washington/19fisa.html?hp.

in Afghanistan[178] or any other location. We will start with presenting President Bush's executive order relating to the persons seen as the main antagonists in the global war on terror, and then proceed with the legal developments regarding detention and treatment of detainees as well as their intended adjudication by military commissions.

a. President Bush's 2001 Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

On November 13, 2001, President George W. Bush invoked his authority as Commander in Chief of the Armed Forces of the United States, vested in him by the Constitution and also by the Authorization for Use of Military Force Joint Resolution (AUMF)[179] as well as by sections 821 and 836 of title 10, United States Code, to issue the Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.[180]

This order sets out policy regarding three pertinent measures: detention, treatment and trial of individuals subject to this order. It consists of eight sections.

Section 1 enumerates the findings to which this order responds. The President refers several times to the terrorist acts against U.S. citizens, diplomatic and military personnel, facilities and property outside and within the United States, and the probability that such acts will occur again.[181] In particular, the September 11 terrorist attacks had reached such a scale that the President acknowledges the creation of "a state of armed conflict that require[d] the use of the United States Armed Forces,"[182] in order "to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks."[183] For that reason, the President had proclaimed a national emergency.[184] International terrorism was deemed to "possess both the capability and the intention to undertake further terrorist attacks against the United States" and the President could foresee "mass deaths, mass injuries, and massive destruction of property" if not prevented. The risk was assessed to be of an extent that could even hinder "the continuity of the operations of the United States Government."[185]

178 The United States attacked Afghanistan on October 7, 2001with the goal to oust the fundamentalist regime of the Taliban, and to destroy the basis of the network of the terrorist organization Al Qaeda.

179 AUMF, *supra* note 118.

180 President George W. Bush, *Military Order of November 13, 2001*, The White House, Office of the Press Secretary, November 13, 2001.

181 Military Order, Section 1 (a), (b), (c), (f), (g).

182 *Id*. at section 1 (a).

183 *Id.* at section 1 (d).

184 Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks, September 14, 2001, *available at* www.yale.edu/lawweb/avalon/sept_11/proc003_091401.htm.

185 Military Order, *supra* note 180, at section 1 (c).

The mission consequently was to protect the United States and its citizens, but also assist its allies in protecting their nations and their citizens. That made it necessary to detain "individuals subject to this order," and to try them by military tribunals for violations of the laws of war and other applicable laws.[186] The President builds his case by stating that he considered it to be impracticable to apply to these military commissions "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[187] Recalling the high danger of future terrorist attacks, the President confirms that he has determined that there exists "an extraordinary emergency for national defense purposes," which entails "an urgent and compelling government interest," and that this order is necessary to meet the afore mentioned emergency.[188]

In Section 2, the order defines the term "individual subject to this order." It delineates the policy according to which he entrusts the Secretary of Defense with the duty to detain and try the individuals subject to this order, and it also obligates "any other officer or agent of the United States or any State" who has control over such individuals to deliver them to the control of the Secretary of Defense.[189] Additional powers of the Secretary of Defense are listed in Sections 5 and 6.[190]

An "individual subject to this order" is defined as a non-citizen of the U.S. for whom the President would determine in writing from time to time that:

(1) there is reason to believe that such individual, at the relevant times,
  (i) is or was a member of the organization known as al Qaida;
  (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
  (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
(2) it is in the interest of the United States that such individual be subject to this order.[191]

186 *Id.* at Section 1(e).

187 *Id.* at Section 1 (f).

188 *Id.* at Section 1 (g).

189 *Id.* at Section 2 (b), (c).

190 *Id.* Sections 5 and 6 provide: Section 5. Obligation of Other Agencies to Assist the Secretary of Defense: Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order. Section 6. Additional Authorities of the Secretary of Defense:(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order. (b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

191 *Id.* at Section 2 (a).

The second element of the order, treatment of certain non-citizens in the war against terrorism, is described in Section 3 which establishes the detention authority of the Secretary of Defense. According to this authority, he would detain the individuals subject to this order at any location he designates suitable either outside or within the United States, and in accordance with any conditions he might prescribe as fitting.[192] This section also enumerates the guarantees to be afforded to such detainees. The detainee is to be:

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
(d) allowed the free exercise of religion consistent with the requirements of such detention;[193]

The third element of the order constitutes trial of the individuals subject to the order, and its Section 4 institutes the authority of the Secretary of Defense regarding trials. Such authority *in brief* includes:

(a) *trial by military commission* for any and all offenses triable by military commission, and punishment in accordance with the penalties provided under applicable law, *including life imprisonment or death*
(b) the authority of the Secretary of Defense to issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary
(c) Such orders and regulations shall include, *inter alia*, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys. These rules and regulations shall at a minimum provide for:
    (1) time and place for the military commissions to sit trial
    (2) a full and fair trial by the military commission sitting as the triers of both fact and law
    (3) admission of such evidence as would have probative value to a reasonable person
    (4) due regard to the protection of information classified or classifiable in the handling of, admission into evidence of, and access to materials and information, and in the conduct, closure of, and access to proceedings
    (5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order
    (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present

192 *Id.* at Section 3 (a), (e).
193 *Id.* at Section 3 (b), (c), (d).

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present and
(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by the President or by the Secretary of Defense if so designated by the President.

Section 7(a) provides, *inter alia*, that the order should not be construed to limit the full authority of the President and Commander-in-Chief, or the lawful authority of any military commander, agent or officer of the United States or of any State "to detain or try any person who is not an individual subject to this order."[194]

In paragraph (b), we find sanctioned the most contentious provisions which brought about an outburst of criticism and legal action. This clause authorizes that with respect to any individual subject to this order:

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

The issuance of this order yielded discussion and criticism from within the U.S. and all over the world. Mainly, its constitutionality was questioned. For many commentators, the President did not have the authority to set up military commissions[195] for the trial of the detainees, and neither did he have the power to formulate crimes, without the authorization of the Congress. According to them, when the President goes beyond the detention of enemy combatants during war to bringing them to trial and meting out punishments, he has surpassed his authority as Commander-in-Chief,[196] and has violated the borders that separate powers.[197]

194 *Id.* Section 7 (a)(2) & (3).

195 Some did not find military commission trials to be applicable in the context of terrorism, which is not a traditional war and cannot be linked to a particular conflict. They foresee that the possibility of these commissions to apply indefinitely would create a parallel legal system, with no sufficient fair trial guarantees. They suggested that terrorism-related crimes be adjudicated by international tribunals, which would give absolute legitimacy to the court, coordinated efforts to capture and submit terrorists to trial, and facilitate evidence gathering. *See* Jennifer Trahan, *Trying Bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24 Houston J. Int'l L. 475-508 (2002).

196 *See* Neal K. Katyal & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). *See also* Jonathan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1 (2001).

197 *See* Harold H. Koh, *The Case Against Military Commissions*, 96 Am. J. Int'l L 337 (2002). Others argued that separation of powers is violated also because "it prevents the judiciary from carrying out its essential function of hearing the claims of individuals who contend

Additionally, the President's choice to make a distinction between citizens and non-citizens in authorizing military commissions to prosecute only non-U.S. citizens has been argued to be unconstitutional and unfair: "The cost of the Military Order's distinction between citizens and noncitizens is not only unfair to those who are subjected to harsher treatment by virtue of belonging to a vulnerable group, but it is also unfair to the character and identity of the community we seek to build, a community of equals" – at least as far as it concerns Legal Permanent Residents.[198]

In the aftermath of this Order, U.S. anti-terrorist policies were refined and modified, often in complex interplay between the Executive, the Judicial and the Legislative Branches. To analyze these decisions substantively, this study will separate the issues regarding detention and treatment of suspected terrorists from their adjudication, as they were leading to different strands of legal standards and court reviews. As a great number of those captured in the hunt for terrorists responsible for September 11 were and are held at Guantánamo Bay, this place became the epicenter of legal attention particularly because the government declared that Guantánamo was not under the sovereignty of the United States and the foreign nationals detained there could not have access to the U.S. courts to question the legality of their detention.

b. Detention of Persons Designated Enemy Combatants in the Global War on Terror

President Bush's November 2001 Military Order was first and foremost going to be applied to those who have come to be known as Guantánamo detainees.[199] The first detainees were brought to Guantánamo Bay Naval Station in Cuba, in January 2002. There have been different assertions and estimations regarding the number of detainees at different times since then.[200] A non-governmental source of 2006 reported that over two hundred had been released or rendered to other countries after long periods of detention; about five hundred still remained in Guantánamo, and still hundreds continued to be held in different facilities around the world.[201] The Department of

that they are being wrongly detained." *See* Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. Nat'l Security L. & Pol'y 73, 82 (2005).

198 Adeno Addis, *Strangers to the Constitution?: Resident Aliens, Military Tribunals, and the Laws of War,* 37 Val. U. L. Rev. 627, 648 (2003).

199 Throughout this chapter, I will be using the term "detainee" as it relates to Guantánamo, without making any distinction between *prisoners of war* and *unlawful enemy combatants.*

200 According to a Government's estimate presented in the case of *Rasul v. Bush*, since early 2002 approximately over 640 non-Americans captured abroad were being held in Guantánamo Bay Naval Base. Rasul v. Bush, 124 S. Ct. 2686 (2004), at section I. Whereas the latest results of the Administrative Review Board give a figure of about 385 unlawful enemy combatants detained at Guantánamo. U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release: *Guantánamo Bay 2006 Administrative Review Board Results Announced*, No. 253-07, March 06, 2007, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=10582 .

201 *See* Joseph Margulies, Guantánamo and the Abuse of Presidential Power 2-4 (2006).

Defense's numbers as of September 6, 2007 showed that approximately four hundred and thirty five detainees have been released or transferred, and about three hundred and forty persons continued to be detained in Guantánamo; whereas in 2008 this number was reported to be about two hundred seventy.[202]

Upon their arrival, they were housed in Camp X-Ray, a makeshift facility, where the detainees were held in outdoor cages.[203] At the prospect of a long-lasting war on terror, and consequently long detentions, as well as at the pressure for better conditions of imprisonment, a new facility of maximum security, called Camp Delta, was built, with the capacity of housing more than one thousand persons.[204]

Guantánamo Bay U.S. Naval Station came to be used as the site for these detentions and, at that time, of the prospective trials, after the announcement by Secretary of Defense Donald Rumsfeld in December 2001 that the trials based on President's Military Order were going to take place in Guantánamo.[205]

It is important to briefly note here the legal status of Guantánamo. The base lying on the South-East coast of Cuba and consisting of forty-five square miles has been occupied by the U.S. since the end of the Spanish-American War, on the basis of a 1903 lease agreement between the U.S. and the Republic of Cuba. According to this treaty, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the least areas]," while "the Republic of Cuba consents that during the period of occupation by the United States … the United States shall exercise complete jurisdiction and control over and within said areas."[206] Later, in 1934, another treaty was concluded between the two parties, which provided that in the absence of an agreement which could modify or abrogate the lease, this lease would

202 U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release, No. 1085-07, September 06, 2007. *Available at* http://www.defenselink.mil/releases/release. aspx?releaseid=11301 , last visited on September 25, 2007). For 2008 reported records see Paul Reynolds, *Why US is stuck with Guantanamo Detainees*, BBC News, May 21, 2008, *available at* http://news.bbc.co.uk/2/hi/americas/7413181.stm (last visited on September 6, 2008).

203 Michael Elliot, *Camp X-Ray: When is a war prisoner not a POW? When the U.S. brings Afghan detainees to Guantánamo Bay*, Time Magazine, Vol.159, Issue 4, at 2002 WL 8385611.

204 Margulies, *supra* note 201, at 4. According to Margulies, the detention center in Guantánamo was built to serve several purposes. First it was meant to be a prison camp for those captured in conflict, then as a site for tribunals trying those charged with war crimes, and most of all as a an interrogation chamber. *Id.*

205 The Military Commissions Act of 2006 and the new Manual for Military Commissions leave it open for the sitting of these commissions, but the Department of Defense has made it clear that Guantánamo remains the most feasible location for the seat of military commissions. DoD Press Briefing, *infra* note 605.

206 Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418.

remain in effect "[s]o long as the United States of America shall not abandon the … naval station of Guantánamo."[207]

So, this location where the United States "exercises complete jurisdiction and control," since 2002 has invited a continuous legal controversy mostly focused on the policy followed by the U.S. government and its claim that these detainees cannot be afforded any rights because they are foreign nationals who are detained outside the sovereign territory of the United States of America. As it will be shown in the next section, not only civil rights and human rights proponents, not only international lawyers, but also the courts in the U.S., including the Supreme Court, came to challenge such position, sometimes bringing about changes to it and at other times merely delaying its implementation. The stormy debate started as a challenge to the U.S. Administration's conclusion that the detainees, including the members of the Taliban movement, were not prisoners of war and consequently could not be afforded the protections of the Geneva Conventions; it continued with sharp criticism of the conditions of detention and the interrogation techniques; and it still goes on with the vast problématique of the military commissions.

aa. The Status of Guantánamo Detainees

In self-defense, the U.S. declared war on terror, a radically different kind of war. Like all wars, this one had its captives. The Commander-in-Chief issued the military order to detain and try them. What the order does not touch on is the issue of the status of those arrested and detained. While it provides for their detention and for the laws applicable for charges when they are tried, not a word is written about what happens between the time they are arrested and tried. Bearing in mind that most of these individuals were apprehended and detained in the course of war operations in Afghanistan, the prisoner of war issue comes to the fore. Additionally, many others were picked up or surrendered to the U.S. custody by coalition forces in countries like Pakistan, Egypt, Bosnia and other European countries. The issue of POW status had accompanied even such surrenders.[208] It is understandable that a number of them might have been members of the regular army of the Taliban government. At

207 Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T.S. No. 866.

208 Such surrenders were sometimes even challenged in court. In February 2003, a Canadian Member of Parliament asked the Québec Superior Court to rule whether there has been a violation of Canada's obligations under the Geneva Conventions, when the Canadian soldiers in Afghanistan had surrendered alleged enemy soldiers to U.S. military without prior determination if those captured were prisoners of war. Richard J. Wilson, *United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole,"* 10(3) Hum. Rts. Brief 41 (Spring 2003). Additionally, as to the status of the detainees, a Council of Europe commission under the leadership of Baroness Kennedy had concluded that the detainees were not prisoners of war, but simple alleged criminals that had to be treated as such. In other words, September 11 was not to be treated as an aggression, but as a monumental criminal act. Thus, all the human rights protections for accused criminals would apply. Military commissions as special courts would thus not be allowable.

the same time, others had been captured from other parts of the world as they were believed to be Al Qaeda operatives.

In early 2002, the President issued another order requiring humane treatment for detainees, but stating that they were not prisoners of war under the relevant Geneva conventions.[209] Also, the President concluded that Common Article 3 of all four Geneva Conventions did not apply, since this was a conflict international in scope, and Article 3 only applied to armed conflicts "not of an international character."[210] The memorandum itself did not detail what "humane treatment" meant, aside from stating that "[a]s a matter of policy, the United States Armed Forces will continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[211] In as long as they were enemy combatants they would remain in detention for an indefinite period or at least until the war on terror was over. Additionally, some of those detained were going to be tried for war crimes before military tribunals.

From then on, the government claimed at all times that it had no doubt as to their status: they were illegal enemy combatants. That meant that under this order not only could their detention be indefinite, but some could be tried for punishable acts committed during hostilities. Had they been granted POW status, except for violation of laws of war, they would not be liable to be prosecuted for other acts that are characteristic of hostilities. Another issue would be the length of this war on terror, given the fact that it is a most unconventional war, without a foreseeable end. Its implication is that even granted POW status, the prospect of repatriation is not easily seen, just as a moment of conclusion of hostilities cannot.

The United States is a party to all four of the 1949 Geneva Conventions. The Third Geneva Convention remains the textual basis for the decision on the POW status *vel non* of detainees, at least of those related to the Afghan war. Article 2 of the Convention states, as to the scope *ratione materiae* of the treaty, that "[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." By inserting its troops into Afghanistan, the global coalition entered into an armed conflict with the State of Afghanistan, whether a war was declared or not. The United States did not formally declare war, as that would have to have been done by a joint resolution of both houses of Congress.[212] This fact does not matter, however, since an armed conflict occurred between two or more of the High Contracting Parties: both the U.S., the other members of the coalition, and Af-

209 *See* President's Memorandum: "Humane Treatment of al Qaeda and Taliban Detainees," Feb. 7, 2002, at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf.

210 *Id.* para. 2(c).

211 *Id.* para. 3.

212 Art. I sec. 8 of the United States Constitution.

ghanistan have ratified the Third Geneva Convention.[213] On its face, the Convention applies, and it can only be seen as inapplicable if it has fallen obsolete in contexts such as these. The fact that it was ultimately applied, that even prisoner of war status was ultimately accorded the Vietcong in the Vietnam War, shows that even in situations of unconventional war, such as guerrilla conflicts and other asymmetrical struggles, the Geneva Convention has been applied in the past.

But to what extent would its guarantees be applicable to the Guantánamo detainees?

The criteria for determining the status of those apprehended in an international armed conflict, including the classification of illegal combatants are established in Articles 4 and 5 of the Third Geneva Convention[214] and also in Articles 45 (3) and Article 75 of the Additional Protocol I,[215] which the U.S. has not ratified, but which may be seen as evidencing customary international law in the field.

Article 4 sets out the elements necessary to qualify for POW status. Relevant parts of that definition are:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>   (a) That of being commanded by a person responsible for his subordinates;
>   (b) That of having a fixed distinctive sign recognizable at a distance;
>   (c) That of carrying arms openly;
>   (d) That of conducting their operations in accordance with the laws and customs of war.
> 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

Reading section 1 and section 3 of this definition together, one may arrive at the conclusion that members of the regular armed forces of a government not recognized by the Detaining Power, such as the Taliban government of Afghanistan, fall under section 3. That is why President Bush may have ultimately decided to apply the Ge-

213 *See* United States Ratification of International Humanitarian Law Treaties, at the ICRC's official website, http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=US.

214 Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

215 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

neva Convention (but not grant POW status) to the Taliban, but not the Al Qaeda fighters.[216]

Actually, Al Qaeda fighters could only qualify as militias under section 2. But note here that as such, they violated openly the laws of war by targeting civilians,[217] by having no distinctive sign or carrying weapons openly, by operating in stealth deliberately mixing into the civilian population by not wearing military insignia or uniforms, all necessary for the success of their unlawful efforts. Recall here that in 1996, Osama Bin Laden issued "A Declaration of War Against the Americans," not "against the United States". Al Qaeda declared war on the people. Further, in 1998, he declared that "to kill the Americans and their allies, civilians and military, is an individual duty for every Muslim."

These statements and practices definitely took Al Qaeda outside the protected POW status. Thus, under the Geneva Convention, probably most, if not all, of the detainees at Guantánamo would not qualify for POW status. Still, as apparent from this discussion, there might have been questions about that status in individual cases. Article 5 comes to offer some explanation to the issue.

Article 5(1) guarantees that the POW status runs from the moment combatants are captured to the moment they are released. Importantly, Article 5(2) of the Third Geneva Convention provides:

> 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.

This article underlines the necessity of determining the status of those captured in combat, and asks for a "competent tribunal" to do that in cases of doubt. This was also an issue of discord within the administration: whether the detainees were to be accorded individual hearings before a competent military tribunal under Article 5 of the Geneva Convention as to whether they fulfilled the elements of the definition of prisoner of war. Secretary of State Colin Powell argued this point,[218] while Secretary of Defense Donald Rumsfeld stated that these determinations had already been made by military officers before the detainees were sent to Guantánamo. It appears on the basis of the provision that such competent tribunals cannot be replaced by an executive decision of the Commander-in-Chief of the detaining power. The legal issue is whether Defense Secretary Rumsfeld's argument is correct according to which the military personnel that selected the detainees for shipment to Guantánamo consti-

216 *See supra* notes 209, 211.

217 For a pre-September 11 analysis, see Edgardo Rotman, *The Globalization of Criminal Violence*, 10 Cornell J. L. & Pub. Pol'y 1, 23 (2000) ("Terrorism is mostly directed toward peaceful, unarmed civilians. Thus, it attacks the idea of democracy as protection of human rights by violating the basic rights of these innocent victims").

218 Katherine Q. Seelye, *Powell Asks Bush to Review Stand on War Captives*, N.Y. Times, Jan. 27, 2002, at 1 col. 6.

tuted the functional equivalent of a "competent tribunal" under Article 5, or whether, as Secretary of State Powell argued, a separate such tribunal needed to be formally established. The language of Article 5 seems to favor the latter interpretation.

In the post-9/11 situation, President Bush decided the status of the al Qaeda and Taliban detainees in his memorandum of February 7, 2002 the following way:

> a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
>
> [...]
>
> d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.[219]

As far as the Taliban go, Attorney General Ashcroft, on February 1, 2002, had suggested to him two theories[220] resulting in an unlawful combatant status for them: "a) Afghanistan was a failed state; as such the treaty's protections do not apply because it has lost its status as party to the treaty able to fulfill its obligations; b) if during the relevant times Afghanistan was a party to the treaty, Taliban combatants were not entitled to Geneva Convention III prisoner of war status because they were unlawful combatants."[221]

The issue is whether in all of the situations involving individual detainees, there was "doubt" regarding their status triggering Article 5 of the Third Geneva Convention. The U.S. Army Field Manual actually foresees such a "competent tribunal" in section 27-10, a board of no less than three officers for the purposes of determining whether a captured person is entitled to POW status. This tribunal, however, was not used in the case of the al Qaeda and Taliban detainees. Instead a Review Panel, the Combatant Status Review Tribunal was set up, but only after the U.S. Supreme

219 President's Memorandum: "Humane Treatment of al Qaeda and Taliban Detainees," issued on February 7, 2002, para. 2.

220 Abrams, *supra* note 128, at 130.

221 *Id*. Abrams also notes that on January 25, 2002, Alberto Gonzales, at that time Counsel to the President, had sent a memo to the President including, *inter alia*, arguments that the Secretary of State had presented advising the President to review his decision on not granting the POW status to the Taliban, noting among others that "our position would likely provoke widespread condemnation among our allies and in some domestic quarters," also "[a] determination that the GPW does not apply to al Qaeda and the Taliban could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries." *Id*. at 131. All of these predictions proved to be correct as time passed.

Court, in *Rasul v. Bush*,[222] mandated it. Is this Review Panel the equivalent of a "competent tribunal"? Or is there not even a need to ask that question, since the U.S. never had a doubt as to the status of the detainees? On the other hand, the U.S. has already released quite a number of detainees without any charges. Isn't there a possibility that some other innocent captives are still within the walls of detention?

It follows from the above paragraph that of course there is no talking here about rights of POWs, as allegedly the detainees did not hold such status. Also, at all times, even when appearing before the Supreme Court, the government was steadfast in its position that the detainees were foreign nationals detained "abroad," in Guantánamo which is not under the sovereignty of the U.S. That translated into no judicial review, no *habeas corpus*, and potentially indefinite detention. In addition, it implied the possibility of secrecy in dealings with the detainees, their total isolation from the outside world and absolute control over them. Under this theory, no rights were owed to them, enforceable in U.S. courts.

At the beginning of their detention, the government picked and chose amongst the rights provided in the Third Geneva Convention.[223] Reportedly, the detainees received humane treatment and only such protections were excluded that would endanger the security of the prison guards in light of the extreme dangerousness of these detainees as well as those protections that would disallow interrogations given the supreme national interest in thwarting further attacks the detainees might have knowledge of.[224]

The very problematic issue of *incommunicado detention* topped the list of concerns for quite some time, and does not seem to have disappeared. The identities of those detained were not revealed; only names of those who chose to correspond

222 For details, see *infra* at notes 231 *et seq.*

223 In detail, the protections granted were: right not to be subjected to torture; right to food/clothing; right to medical care; access to the ICRC; right to religious practice; right to mail communication. From the Geneva protections, the following were denied: right to work and privileged treatment accorded to them, *inter alia*, by reason of their professional qualifications; right to receive advance pay; right to exercise.

224 However, the European and international press have loudly denounced the prisoners' treatment, early on. U.S. Defense Department photos of the prisoners shackled, and kneeling while wearing blacked-out goggles, earmuffs, mittens and masks over their mouths and noses appeared on the front pages of prestigious newspapers and magazines. In addition to press, deep concern was expressed by the European Union's foreign policy chief, Javier Solana, Germany's foreign minister Joschka Fisher and even United Kingdom's Prime Minister Tony Blair and parliamentarians. Condemnations also came from human rights agencies and organizations, such as Amnesty International. *See Outcry flares over rights: Guantánamo prisoners blindfolded, shackled*, The Miami Herald, Jan. 21, 2002, at 1A. *Cf.* the French Foreign Ministry's statement: "France underlined to American authorities…that all prisoners, regardless of their legal status or their nationality should benefit from all rights accorded to them under international law, especially concerning the conditions of their detention." Jocelyn Gecker, *France urges international law apply to Guantánamo prisoners*, Associated Press, Jan. 28, 2002, at WL database ALLNEWSPLUS (1/28/02 APWIRES 08:04:00).

through the Red Cross were known.[225] The press spearheading commentaries and reports of all sorts stayed tuned for everything it could lay hands or ears on. In a 2004 survey conducted by United Press International, there was provided a detailed breakdown of the nationalities of the detainees held at Guantánamo. According to this survey, the 650 detainees held at that time were nationals of 38 countries. The list of home states is led by Saudi Arabia with 160 detainees; Yemenis constituted 85 detainees; Pakistan had 81; 80 of them were Afghans; Jordan and Egypt each had 30 detainees; others came, *inter alia,* from Morocco, Algeria, Kuwait, China, Tajikistan, Turkey, Britain, Canada, Tunisia, Russia, etc.[226]

There were multiple levels of review by military officers and officials of the Department of Defense, established to determine whether a captured person is an enemy combatant.[227] Their verdicts, however, did not go unchallenged. A number of *habeas corpus* petitions challenging the legality of detention made their way into courts, yielding some positive results on behalf of the detainees.

bb. Rasul v. Bush *and* Hamdi v. Rumsfeld

As it was to be expected, the wartime deviation from the high standard of justice that America prides itself on could not go on long without being challenged. The challenge came from two angles: on one side, from Guantánamo alien detainees designated "enemy combatants" or "unlawful enemy combatants," such designations depending on what board and standard one went by, and on the other side, from the U.S. citizens, initially detained on different grounds as discussed above, and subsequently considered enemy combatants. In both cases, what was at stake, by being designated as an enemy combatant, was the possibility of indefinite detention without charges, and without access to courts.

The initial attempts on the part of alien detainees to challenge this jurisdictional assumption before the U.S. courts were futile.[228] Guantánamo Bay detainees challenged the legality of their detention in federal court, claiming that they had never been combatants against the United States, nor had they engaged in terrorist acts. They also challenged their detention without any charges of any wrongdoing, without access to counsel, or to courts or other tribunals. The U.S. District Court for the District of Columbia had construed the suits as habeas corpus petitions and had dismissed the cases for lack of jurisdiction, based on the holding of *Johnson v. Eisentrager,*[229] according to which aliens detained outside United States sovereign territory

225 John C.K. Daly, *Revealed: the Nationalities of Guantanamo*, United Press Int'l, April 2, 2004, *available at* www.upi.com/view.cfm?StoryID=20040204-051623-5923r.

226 *Ibid.*

227 *See* Bismullah v. Gates (I), 501 F.3d 178, 182-183 (C.A.D.C., 2007), at I.A., quoting the relevant text of the July 2004 CSRT procedures.

228 *See* Rasul v. Bush, 215 F.Supp.2d 55 (D.D.C. July 30, 2002).

229 339 U.S. 763 (1950).

may not invoke habeas corpus relief. The Court of Appeals had affirmed this decision in *Al Odah v. U.S.*[230]

The first, and landmark, case to break the grounds of the Supreme Court was *Rasul v. Bush*.[231] The case involves two Australians[232] and twelve Kuwaitis[233] captured abroad during the hostilities, and held in military custody at Guantánamo Bay.[234] When the Court had granted certioriari, the case included two British citizens, Shafiq Rasul and Asif Iqbal, who had in the meantime been released from custody. Rendering the opinion of the Court, Justice Stevens stated that the United States courts have jurisdiction to entertain challenges to the legality of the detention of aliens captured abroad in connection with hostilities and detained at Guantánamo Bay, and the case was remanded to be considered in first instance on its merits.[235] With this holding, the Court answered affirmatively to the question whether the District Courts have jurisdiction to hear petitioners' habeas challenges and whether the statute confers the right to question the legality of their detention to aliens who are under U.S. custody "in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[236] Describing the *habeas corpus* writ as rooted in the "genius of our common law" and as an "integral part of our common law heritage," the Court added that the writ had "received explicit recognition in the Constitution, which forbids suspension of '[t]he Privilege of the Writ of Habeas Corpus ... unless

230 321 F.3d 1134, 192 A.L.R. Fed. 775, 355 U.S.App.D.C. 189 (D.C.Cir. Mar 11, 2003) (No. 02-5251), rehearing denied (two orders) (Jun 02, 2003), rehearing en banc denied (two orders) (Jun 02, 2003).

231 Rasul v. Bush, 542 U.S. 466 (2004).

232 The Australians, Mamdouh Habib and David Hicks, each had filed a petition for writ of habeas corpus, asking to be released from custody, to be afforded access to counsel, and entitlement to be free from interrogations. *Rasul*, *supra* note 231, at 472.

233 Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees petitioned to be informed of the charges against them, to be permitted to meet with their families, to have access to counsel, and to the courts or some other impartial tribunal. They claimed the unconstitutionality of the denial of such rights, and its violation of international law, and treaties of the United States. They also asserted causes of action under the Administrative Procedure Act, the Alien Tort Statute, and the general federal habeas corpus statute. Rasul, *supra* note 231, at 472.

234 "Relatives of the Kuwaiti detainees allege that the detainees were taken captive "by local villagers seeking promised bounties or other financial rewards" while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U.S. custody. The Australian David Hicks was allegedly captured in Afghanistan by the Northern Alliance, a coalition of Afghan groups opposed to the Taliban, before he was turned over to the United States. The Australian Mamdouh Habib was allegedly arrested in Pakistan by Pakistani authorities and turned over to Egyptian authorities, who in turn transferred him to U.S. custody." Rasul, *supra* note 231, at 472, n. 4.

235 Rasul, *supra* note 231, at 485.

236 *Id.* at 475.

when in Cases of Rebellion or Invasion the public Safety may require it,' Art. I, § 9, cl. 2."[237]

Rejecting the basis of District Court's decision, the Supreme Court struck the difference between the detainees in the *Eisentrager* case and the case at bar. First, the Court referred to the reasoning of the Court of Appeals in the case of *Eisentrager v. Forrester*[238] by quoting that court as stating that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ."[239] In that case, the Supreme Court had reversed this determination of the Court of Appeals on the basis of six critical facts,[240] which in the present case the Supreme Court found to be all different from *Eisentrager*. Accordingly, the Court found that the present petitioners are not nationals of countries at war with the United States, they claim not to have been involved in or plotted acts of aggression against the U.S., they have never had access to any tribunal, consequently not charged with and convicted of wrongdoing, but for over two years they have been detained in a territory over which the United States exercises exclusive jurisdiction and control.[241]

An important element brought up by the Court was the fact that the *Eisentrager* Court had reasoned on the basis of the detainees' *constitutional* entitlement to *habeas corpus* review, while in passing it had mentioned absence of any *statutory* authorization.[242] Building its case for such an entitlement, the Court referred to its previous rulings[243] highlighting that because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of [the habeas statute] as long as "the custodian can be reached by service of process,"[244] and consequently *Eisentrager* does not preclude the exercise of jurisdiction over petitioners' claims.[245] "[P]ersons detained outside the territorial jurisdiction

237 *Id.* at 473-474.

238 Eisentrager v. Forrestal, 174 F.2d 961 (C.A.D.C.1949).

239 Quoted in *Rasul*, *supra* note 231, at 475.

240 "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U.S., at 777, quoted in *Rasul*, at 475-476.

241 Rasul, *supra* note 231, at 476.

242 *Id.* at 476.

243 Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-495.

244 Rasul, *supra* note 231, at 478-479.

245 *Id.* at 479.

of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review."[246] Its ruling was clear: "We therefore hold that [the habeas statute] confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantánamo Bay Naval Base."[247] This distinction in the reasoning of the Supreme Court in the cases of *Eisentrager* and *Rasul*, treating the right to challenge the legality of detention not as a constitutional right, but rather as a statutory right, brought about quite a perplexity in lower courts' reasoning in the cases that mushroomed in the wake of *Rasul*.[248]

The Court also rebuffed the government's claim that the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested,"[249] by noting that this was irrelevant in this case because the habeas statute operates with respect to persons detained within "the [United States'] territorial jurisdiction," and by the express terms of the lease with Cuba, Guantánamo is under U.S. jurisdiction, even permanently, if the U.S. so chooses.[250] So for the Court, aliens and citizens alike are entitled to invoke the federal courts' authority, because "[c]onsidering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."[251] The Court highlighted the fact that the writ has been historically invoked to questioning the validity of detention by the executive.[252]

The Court also concluded that the District Court has jurisdiction to hear the *Al Odah* petitioners' complaint under the federal question statute,[253] and under the Alien Tort Statute.[254] The Court shrugs off the contention of the Appeals Court that the petitioners lacked the privilege of litigation in U.S. courts, and confirms that no previous rulings categorically exclude aliens detained in military custody outside the

246 *Id.* at 478.

247 *Id.* at 484.

248 *See generally* Khalid v. Bush, *infra*, note 302.

249 Rasul, *supra* note 231, at 480.

250 *Id.* at 480.

251 *Id.* at 481.

252 To illustrate this fact, the Court quoted Justice Jackson's dissenting opinion in *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 218-219 (1953): "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." Rasul, *supra* note 231, at 474.

253 28 U.S.C. § 1331, according to which the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

254 28 U.S.C. § 1350, which provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

United States from the privilege of suing in U.S. courts.[255] On the contrary, the Court holds that the "United States courts have traditionally been open to nonresident aliens."[256] Moreover, the Court states, the Alien Tort Claims Act explicitly confers only to aliens the privilege of suing for an actionable "tort ... committed in violation of the law of nations or a treaty of the United States." The Court reasoned that the petitioners could not be stripped of this privilege only because they are detained in military custody. This fact is "immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims."[257]

On June 28, 2004, the Supreme Court together with *Rasul* decided the case of *Hamdi v. Rumsfeld*,[258] involving a writ of *habeas corpus* on behalf of an American citizen captured in Afghanistan as an alleged enemy combatant. Justice O'Connor delivering the opinion of the Court noted that the question at issue was "to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such."[259] To that effect the Court held that "although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[260]

The Court was engaged in deciding whether the government had the right to detain citizens that were designated as "enemy combatants," and in order to do that it based itself on the definition provided by the government for the purposes of that case which reads: "the 'enemy combatant' that [the government] is seeking to detain is an individual who… was 'part of or supporting forces hostile to the United States or coalition partners'" in Afghanistan and who "engaged in an armed conflict against the United States" there.[261] No definition of the term existed before the case came to this Court.

The Court agreed that through the AUMF, the Congress had actually authorized Hamdi's and others' detention, and that "the AUMF is explicit congressional authorization" allowing for the detention of such individuals.[262] Quoting *Quirin*, the Court concluded that "[t]here is no bar to this Nation's holding one of its own citizens as

255 Rasul, *supra* note 231, at 484.

256 *Id.* at 484.

257 *Id.* at 485.

258 Hamdi v. Rumsfeld, 542 U.S. 507 (2004), decided on June 28, 2004.

259 *Id.* at 509.

260 *Id.* at 509.

261 *Id.* at 516.

262 *Id.* at 517. "There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an ex-

an enemy combatant."[263] While detention in this narrow case was considered lawful, the prospects of indefinite detention deserved a closer scrutiny, because there is no such a thing as authorization for indefinite detention with the purpose of interrogation.[264]

Acknowledging the government's position that "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement,"[265] the Court could foresee that "Hamdi's detention could last for the rest of his life."[266] But, as to the date of the case in question there was active combat in Afghanistan going on, which made the detention of "enemy combatants" lawful, and could not be considered indefinite.[267] In the light of lack of Congressional suspension of the writ of habeas corpus as well as lack of prosecution of Hamdi for treason or some other crime,[268] the Court's majority opined that there is a third option: detention under "proof of enemy-combatant status in a proceeding that comports with due process."[269] Moreover, being captured on a foreign battlefield allows for detention outside of the criminal process.[270]

On the writ of habeas corpus as a mechanism of judicial review, the Court agreed that "absent suspension, the writ of *habeas corpus* remains available to every individual detained within the United States."[271] In analyzing the process which is due to Hamdi, the court had to weigh the interests at stake. Referring to its previous jurisprudence, it held that "Hamdi's "private interest ... affected by the official action," is the "most elemental of liberty interests – the interest in being free from physical detention by one's own government."[272] Accordingly, the Government's interest "in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict," could not ask for "an un-

ercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id*. at 515.

263 *Id.* at 519.

264 *Id.* at 521.

265 *Id.* at 520.

266 *Id.* at 520.

267 *Id.* at 521.

268 Opinion held by Justice Scalia, that there are only those two options, and referred to by O'Connor. Hamdi, *supra* note 258, at 523.

269 *Id.* at 523.

270 O'Connor challenging Scalia. Hamdi, *supra* note 258, at 524.

271 *Id.* at 525. The Court affirms that conclusion by reasoning: "while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge." *Id*. at 536-537.

272 *Id.* at 529. *Inter alia,* it emphasized the "importance to organized society that procedural due process be observed," and… that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." Quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

checked system of detention" because it "carries the potential to become a means for oppression and abuse of others who do not present that sort of threat,"[273] though such governmental interests should be taken into consideration. The government also asserted that "its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process."[274] The Court valued the importance of striking the proper constitutional balance bearing in mind that "during our most challenging and uncertain moments… our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[275]

In its holding, the Court concluded that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[276] However, the Court took its time in clarifying the concept of such a "neutral" decision maker. In addition to the "core elements" mentioned above, the exigencies of the circumstances, the Court reasoned, could demand tailoring of enemy-combatant proceedings in order to alleviate the uncommon burden on the Executive during an ongoing military conflict. The Court became very technical in delineating such potential alterations. So, according to this Court:

> Hearsay … may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the 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. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.[277]

But, the Court, concerned with undue burden on the government during an on-going war, made it clear that "initial captures on the battlefield need not receive the [above mentioned] process …, that process is due only when the determination is made to *continue* to hold those who have been seized."[278]

In conclusion, the Court believed that continued detention could be challenged according to the standards discussed above, before "an appropriately authorized

273 *Id.* at 530.

274 *Id.* at 531.

275 *Id.* at 532.

276 *Id.* at 533.

277 *Id.* at 533-534.

278 *Id.* at 534.

and properly constituted military tribunal," and the Court observed that there are examples of such tribunals and military regulations which provide for a process of determining respective instances such as "the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention."[279]

cc. Combatant Status Review Tribunals and Administrative Review Boards

Immediately after the Supreme Court decisions in the *Hamdi* and *Rasul* cases, the government established two administrative procedures to review the status of the detainees. One such procedure is the Combatant Status Review Tribunal, established by the Deputy Secretary of Defense Order of July 7, 2004. This is a non-adversarial, facts-based proceeding to determine whether each detainee meets the criteria to be designated an enemy combatant, by also allowing the detainee to contest such designation. The definition of the term "enemy combatant" was provided in the above mentioned order and it states: "An 'enemy combatant' for purposes of this order shall mean an individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

Each of these tribunals consists of a panel of three neutral commissioned officers of the U.S. Armed Forces, one of them being a judge advocate.[280] They must not have been involved in prior dealings with the detainee, such as his apprehension, detention, interrogation, status determination. The Director of the CSRT also appoints a legal advisor to the tribunal to assist with legal, evidentiary and procedural issues and reviews each decision for legal sufficiency. The procedure provides for a personal representative to the detainee to help him with reviewing the unclassified material, preparing the material for presentation before the tribunal, and with questioning of witnesses at the CSRT. If needed, an interpreter is also provided. As in all other proceedings related to the war on terror, this procedure also pays due regard to classified information, and use of substitutes for them.[281]

The detainee may participate in the CSRT process or he may waive this right. Even if he is not present, the CSRT still reviews his status. The detainee cannot be represented by a lawyer, but is assisted by the personal representative, and an interpreter if needed. He is not obliged to testify or answer questions, if he so chooses, other than identifying himself. He can present evidence, written documentary, testimony of witnesses reasonably available and whose testimony is relevant. He may also testify orally, either sworn or not. If he takes this option, he may be asked, but he is not compelled to answer. The personal representative of the detainee has the opportunity to review all government information, so as to consult with the detainee about his

279 Hamdi, *supra* note 258, at 538.

280 Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba, July 14, 2006

281 *Id.* at (D) Handling of Classified Material.

enemy combatant status, and he can share with the detainee the unclassified information.[282]

As to the burden of proof, the CSRT determines whether the preponderance of evidence supports the classification of the detainee as enemy combatant, and they work under the rebuttable presumption that the government evidence is genuine and accurate.[283]

The decision of the CSRT after being reviewed for legal sufficiency by the legal advisor is submitted to the CSRT Director, who may approve the decision and take appropriate action or return it to the Tribunal for further proceedings. If the decision is made that the detainee is no longer an enemy combatant, arrangements are made for repatriation for release or other disposition according to applicable laws. If the CSRT decides that the detainee has been rightly designated as enemy combatant, he will remain in custody, but subject to an annual review by the Administrative Review Board, which constitutes the next review procedure. Its responsibility is to assess whether the detainee who has been confirmed to be an enemy combatant by the CSRT, continues to present a threat to the U.S. or whether he could have intelligence information that would be of value.

The CSRT procedure required that by July 17, 2004, each Guantánamo detainee be notified that he had the chance to challenge his status as enemy combatant with the CSRT,[284] as well as of the jurisdiction of the U.S. courts to entertain a *habeas corpus* petition filed on the detainee's behalf.

The other relevant review procedure takes place before the Administrative Review Board (ARB). The ARB consists of three members who are all military officers. The Deputy Secretary of Defense, who is the Designated Civilian Official (DCO) for the ARB process is the one who makes the final decision upon recommendation of the ARB. The review process is conducted annually to decide whether a detainee will be released, transferred to the control of another country, or will continue to be detained at Guantánamo for another year. The decision as to the above is primarily grounded on threat assessment and intelligence value of each detainee.[285] This proce-

282 *Id.* at (F).

283 *Id.* at (G) (11).

284 A record of November 2, 2007, reports that the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) held 572 tribunals between July 30, 2004 and June 15, 2007. The tribunals determined that 534 detainees were properly classified as enemy combatants and 38 detainees were found to no longer be classified as enemy combatants. *Available at* http://www.defenselink.mil/news/Nov2007/ CSRTUpdate-Nov2-07.pdf (last visited on September 5, 2008). For further details and updates regarding GITMO detainee process, press releases etc., see United States Department of Defense, Combatant Status Review Tribunals/Administrative Review Boards, CSRT Update - A summary of CSRTs held by OARDEC, *available at* http://www.defenselink.mil/news/combatant_ tribunalsarchive.html.

285 Based on such assessments, some are released, others are transferred for continued detention, mostly in the countries they are nationals of. When concerns of torture or ill-treatment in their home countries arise, the released detainee is transferred to another country that agrees to accept him. *See Spanish National Transferred from Guantánamo:*

dure is a discretionary and unprecedented process, and not required by the Geneva Convention, other international law, or by U.S. law.[286] The process involves hearing in person of each eligible enemy combatant to provide information to support his release. Throughout this process he is assisted by a military officer. The ARB also solicits information from the DoD, from other U.S. government agencies, and, with the assistance of the Department of State, also from the family and national government of the enemy combatant.[287] If the DCO decides that the detainee should remain in detention, a new review date is scheduled to ensure an annual review. The review process is managed by the Office for the Administrative Review of the Detention of Enemy Combatants.[288] According to the Department of Defense the number of detainees that have been released or transferred is larger than those still remaining in Guantánamo, and the DoD states that "the United States has put in place processes to assess each individual and make a determination about whether they may be released or transferred during the course of ongoing hostilities."[289] The Defense Department further asserted that all of the Guantánamo detainees are enemy combatants, still representing a threat to the United States and our allies. Addressing the domestic and international calls for closing Guantánamo, the DoD first fired back, stating that "no one has suggested a viable option to deal with these dangerous men," and then defended its case by confirming that "Guantánamo remains the most secure and effi-

DoD says government of Spain now detaining individual, News Release, February 13, 2004, *available at* http://usinfo.state.gov/dhr/Archive/2004/Feb/18-861679.html; this Spanish detainee no longer required detention by the U.S. *See* also *U.S. Agrees to Transfer Danish Detainee at Guantánamo to Denmark: State Department Spokesman says details still being discussed*, February 19, 2004, *available at* http://usinfo.state.gov/dhr/Archive/2004/Feb/20-755859.html; decision was based on assurances given by the Danish government that the detainee will not continue to pose a threat to the U.S. or international community. *DoD Says Seven Russian Detainees Transferred form Guantánamo: DoD made decision after talks with Russian government*, March 1, 2004, *available at* http://usinfo.state.gov/dhr/ Archive/2004/Mar/02-723222.html; the notice of this date stated that 88 detainees had been released so far, while 12 had been transferred for continued detention: four to Saudi Arabia, 1 to Spain and seven to Russia. *See also U.S. Transfers Five British Guantánamo Detainees to UK*, News Release, March 9, 2004, *available at* http://usinfo.state.gov/dhr/Archive/2004/Mar/10-413841.html; these transfers were based upon assurances on the part of British government that it will take responsibility that these detainees will not pose a threat to the U.S. or its allies. (All the above mentioned websites were last visited on April 20, 2004).

286 U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release: *Guantánamo Bay Administrative Review Board Results Announced*, No. 124-06, Feb. 9, 2006, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=9302.

287 *Id.*

288 *Id.*

289 U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release: *Guantánamo Bay 2006 Administrative Review Board Results Announced*, No. 253-07, March 6, 2007, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=10582.

cient environment to process and contain these individuals."[290] There have been three rounds of reviews so far, the first round conducted during the period of December 14, 2004 to December 23, 2005, and the second round covering the period of January 30, 2006 to December 6, 2006, the third ARB procedure met in the period of January 2007 to March 2008 . In the first round, out of 463 board recommendations, the DCO decided on 14 releases (or 3 percent), 120 transfers (or 26 percent) and 329 continued detention (or 71 percent).[291]

In the second round out of 328 board recommendations, 55 (or 17 percent) were transferred and 273 detainees were affirmed continued detentions.[292] ARB-3 had 253 detainees eligible for review, out of which the DCO decided on 228, transferring 33 detainees, and continuing to detain 195 detainees.[293] During ARB-3, the DCO authorized the transfer of 25 detainees even before their respective ARB-3 proceedings were complete.[294] Since 2002, there have been approximately 423 releases and transfers. The current number of detainees currently at Guantánamo is estimated to be approximately 270, with about 70 detainees constituting an "irreducible minimum," because, according to the Defense Secretary Robert Gates, "either their home government won't accept them or we're concerned that the home government will let them loose once we return them home."[295] A number of detainees had also been designated for release or transfer, "pending discussions with other nations or pending resolution of litigation in U.S. courts."[296] But that has not been easy either. Gates, who favors closing Guantánamo, accepted that the U.S. is basically "stuck" with that "irreducible minimum." CNN quotes him to have said: "We have a serious 'not in my backyard' problem. I haven't found anybody who wants these terrorists to be placed in a prison in their home state."[297] While the numbers seem promising, the reality of the review process before the CSRTs had been highlighted in July 2007, by the testimony of Lt. Col. Stephen L. Abraham, who had painted a dire picture, before Congress, of the

290 *Id.* DoD further added that "[t]he ARB process represents an effective way for the U.S. Government to achieve a balance between the risk posed by these detained enemy fighters and the U.S. Government's desire to not hold these individuals any longer than necessary. The rigor of the ARB process helps mitigate the risk that a released/transferred detainee will return to the fight and the Global War on Terror." *Ibid.*

291 News Release No. 124-06, Feb. 9, 2006, *supra* note 286.

292 *Supra* note 289.

293 *See* Administrative Review Board Summary: ARB-3, at http://www.defenselink.mil/news/arb3.pdf.

294 *Ibid.* ARB-3, at http://www.defenselink.mil/news/arb3.pdf.

295 *See* Paul Reynolds, *Why US is stuck with Guantánamo Detainees*, BBC News, May 21, 2008, *available at* http://news.bbc.co.uk/2/hi/americas/7413181.stm (last visited on September 6, 2008).

296 *Supra* note 289.

297 *See Gates: U.S. "Stuck" in Guantánamo*, CNN, May 21, 2008, *available at* http://www.cnn.com/2008/US/05/20/gates.guantanamo/index.html (last visited September 6, 2008).

procedures employed in determining enemy combatant status.[298] For the purposes of better understanding the law in action, as well as because of the fact that after this testimony the U.S. Supreme Court decided to reverse itself and grant the review of the Military Commissions Act's exclusion of *habeas corpus* for aliens in U.S. custody "determined by the United States to have been properly detained as enemy combatants or … awaiting such determination,"[299] this testimony is being included below in full. In his affidavit submitted to the U.S. Supreme Court, Abraham stated:

> 1. I am a lieutenant colonel in the United States Army Reserve, having been commissioned in 1981 as an officer in Intelligence Corps. … In my civilian occupation, I am an attorney with the law firm Fink & Abraham LLP in Newport Beach, California. …
> 3. From September 11, 2004 to March 9, 2005, I was on active duty and assigned to OARDEC [Office for the Administrative Review of the Detention of Enemy Combatants]. Rear Admiral McGarrah served as the Director of OARDEC during the entirety of my assignment.
> 4. While assigned to OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense ("DoD") and non-DoD organizations, to gather or validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT, and had the opportunity to observe and participate in the operation of the CSRT process. …
> 10. As one of only a few intelligence-trained and suitably cleared officers, I served as a liaison while assigned to OARDEC, acting as a go-between for OARDEC and various intelligence organizations. In that capacity, I was tasked to review and/or obtain information relating to individual subjects of the CSRTs. More specifically, I was asked to confirm and represent in a statement to be relied upon by the CSRT board members that the organizations did not possess "exculpatory information" relating to the subject of the CSRT.
> 11. During my trips to the participating organizations, I was allowed only limited access to information, typically prescreened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit. I was not permitted to request that further searches be performed. I was given no assurances that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information relating to the subject.
> 12. I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative

298 Dan Robinson, *US Lawmakers Debate Guantánamo Detainee Rights*, Voice of America, July 27, 2007, at http://www.globalsecurity.org/security/library/news/2007/07/sec-070727-voa03.htm. In his testimony before the House Armed Services Committee, Abraham "describe[d] a process at Guantánamo in which he assert[ed] commanders merely rubber stamp decisions already made regarding individual detainees. He acknowledge[d] only serving on one tribunal, a point seized on by panel Republicans in challenging his expertise, but notes that he saw documents in hundreds of cases." *Id.*

299 *See infra*, at note 344.

of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied.

13. At one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information.

14. The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted to review. In short, based upon the selective review that I was permitted, I was left to "infer" from the absence of exculpatory information in the materials I was allowed to review that no such information existed in materials I was not allowed to review.

15. Following that exchange, I communicated to Rear Admiral McGarrah and the OARDEC Deputy Director the fundamental limitations imposed upon my review of the organization's files and my inability to state conclusively that no exculpatory information existed relating to the CSRT subjects. It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process at further searches.

16. The content of intelligence products, including databases, made available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information. What information was not included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the person preparing materials for use by the CSRT board members did not know whether they had examined all available information or even why they possessed some pieces of information but not others. …

21. On one occasion, I was assigned to a CSRT panel with two other officers, an Air Force colonel and an Air Force major, the latter understood by me to be a judge advocate. We reviewed evidence presented to us regarding the recommended status of a detainee. All of us found the information presented to lack substance.

22. What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source. Statements of interrogators presented to the panel offered inferences from which we were expected to draw conclusions favoring a finding of "enemy combatant" but that, upon even limited questioning from the panel, yielded the response from the Recorder, "We'll have to get back to you." The personal representative did not participate in any meaningful way.

23. On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. Rear Admiral McGarrah and the Deputy Director immediately questioned the validity of our findings. They directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to reopen the hearing to allow the Recorder to present further argument as to why the detainee should be

> classified as an enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an enemy combatant. OARDEC's response to the outcome was consistent with the few other instances in which a finding of "Not an Enemy Combatant" (NEC) had been reached by CSRT boards. In each of the meetings that I attended with OARDEC leadership following a finding of NEC, the focus of inquiry on the part of the leadership was "what went wrong."
> 23. I was not assigned to another CSRT panel. I hereby declare under the penalties of perjury based on my personal knowledge that the foregoing is true and accurate.[300]

Whether the CSRT review procedures constituted sufficient substitute procedures for habeas corpus became the topic of discussion of the Supreme Court in *Boumediene*, which was decided in June 2008 and will be discussed in detail in a later section.

dd. *Post*-Rasul Habeas Corpus *Litigation*

The Supreme Court's ruling in *Rasul* gave a new impetus to *habeas corpus* petitions challenging the legality of detention of foreign nationals, and also the conditions of confinement.[301] However, the courts in various cases reached opposite conclusions. Two such cases are instructive.

In the case of *Khalid v. Bush*,[302] District Court Judge Richard Leon granted the

300 Declaration of Stephen Abraham, Lieutenant Colonel, United States Army Reserve, dated June 15, 2007, Appendix to: Reply to Opposition to Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Al Odah v. U.S., No. 06-1196, June 22, 2001, *available at* http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf. This brief for petitioners, successful in the Supreme Court, stated that "courageous military officer, Lieutenant Colonel Stephen Abraham … avers that, in every phase, the CSRT process was infected with command influence and an illusion," and concluded that "it is now clear that, not only is the remedy provided by the DTA inadequate, but also the underlying CSRT process was an irremediable sham." *Id.* at 4.

301 "As of the end of July 2004, thirteen cases involving more than sixty detainees were pending before eight Judges in this District Court." *In Re Guantánamo*, *infra* note 304, at 451.

302 Khalid v. Bush, 355 F.Supp.2d 311, (D.D.C.2005), decided on January 19, 2005. This case involved seven foreign nationals, namely five Algerian-Bosnian citizens, one Algerian citizen with permanent Bosnian residency, and Ridouane Khalid, who was a French citizen, captured in Pakistan in early fall 2001. The rest were all captured in Bosnia, in October 2001.

respondent[303] the motion to dismiss, whereas in *In Re Guantánamo Cases*,[304] Judge Joyce Hens Green partly granted such a motion and partly denied it. Noting, *inter alia,* the importance of preventing the combatants to return to the battlefield,[305] the *Khalid* court stated that "[t]he fact that the petitioners in this case were not captured on or near the battlefields of Afghanistan … is of no legal significance to this conclusion because the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists."[306] Consequently, for the court, "the President's Detention Order was lawful under the AUMF and consistent with his war powers under the Constitution."[307] But while Judge Leon justifies in this way indefinite detention, Judge Green arrives at a different conclusion. For her, the interest to be free from physical detention by a government is the most elemental of liberty interests. "Although the detainees in the cases before this Court are aliens and are therefore not being detained by their own governments, that fact does not lessen the significance of their interests in freedom from incarceration and from being held virtually *incommunicado* from the outside world."[308]

As to the detainees' contention that their continued detention violated their substantive rights of due process, right to confrontation, right to counsel, protection against cruel and unusual punishment, under the United States Constitution, the *Khalid* Court, notwithstanding the Supreme Court's decision in *Rasul*, which according to Judge Leon "did not concern itself with whether the petitioners had any independent constitutional rights," relies on "a long line of Supreme Court opinions," and holds that "non-resident aliens captured and detained pursuant to the AUMF and the President's Detention Order have no viable constitutional basis to seek a writ of habeas corpus."[309] On the contrary, Judge Green would state that "the Court interprets *Rasul,* in conjunction with other precedent, to require the recognition that

303 "The respondents ("United States") have moved to dismiss these petitions claiming, in essence, that there is no viable legal theory by which this Court could issue such a writ because: (1) non-resident aliens detained under these circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances." Khalid, at 314.

304 In Re Guantánamo Detainee Cases, 355 F.Supp.2d 443 (D.D.C. 2005), Judgment of January 31, 2005. This case involved eleven coordinated habeas cases that were filed by detainees held as "enemy combatants" at the United States Naval Base at Guantánamo Bay, Cuba.

305 Khalid, *supra* note 302, at 322.

306 *Id.* at 320.

307 *Id*. *supra* note 302, at 320.

308 In Re Guantánamo, *supra* note 304, at 465. Further, she added "There is no practical difference between incarceration at the hands of one's own government and incarceration at the hands of a foreign government; significant liberty is deprived in both situations regardless of the jailer's nationality." *Ibid*.

309 Khalid, *supra* note 302, at 321. Judge Leon further explains: "The petitioners in this case are neither United States citizens nor aliens located within sovereign United States territory. To the contrary, they are non-resident aliens, captured in foreign territory, and held

the detainees at Guantánamo Bay possess enforceable constitutional rights."[310] The *In Re Guantánamo* court also recognized "the special nature of Guantánamo Bay"[311] and treated it "as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist."[312] This Court found "nothing impracticable and anomalous in recognizing that the detainees at Guantánamo Bay have the fundamental right to due process of law under the Fifth Amendment,"[313] and that no hardship is caused to the U.S. when recognizing the existence of constitutional rights of the detainees in the same way as "had they been held within the continental United States."[314] The final challenge had to do with the petitioners' contention that their detention unlawfully violates other United States treaties, namely the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, because their detention conditions actually constitute "torture." Opposing this theory as well, the Khalid Court noted that "[i]n the absence of a self-executing treaty and Congressional implementation, the individual does not have standing to assert the alleged violation in federal court,"[315] and neither CAT nor ICCPR are self-executing treaties. Ultimately, Judge Leon's Court found "no viable legal theory under [national or] international law by which a federal court could issue a writ,"[316] whereas, Judge Green, analyzing claims raised by the detainees under the Geneva Conventions, concluded that the Geneva Conventions are self-executing.[317] Rebuffing the government's posi-

at a naval base, which is located on land subject to the "ultimate sovereignty" of Cuba." *Ibid*.

310 In Re Guantánamo, *supra* note 304, at 454.

311 The Court clarified that "American authorities are in full control at Guantánamo Bay, their activities are immune from Cuban law, and there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice." *Id.* at 463.

312 *Id.* at 462-462.

313 *Id.* at 463. This court concluded: "In sum, there can be no question that the Fifth Amendment right asserted by the Guantánamo detainees in this litigation-the right not to be deprived of liberty without due process of law-is one of the most fundamental rights recognized by the U.S. Constitution." *Id*. at 464.

314 *Id.* at 463.

315 Khalid, *supra* note 302, at 327. In the previous paragraph, the Court had also reasoned that the U.S. was not bound by the Inter-American human rights treaties either, and based its argument on a recent case, *Garza v. Lappin,* 253 F.3d 918, 925 (7th Cir.2001), which stated: "The American Declaration of the Rights and Duties of Man is an aspirational document which ... did not on its own create any enforceable obligations .... [The U.S.] has not ratified [the American Convention on Human Rights], and so that document does not yet qualify as one of the 'treaties' of the United States that creates binding obligations." *Id*. at 326.

316 *Id.* at 330.

317 Judge Green adopted Judge Robertson's conclusion in *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 165 (D.D.C.2004), quoting: "Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing

tion that the final word on the matter is President Bush's determination that Taliban fighters are not entitled to prisoner of war status under the Third Geneva Convention, she stated, "Nothing in the Convention itself … authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of "prisoners of war."[318] In conclusion, for her Court, "Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal have also stated valid claims under the Third Geneva Convention."[319]

On the U.S. citizens' front, José Padilla is another person detained in the context of war on terror.[320] He stood trial in the U.S. District Court for the Southern District of Florida facing criminal charges, and was convicted, *inter alia,* of conspiracy to murder, maim and kidnap people in a foreign country, a charge that can carry a life sentence.[321] However, how he ended up there is interesting for the purposes of this study. He was apprehended at Chicago's O'Hare International Airport on May 8, 2002 on a material witness warrant issued by the United States District Court for the Southern District of New York. On June 9, the President designated Padilla as enemy combat-

legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty." *In Re Guantánamo*, *supra* note 304, at 479.

318 *Id.* at 480.

319 *Id.* at 481.

320 The paragraph that follows contains information regarding the case of José Padilla as found in *Padilla v. Hanft*, 547 U.S. 1062 (2006), decided on April 3, 2006. In this case, the Supreme Court denied certiorari to Mr. Padilla noting that "Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested." Justice Kennedy explained: "Whatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power. Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings." *Id.*

321 His jury trial opened on May 14, 2007 and his guilty verdict was pronounced on August 16, 2007. More details on this trial to be found on The Miami Herald, *Timeline: The José Padilla Case, available at* http://www.miamiherald.com/multimedia/news/padilla/. Reports noted that this trial "did prove an important point - you don't need a military tribunal for this type of terrorism case." *The José Padilla Trial: Civilian Court Proved a Point*, The Philadelphia Inquirer, Aug. 21, 2007, Editorial, *available at* http://www.philly.com/inquirer/opinion/20070821_Editorial_The_Jose_Padilla_Trial.html. To prove that conspiracy charge, "the strongest piece of evidence … was what prosecutors said was an application form Mr. Padilla filled out to attend a training camp run by Al Qaeda in Afghanistan in 2000." Adam Liptak, *Padilla Case Offers New Model of Terrorism Trial*, N.Y. Times, Aug. 18, 2007, at http://www.nytimes. com/2007/08/18/us/nationalspecial3/18legal.html.

ant and ordered his military detention in the Consolidated Naval Brig in Charleston, South Carolina. On June 11, a *habeas corpus* petition in the Southern District of New York was filed on his behalf challenging the military detention, which was dismissed without prejudice, as the New York court was not the proper one to consider it.[322]

In his *habeas* petition to the United States District Court for the District of South Carolina on July 2, 2004, Padilla requested immediate release or else be charged with a crime. The petition was granted, but this decision was reversed by the Court of Appeals for the Fourth Circuit on September 9, 2005. When Padilla filed petition for a writ of certiorari before the Supreme Court, the Government obtained an indictment which charged him with several federal crimes. Consequently, he was released from military custody and brought under the control of the Attorney General, while facing criminal charges.

Padilla's petition for a writ of certiorari was thus denied, though Padilla had argued that "there remains a possibility that he will be redesignated and redetained as an enemy combatant."[323] The Court, however, argued that "the District Court [of Florida] will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants….Were the Government to seek to change the status or conditions of Padilla's custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla."[324] At that time, any such claims raised by Padilla were considered merely hypothetical.[325]

ee. The Detainee Treatment Act of 2005

On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005[326] as passed by both houses of Congress. Section 1005 asked of the Secretary of Defense to provide Congress with procedures for status review of detainees at Guantánamo Bay, in Afghanistan and Iraq, through the Combatant Status Review Tribunals and the Administrative Review Boards already in operation at Guantánamo Bay, and other procedures operating in Afghanistan and Iraq. The goal is to review the need for continued detention each year, by considering new evidence relating to the enemy combatant status of a detainee, as well as to assess if any statement from the detainee was obtained as a result of coercion, and to assess the probative value of any such statement.[327]

The paragraph on the judicial review of detention of enemy combatants provides:

322 Rumsfeld v. Padilla, 542 U.S. 426 (2004).

323 Padilla v. Hanft, *supra* note 320.

324 *Id.*

325 Padilla was tried in the Federal District Court in Miami. On January 22, 2008, Judge Marcia G. Cooke sentenced him to 17 years and 4 months in prison, though the prosecution had asked for life in prison. See Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case,* N.Y. Times, Jan. 23, 2008, *available at* http://www.nytimes.com/2008/01/23/us/23padilla.html?_r=1&oref=slogin (September 6, 2008).

326 Title X, Pub. L. 109–148; 119 Stat. 2742.

327 Detainee Treatment Act 2005, Section 1005 (b) (1). This provision's applicability starts on or after the date of the enactment of this Act.

(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider
  (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or
  (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba, who –
    (A) is currently in military custody; or
    (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.[328]

As to the review of decisions regarding the propriety of detention by the CSRTs, it provided that "the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." This was subject to important limitations: it had the power of review only as to whether the CSRT's decision "was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)."[329] Such jurisdiction of the court ends when the alien is released from the custody of the Department of Defense.

328 Detainee Treatment Act 2005, Section 1005 (e).

329 (B) LIMITATION ON CLAIMS – The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien –
  (i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantánamo Bay, Cuba; and (ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW – The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of – (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

Section 1005(e)(2). Later, the Military Commissions Act of 2006 amended Section 1005(e)(2)(B)(i) of the Detainee Treatment Act of 2005 by striking "the Department of Defense at Guantánamo Bay, Cuba" and inserting "the United States."

Most importantly, the Act noted that "Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States,"[330] and further clarified that, "For purposes of this section, the term `United States', when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantánamo Bay, Cuba."[331] This determination turned out to be at odds with the Supreme Court's view of the law.

ff. The Military Commissions Act of 2006[332]

On October 17, 2006, President Bush signed into law the Military Commissions Act of 2006.[333] In Section 7, it prescribed the wholesale abolition of the writ of *habeas corpus* for aliens designated as enemy combatants:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who –
> (A) is currently in United States custody; and
> (B) has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

This provision of the Act has proven to be the most controversial of all of its prescriptions. Former Attorney General Janet Reno, together with other former senior Justice Department officials,[334] took the unusual step of submitting an amicus curiae brief arguing that "the MCA purports to strip the courts of jurisdiction over *habeas corpus* cases filed by alleged alien enemy combatants. But the Constitution forbids subjecting civilians … to military jurisdiction without the availability of *habeas corpus*, when they have not been arrested on a battlefield and the civilian courts are 'open and their process unobstructed.'"[335] Referring to pertinent recent cases, she concludes that the "existing criminal justice system is more than up to the task of prosecuting and bringing to justice those who plan or attempt terrorist acts within the United States—without sacrificing any of the rights and protections that have been the hallmarks of the American legal system for more than 200 years. The federal government is eminently capable of both protecting our nation's security and safeguarding our proud traditions of civil liberties."[336] Many respected personalities, including former Secretary

330 DTA of 2005, *supra* note 326, Section 1005 (f).

331 *Id*. at Section 1005 (g).

332 Pub. L. 109-366, 120 Stat. 2600 (2006).

333 The White House, *President Bush Signs Military Commissions Act of 2006*, Oct. 17, 2006, at http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

334 Amicus Curiae Brief of former Senior Justice Department Officials submitted in the *Al Marri* Case, http://www.washingtonpost.com/wp-srv/politics/documents/Senior_DOJ_Officials.pdf (Nov. 20, 2006).

335 *Id.* at 4.

336 *Id.* at 15.

of State Colin Powell,[337] as well as many human rights organizations have urged the repeal of this provision; pertinent legislation has been introduced in Congress,[338] but is unlikely to succeed since the supporting members will not have the two-thirds majority in both Houses necessary to override an expected Presidential veto. In the U.S. Senate, Senator Specter tried to attach the bill as an amendment to the National Defense Authorization Act of 2008, but his motion to invoke cloture, which needs 60 votes to overcome a filibuster, failed by a vote of 56 in favor, 43 against, and one not voting.[339]

The main argument against the constitutionality of the MCA is that, in removing *habeas corpus* for aliens declared unlawful enemy combatants, the requirements of the Suspension Clause of the Constitution have been disregarded. On February 20, 2007, in *Boumediene v. Bush*,[340] the U.S. Circuit Court for the District of Columbia, by a 2 to 1 majority, upheld this provision of the MCA.[341] It argued that, because the common law writ of "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States," the Congress did not violate the Suspension Clause when it stripped the federal district court of jurisdiction to hear any habeas petition filed by an "alien detained by the United States."[342]

However, the U.S. Supreme Court, in an extremely rare reversal of an earlier decision,[343] granted the petition for a writ of certiorari against this decision,[344] and it

337 "I would close Guantánamo not tomorrow, but this afternoon,…and let [the detainees] have access to writs of *habeas corpus*…," General Colin L. Powell, *Get rid of Gitmo and restore Habeas Corpus*, MSNBC "Meet the Press," video interview, *available at* http://www.youtube.com/watch?v=Pl3V-231Hpw, (last visited on September 16, 2007).

338 Senators Arlen Specter and Patrick Leahy, supported by a number of other senators introduced on January 4, 2007, the "Habeas Corpus Restoration Act of 2007" (S. 185), with Congressman Jerrold Nadler and Congresswoman Jane Harman introducing the House version of the bill (HR 1416), asking to restore the habeas corpus right alien unlawful enemy combatants detained in Guantánamo or in the U.S. *See* "Habeas Corpus Restoration Act of 2007," text *available at*: http://www.govtrack.us/congress/ billtext.xpd?bill=s110-185 and http://www.washingtonwatch.com/bills/show/110_HR_1416.html .

339 *Cf.* the roll call on S.Amdt. 2022: To restore habeas corpus for those detained by the United States., amending H.R. 1585: National Defense Authorization Act for Fiscal Year 2008, Senate Vote #340 (Sept. 19, 2007), at http://www.govtrack.us/congress/vote.xpd?vote=s2007-340.

340 476 F.3d 981 (D.C. Cir. 2007), text of decision at: http://pacer.cadc.uscourts.gov/docs/common/ opinions/200702/05-5062b.pdf.

341 Arguing that those aliens have no constitutional or common-law right to habeas corpus review. *Id*. at 988-994.

342 *Id.* at 990-91. This argument would, presumably, not be available in the case of an alien who was present in the U.S. before being detained, as in the *al-Marri* case, *infra* note 425 *et seq.*

343 127 S. Ct. 1478 (April 2, 2007).

344 On the final day of its term, the Supreme Court reversed course and granted the two petitions for certiorari. Boumediene v. Bush, 2007 WL 1854132 (June 29, 2007) (No. 06-1195), and Al Odah v. United States, 2007 WL 681992 (June 29, 2007) (No. 06-1196). A rehearing

reviewed the case in the fall of 2007. This change of heart by the Court has been attributed, at least partially, to the affidavit submitted by Lt. Col. Stephen Abraham, a military lawyer involved in CSRT procedures who shared a devastating picture of the reality of these reviews with the public and Congress.[345]

gg. Boumediene v. Bush

In *Boumediene v. Bush*,[346] the petitioners were aliens who were designated enemy combatants and detained in Guantánamo Bay. They claimed that they have the constitutional privilege of habeas corpus, which can only be withdrawn based on the Suspension Clause, Article I, paragraph 9, clause 2, of the Constitution of the United States. By a close vote of 5 to 4, the Court decided that the petitioners have the benefit of the constitutional privilege of habeas corpus, and that the 2005 DTA CSRT procedures for review of a detainee's status are not adequate substitute procedures. Consequently, Justice Kennedy, speaking for the Court, held that paragraph 7 of the MCA 2006 constituted an unconstitutional suspension of the writ.[347] The Court, however, did not address the issue of whether the President has the authority to detain these petitioners, nor did it hold that the writ must issue. Reversing the judgment of the Court of Appeals, the Court remanded the case to the District Court[348] which was to resolve, in first instance, these and other issues related to the legality of detention.[349]

The Court first addressed the threshold matter as to whether section 7 of the MCA denied the federal courts' jurisdiction to hear habeas petitions that were pending at the time when the MCA was enacted. If the MCA denied such jurisdiction, the issue became the constitutional validity of the statute; if it was valid, the petitioners' cases would have to be dismissed.[350] Thus the Court proceeds to analyze the terms of the MCA which amends 28 U.S.C.A. § 2241 (e),[351] and it challenges the petitioners'

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is granted only if there has been a change in "intervening circumstances of a substantial or controlling effect" or if counsel can cite "substantial grounds not previously presented." It needs affirmative votes of five justices, and last occurred in the 1947 case of *Hickman v. Taylor*, 329 U.S. 495. Lyle Denniston, *Court switches, will hear detainee cases*, June 29, 2007, http://www.scotusblog.com/movabletype/archives/2007/06/court_1.html.

345 *See supra* at note 300.

346 128 S.Ct. 2229 (2008). The case was argued on December 5, 2007 and decided on June 12, 2008.

347 *Id*. at 2240.

348 *Id*. at 2277.

349 *Id*. at 2240.

350 *Id.* at 2242.

351 This paragraph now provided:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in [§§ 1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States

textual arguments[352] that the effective date subsection of the MCA, § 7(b), does not apply to their pending habeas petitions, but to another class of cases not pertinent to their case. The Court concludes that both paragraphs are closely related, and that the pending habeas corpus cases were subject to the statute's jurisdictional bar.[353] The Court discussed the litigation history, namely the *Hamdan* case, which prompted the Congress to enact the MCA. In *Hamdan*, the Court had noted that it should not be presumed that Congress intended to reach the pending habeas cases, unless there was a clear statement to that effect, and it had concluded that the DTA's "jurisdiction-stripping provision" did not apply to pending habeas cases. Invocation of the clear statement rule by the *Hamdan* court triggered Congress to move and enact the MCA, which as Court noted above does deprive the federal courts of their jurisdiction to entertain habeas cases of the category of Guantánamo enemy combatant detainees. While the Court recognized that the Congress, in its judgment, presumably deemed the amended statute to be "a lawful one," the Court now "proceed[ed] to its own independent judgment"[354] on the constitutionality of § 7 of the MCA.

In determining whether petitioners are barred from seeking the writ or invoking the protection of the Suspension Clause of the Constitution, the Court addresses two arguments brought forth by the Government: their status as enemy combatants, as well as their physical location in Guantánamo, Cuba. In reaching its conclusion, the Court's majority resorts to two propositions: first, the need to explore the history and development of the writ of habeas corpus, as a instrument to protect freedom with a "centrality" in a Constitution that, originally, had no Bill of Rights;[355] and second, the search for any settled precedents or legal commentaries of 1789 as regards the extraterritorial scope and application of the writ.

> or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Id. at 2242.

352 According to the petitioner's argument, paragraph 2241(e)(1) referred to "a writ of habeas corpus." The next paragraph, § 2241(e)(2), referred to "any other action … relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who … [has] been properly detained as an enemy combatant or is awaiting such determination." Since these were two distinct paragraphs, so were the cases: two distinct classes of cases. The effective date subsection, MCA § 7(b), they argued, referred only to the second class of cases, thus their pending habeas cases would not be barred. *Id*. at 2243.

353 *Id*. at 2243.

354 *Ibid*., including discussion on the dialogue between Congress and the Court ("If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases.").

355 *Id*. at 2244.

In thorough historical analysis,[356] the Court invoked the intent of the Framers to protect the individual from unlawful restraint as a "fundamental precept of liberty." This goal was to be achieved through the provision of the writ of habeas corpus and through specifying limited grounds for its suspension. The Suspension Clause was intended not only to protect against arbitrary suspensions of the writ, but also to maintain "the delicate balance of governance" as a safeguard of liberty, protecting "the rights of the detained by affirming the duty and the authority of the Judiciary to call the jailer to account."[357]

The Court proceeds to discuss the second issue, *i.e.* whether foreign nationals, apprehended and detained extraterritorially, had been allowed to assert the privilege of the writ. The Court recognized that the parties had diligently examined historical sources and cases to support their views, but it concludes that all that research is *inconclusive* as to whether "a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantánamo, over which the Government has total military and civil control."[358] Reviewing and discussing a number of cases,[359] the Court observes that "[c]ommon-law decisions withholding the writ from prisoners detained in these places [such as Scotland and Hanover] easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgments of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgments outside their territorial jurisdiction."[360] The Court concludes that in this case the prudential barriers would be irrelevant, as it highlights the contrast between those cases and the present one. It lists three grounds for this conclusion: (1) there is no basis to believe that an order of a federal court would be disobeyed at Guantánamo; (2) no Cuban court has jurisdiction to hear these petitioners' claims; (3) no law other than the law of the United States applies at the naval station.[361]

As the historical record has inherent shortcomings, and the common-law courts have simply not encountered cases quite parallel to the one at bar, the Court addresses the distinctive characteristics of the present case: the unique status of Guantánamo Bay and the particular dangers of terrorism in the modern age.[362]

First, the Court discusses the issue of the U.S.' relationship with the place of detention, Guantánamo. It agrees that Cuba, in the legal, technical sense, *de jure,* maintains sovereignty over Guantánamo. However, a territory can "be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty,

356 *Id*. at 2244-2247.

357 *Id*. at 2247.

358 *Id*. at 2248.

359 *Id.* at 2248-2251.

360 *Id*. at 2250.

361 *Id*. at 2251.

362 *Id*.

of another."[363] As in Rasul, the Court took notice of the "obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty" over Guantánamo.[364] Referring to a number of cases of its earlier jurisprudence, the Court challenges the Government's argument that "the Constitution necessarily stops where *de jure* sovereignty ends,"[365] emphasizing, on the contrary, that "the questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[366] The Court goes on to state that such formalism raises "troubling separation-of-powers concerns,"[367] as it would allow the political branches to "govern without legal constraint" if they surrendered formal sovereignty over a territory to a third party, while a the same time leasing it back with full control over it.[368]

The Court concludes that the Constitution cannot be switched on and off that way: "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply,"[369] even when the United States is acting outside its borders. Otherwise, according to the Court, there would be a striking anomaly in the "tripartite system of government." The Court majority goes on to note that habeas corpus is in itself the indispensable mechanism in monitoring the separation of powers, and it should not be manipulated by those whose power it is "designed to restrain."[370]

Mindful of this consideration, the Court turns to determining the reach of the Suspension Clause. Relying on *Eisentrager* and other extraterritoriality opinions, the Court presents three relevant factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[371]

As regards the first element, the Court finds the CSRT procedures "far more limited" than the procedural protections afforded to the detainees in *Eisentrager*, and considers them to "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[372] The Court states specifically that the "personal representative" that assists the detainee before the CSRT is actually not his lawyer or advocate; the Government's evidence is accorded a presumption of validity; the detainee's ability to rebut the Government's evidence against him is

363 *Id.* at 2252.

364 *Id*. at 2253.

365 *Id*.

366 *Id*. at 2258.

367 *Ibid.*

368 *Id.* at 2258-2259. The Court states: "Our basic charter cannot be contracted away like this." *Id*. at 2259.

369 *Id.* at 2259.

370 *Id*.

371 *Id.*

372 *Id*. at 2260.

limited under the circumstances of his confinement and also by his lack of counsel at that stage; and, finally, the review process in the Court of Appeals does not afford a "cure" for all the defects in the earlier proceedings.[373]

Regarding the second element, that of the nature of the site of detention, the Court's majority reaffirmed its position in *Rasul* that Guantánamo bears no resemblance to any other cases decided before, especially Landsberg, Germany, in the case of *Eisentrager*, and that, in every practical sense, it is not considered to be "abroad," but "within the constant jurisdiction of the United States."[374]

As to the third factor, practical obstacles to upholding the Suspension Clause in military detentions abroad, the Court argued that while that it is sensitive to the expenditure of funds as well as the potential diversion of the military's attention, it does not find these arguments dispositive. Any judicial process requires some expenditure of funds, and, in light of the United States' plenary control over Guantánamo, the military mission in this territory could not be credibly compromised by habeas hearings in federal courts.[375] Nor, does the Court see any apparent threats that the judicial proceedings would interfere with the military's efforts to contain the enemy.[376] Additionally, the Court observes that there are no potential frictions that habeas adjudication could cause with the host government, since no Cuban court has jurisdiction over military personnel or the detainees in Guantánamo: the U.S. is not answerable to any other sovereign.[377] A few other practical barriers that could arise to the running of the writ could be addressed by modifying habeas procedures.[378]

Based on the above reasoning, the Court held that the Suspension Clause has full effect at Guantánamo Bay. As the MCA does "not purport to be a formal suspension of the writ," the petitioners are "entitled to the privilege of habeas corpus in challenging the legality of their detention."[379]

The Court recognizes that the MCA stripped petitioners of access to statutory habeas corpus; still this does not automatically trigger a constitutional violation as Congress may have provided a functional equivalent in the sense of "adequate substitute procedures." The Court answers this question not only by considering whether the DTA review process in the Court of Appeals is an adequate substitute for the writ, but also by comparing the cases and statutes that restricted the writ in the first place,[380] mostly for the purposes of gate-keeping in the context of the abuse-of-the-writ doctrine. The Court noted that such restrictions, mostly on repetitive claims of

373 *Id.*

374 *Id*. at 2261.

375 *Id*.

376 *Id*.

377 *Id*. at 2262.

378 *Id.*

379 *Id*.

380 Such as Title I of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), and the cases of *United States v. Hayman*, 342 U.S. 205 (1952) and *Swain v. Pressley*, 430 U.S. 372 (1977), both streamlining, not cutting back habeas corpus relief. *Id*. at 2263-2265.

the writ, come generally after the trials have already taken place in courts, and thus provide no instruction, since in the present cases no trial has been held. Above all, the Court emphasizes the fact that in all of those cases the statute had a saving clause which provided that "a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective."[381] The constitutionality of these habeas-like statutes never came to question because habeas corpus remained available as a last resort, and the courts were granted broad remedial powers in making findings of fact and conclusions of law.

In the present case, the DTA and MCA were intended to circumscribe habeas corpus review, and there is no saving clause for habeas as a last resort.[382] The Court goes on arguing that the DTA only grants limited jurisdiction to the Court of Appeals, which cannot inquire into the legality of detention generally, but it can only assess "whether the CSRT complied with the 'standards and procedures specified by the Secretary of Defense' and whether those standards and procedures are lawful."[383] Paragraph 7 of the MCA eliminates habeas corpus review for enemy combatants, and through DTA and MCA Congress intended a limited procedure, which to the Court does not pass the test of a valid habeas substitute. While assessing the flaws of the CSRT proceedings,[384] the Court makes "no judgment as to whether the CSRTs, as currently constituted," satisfy due process standards, but accepts that there is such an inherent risk in any proceeding that is "closed and accusatorial."[385] Still, "given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore."[386] The Court notes that the habeas court should have the "means to correct errors that occurred during the CSRT proceedings," to "assess the sufficiency of the Government's evidence," and the "authority to admit and consider relevant exculpatory evidence" not introduced earlier.[387] Also, the court must have "adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."[388]

381 *Id*. at 2265.

382 *Id*. at 2265-2266.

383 *Ibid*.

384 *Id*. at 2269: "[A]t the CSRT stage, the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention … (… detainee can access only the 'unclassified portion of the Government Information'). The detainee can confront witnesses that testify during the CSRT proceedings. … But given that there are in effect no limits on the admission of hearsay evidence – the only requirement is that the tribunal deem the evidence 'relevant and 'helpful,' … – the detainee's opportunity to question witnesses is likely to be more theoretical than real."

385 *Id*. at 2270.

386 *Id.*

387 *Id.*

388 *Id*. at 2271.

According to the majority of the Court, as the statute stands, the Court of Appeals does not have such power, and the Court finds this "troubling."[389] The Court also sees "no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings."[390] Under such circumstances, the Court holds that § 7 of the MCA "effects an unconstitutional suspension of the writ."[391]

As it concludes that there is no jurisdictional bar to the District Court to entertain habeas petitions of the detainees, the Court also finds no prudential barriers: the real risks and threats of terrorist acts are not likely to abate; some of these detainees have had no judicial oversight of detention for over six years now. To require these detainees to first complete DTA review before proceeding with their habeas actions would require "additional months, if not years, of delay," the costs of which, the Court says, "can no longer be borne by those held in custody." They are entitled to a prompt habeas hearing.[392]

Having decided this way, the Court also addressed the sensitivities of dealing with such cases. It clarified that it left the DTA and the CSRT processes "intact"; it stated that a habeas court should not intervene the moment that a detainee sets foot on a territory where the writ runs; it advised the federal courts to refrain from entertaining habeas petitions until the CSRT had a chance to act; it cautioned the habeas corpus courts not to disregard the dangers that the detention is intended to prevent; it urged for innovation in the field of habeas corpus, by accommodating concerns of the burdens put on the military by habeas proceedings; it found no problem with channeling future cases to one district court to reduce administrative burdens to the Government, even without amending § 2241; it noted that it expects the district court to use its discretion in protecting sources and methods of intelligence gathering; it stated that the law must accord substantial power to the Executive to apprehend and detain those posing a threat to the security; it confirmed that this decision does not undermine the powers of the Commander-in-Chief; and it finally urges the political branches to engage in a genuine debate about how best to preserve the Constitution while still protecting the nation from terrorism.[393]

The decision drew two vigorous expressions of dissent, both of them joined, respectively, by all four dissenters. One, written by Justice Scalia, culminated in the ominous warning: "The Nation will live to regret what the Court done today."[394] The other opinion, authored by Chief Justice Roberts, used labels ranging from "misguid-

389 *Id*. ("We cannot ignore the text and purpose of a statute in order to save it.") See further detailed discussion at 2271-2274.

390 *Id*. at 2272.

391 *Id*. at 2274.

392 *Id.* at 2274-2275.

393 *Id*. at 2275-2277.

394 Justice Scalia, dissenting, *id.* at 2307.

ed" and "fruitless"[395] to "egregious."[396] According to Roberts, the winner was not the rule of the law, but the "rule of lawyers."[397] He characterized the decision as a result of "hemming and hawing,"[398] a decision that brought no win to the detainees or to Congress, to the Great Writ or to the rule of law, or to the American people.[399]

In substance, Chief Justice Roberts starts by criticizing the Court for not first requiring the petitioners to exhaust their remedies under the statute, and if the CSRT procedures would "meet the minimum due process requirements outlined in *Hamdi*" side by side with the availability of an Article III court for reviewing such procedures, if need be, then there was no need to reach the Suspension Clause question.[400] It is unnecessary, he states, "to consider the availability of the writ until the statutory remedies have been shown to be inadequate to protect detainees' rights."[401] "[I]n the absence of any assessment of the DTA's remedies," he concludes, a judgment on their constitutionality is speculative and based on hypothetical questions.[402] Such remedies have not yet been tested because the petitioners have "consistently refused" to use the DTA system and its guarantees, and have preferred "to litigate instead."[403]

Chief Justice Roberts goes on to outline the functions and procedures of the CSRTs, as "military tribunals" part of "the first tier of collateral review in the DTA system" which tests the validity of the Executive's determination on the detainee's status. Additional review, he says, is already provided in the statute through an Article III court, the D.C. Circuit. This, according to Chief Justice Roberts, meets the standards of *Hamdi* for American citizens detained as enemy combatants. *A fortiori*, he states, these are good standards for alien enemy combatants.[404] He reasons that the DTA is actually an adequate substitute for habeas, and blames the Court for labeling it an "inadequate substitute" without even "knowing what rights either habeas or the DTA are supposed to protect."[405] He enumerates guarantees afforded through the DTA, such as the opportunity for the detainees to confront witnesses, to call witnesses of their own who are "reasonably available," noting that the duty of our armed forces abroad is to fight terrorists and not to "serve subpoenas."[406] He refers to *Hamdi* in supporting the admissibility of "some form of hearsay evidence." In discussing access to classified information, he argues that though the detainees cannot access it themselves, their personal representative before the CSRT, as well as their counsel on

395 Chief Justice Roberts, dissenting, *id.* at 2280.

396 *Id*. at 2284.

397 *Id.* at 2293.

398 *Id.* at 2284.

399 *Id.* at 2293.

400 *Id.* at 2280-2281.

401 *Id*. at 2281.

402 *Id.* at 2281.

403 *Id*. at 2282.

404 *Id.* at 2284-2287.

405 *Id.* at 2286.

406 *Id.* at 2288.

appeal, have access to such evidence and can summarize it for the detainee. He ends this argument by noting that even "prisoners of war are not permitted access to classified information, and neither are they permitted access to counsel."[407] So, to him, this is not a failure of the CSRT, as the majority opinion claims. To top it off, the Chief Justice goes on, before the D.C. Circuit, the detainees have "full access to appellate counsel and the right to challenge the factual and legal bases of their detentions," and this is all habeas need allow.[408] Also, the dissenting justices would allow for a broader reading of the DTA provisions. According to Chief Justice Roberts, the DTA permits the D.C. Circuit to remand a case for a new CSRT determination if new evidence is discovered, and this procedure is no different from the procedure before federal appellate courts reviewing factual determinations.[409] He further notes that the DTA like the habeas corpus statute itself provides no express remedy of any kind, but that both can be read similarly to include the court's power to order the release of a prisoner in appropriate circumstances.[410]

Justice Scalia adds that, in his view, the decision was driven by "an inflated notion of judicial supremacy,"[411] based in part on a "nonsensical" interpretation of separation-of-powers principles "dreamed up by the Court."[412] In his opinion, "manipulation" by the Judiciary of the territorial reach of the writ is as big a threat to the separation-of-powers:[413] "[I]f the understood scope of the writ of habeas corpus was 'designed to restrain'…the actions of the Executive, the understood *limits* upon that scope were… just as much 'designed to restrain' the incursions of the Third Branch."[414]

hh. Detention Post-Boumediene

At the time of this writing, four months after the ruling in *Boumediene*, lawyers for most of the now 255 Guantánamo detainees have pressed ahead with habeas corpus lawsuits, yet "most of those cases have been delayed by battles over issues like whether some court sessions will be held in secret, whether detainees can attend and what level of proof will justify detention."[415]

There is one exception: On October 7, 2008, Judge Ricardo Urbina ordered the Bush Administration to release 17 Chinese Muslims, members of the Uighur ethnic group, who had been kept in Guantánamo for close to seven years.[416] The Uighurs,

407 *Id.* at 2288-2289.

408 *Id.* at 2289.

409 *Id.* at 2289-2290.

410 *Id*. at 2291-2292.

411 Justice Scalia, *id*. at 2302.

412 *Id.* at 2297.

413 *Id.* at 2298.

414 *Id.* at 2297-2298.

415 William Glaberson, *Despite Ruling, Detainee Cases Facing Delays*, N.Y. Times, Oct. 4, 2008, *available at* http://www.nytimes.com/2008/10/05/us/05gitmo.html?hp.

416 William Glaberson, *Federal Judge Orders Release of Chinese Muslims*, N.Y. Times, Oct. 7, 2008, *available at* http://www.nytimes.com/2008/10/08/washington/08detain.html?hp.

detained in Afghanistan in 2002, maintain their innocence, vowing they have "never been enemies of the United States." While the U.S. Government cleared them of suspicion in 2004, they have remained in detention because they could be persecuted or killed if returned to China, which considers them terrorists because of their separatist tendencies, arguably spawned by "violent oppression;"[417] other countries fear retaliation from China if they accepted them; the U.S. Government does not allow them on U.S. territory.[418] Judge Urbina argued that the Government's efforts at their resettlement, used to justify continued detention, "have failed for the last 4 years and have no foreseeable date by which they may succeed."[419] Citing *Boumediene*, he wrote, "[t]o accede to such manipulation would grant the political branches 'the power to switch the Constitution on or off at will....'" This "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.' … [T]he carte blanche authority the political branches purportedly wield over the Uighurs is not in keeping with our system of governance. … Because their detention has already crossed the constitutional threshold into infinitum and because our system of checks and balances is designed to preserve the fundamental right of liberty, the court grants the petitioners' motion for release into the United States."[420]

A federal appeals court has temporarily stayed the ruling, while it considers whether to grant a longer stay.[421] The Justice Department has argued that the court "simply ha[d] no authority" to order the release.[422] It also stated in a court filing that the Uighurs were "a danger to the public" and men who had been trained in insurrection, thus thwarting State Department efforts to find other countries willing to take them in.[423]

An interesting application of the extended *habeas* denial of the Military Commissions Act to aliens detained as enemy combatants *with presence in the U.S.* occurred in the *al-Marri* case.

Ali Saleh Kahlah al-Marri, a Qatari national and a legal resident of the U.S. was first detained by the FBI on December 12, 2002 as a material witness in the government's investigation of the terrorist attacks of September 11, 2001. On January 28,

417 Editorial, *The Rule of Law in Guantánamo*, N.Y. Times, Oct. 11, 2008, *available at* http://www.nytimes.com/2008/10/12/opinion/12sun2.html?scp=4&sq=uighur&st=cse.

418 Glaberson, *supra* note 416.

419 In re Guantánamo Bay Detainee Litigation, – F.Supp.2d –, 2008 WL 4539019 (D.D.C, Oct. 9, 2008).

420 *Id.*

421 William Glaberson, *Appeals Panel Issues Stay of Order Freeing Detainees*, N.Y. Times, Oct. 8, 2008, *available at* http://www.nytimes.com/2008/10/09/washington/09gitmo.html?fta=y.

422 Glaberson, *supra* note 416.

423 Glaberson, *Release of 17 Guantánamo Detainees Sputters as Officials Debate the Risk*, N.Y. Times, Oct. 15, 2008, *available at* http://www.nytimes.com/2008/10/16/washington/16gitmo.html?scp=2& sq=uighur&st=cse.

2002, he was formally arrested on a criminal complaint, and was charged with credit card fraud related to his alleged involvement with al Qaeda. Later, he was criminally charged on several counts such as possession of unauthorized or counterfeit access devices, making a false statement to the FBI, making a false statement in a bank application, using somebody else's identification to benefit from a federally insured financial institution, all related to his alleged involvement with al Qaeda. On June 23, 2003, al-Marri was designated by the President as an "enemy combatant," and was brought under the custody of the Secretary of Defense to the Naval Consolidated Brig in Charleston, South Carolina.[424] He filed a habeas corpus petition with the United States District Court for the District of South Carolina, which in turn dismissed the petition. Al-Marri appealed, though the government argued that under the Military Commissions Act, the federal courts do not even have jurisdiction to consider the habeas petition of enemy combatants.[425]

Circuit Judge Diana Gribbon Motz of the Court of Appeals held that her court had "found no authority for holding that the evidence offered by the Government affords a basis for treating al-Marri as an enemy combatant, or as anything other than a civilian…. the Government cannot subject al-Marri to indefinite military detention. For in the United States, the military cannot seize and imprison civilians-let alone imprison them indefinitely."[426] Discussing the MCA, she observed that it "eliminates habeas jurisdiction under § 2241 only for an alien who "has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[427] And she further states that "the MCA does not apply to al-Marri and the Government's jurisdictional argument fails *unless* al-Marri (1) "has been determined by the United States to have been properly detained as an enemy combatant," or (2) "is awaiting such determination,"[428] none of which she found to have been the case. So, her Court claimed jurisdiction and discussed the case on its merits.[429] On the merits, Judge Motz concluded that the President has no inherent power to order the military to seize and indefinitely detain civilians, whom he chooses to designate "enemy combatants." The Court reversed the judgment of the district court which had dismissed al-Marri's petition for a writ of habeas corpus, and remanded the case instructing that court "to issue a writ of habeas corpus directing the Secretary of Defense to release al-Marri from military custody within a reasonable period of time to

424 *See* Amicus Brief *supra* note 1839.

425 Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), decided on June 11, 2007.

426 *Id*. at 164.

427 *Id*. at 168.

428 *Id*. at 169.

429 "He was not captured outside the United States, he is not being held at Guantánamo Bay or elsewhere outside the United States, he has not been afforded a CSRT, he has not been 'determined by the United States to have been properly detained as an enemy combatant,' and he is not 'awaiting such determination.' The MCA was not intended to, and does not, apply to aliens like al-Marri, who have legally entered, and are seized while legally residing in, the United States. Accordingly, the Government's jurisdictional argument fails and we turn to the merits of al-Marri's petition." *Id*. at 173.

be set by the district court. The Government can transfer al-Marri to civilian authorities to face criminal charges, initiate deportation proceedings against him, hold him as a material witness in connection with grand jury proceedings, or detain him for a limited time pursuant to the Patriot Act,"[430] but the Court was adamant that "military detention of al-Marri must cease."[431]

The entire Court, however, vacated this judgment, on July 15, 2008, after an *en banc* rehearing on October 31, 2007. By a close vote of 5 to 4, with different majorities for each holding, the Court held that "(1) if the Government's allegations about al-Marri are true, Congress has empowered the President to detain him as an enemy combatant; and (2), … assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government's allegations against him are true, al-Marri has not been afforded sufficient process to challenge his designation as an enemy combatant."[432] The swing vote in this case, Judge Traxler, argued:

> The case before us deals on the surface with a foreign national who has entered the United States. But the rights al-Marri asserts are those available under our Constitution to anyone within our borders, including, obviously, American citizens. Under the current state of our precedents, it is likely that the constitutional rights our court determines exist, or do not exist, for al-Marri will apply equally to our own citizens under like circumstances. This means simply that protections we declare to be unavailable under the Constitution to al-Marri might likewise be unavailable to American citizens, and those rights which protect him will protect us as well.
>
> The *Hamdi* court gave the government the opportunity to use hearsay testimony when practical considerations required it, and the court suggested that this evidence might also be accompanied by a presumption of validity. *See id.* at 534, 124 S.Ct. 2633. Because the detainee must prove a negative-that he is *not* an enemy combatant-to obtain release and he or someone on his behalf must do it with more persuasive evidence in circumstances where the military may be holding the detainee incommunicado, simple fairness seems to me to require that first-hand evidence from the government should be the norm and the use of hearsay the exception. Add to the mix that the individual could be an American citizen and that the government's evidence could be here in the United States, easily accessible and publicly disclosable, and the need for a check on the government's use of a hearsay affidavit to justify the long-term military detention of a person becomes obvious. …
>
> If the allegations against al-Marri are true, al-Marri is a foreign national and member of al Qaeda who entered the United States with a purpose to commit additional hostile and war-like acts within our homeland, and he may therefore be detained as an enemy combatant under the AUMF. Accordingly, I would affirm the district court's order denying al-Marri's motion for summary judgment on the issue of whether the President possesses the legal authority to detain al-Marri as an enemy combatant.

430 *Id*. at 195.

431 *Id*. at 195.

432 *See* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008).

> However, because al-Marri was present within our borders at the time our intelligence sources identified him as an enemy combatant, he is entitled to contest his designation under the burden-shifting scheme outlined in *Hamdi.* Under this scheme, the government may demonstrate that the balance of the competing interests weighs on the side of lessened due process protections, which al-Marri and his counsel may contest. But because the district court applied *Hamdi*'s lessened procedures to al-Marri without any additional inquiry or balancing of the respective interests, I would hold that the process al-Marri received was constitutionally insufficient, vacate the district court's order dismissing al-Marri's petition, and remand for further proceedings. [433]

In his concurring opinion, Judge Gregory stated that "the Constitution requires a person detained in the United States under the Authorization for the Use of Military Force ("AUMF") receive a *determinate* level of due process to justify the denial of his liberty. And it is the role of this Court to provide clear guidance as to the contours of that due process."[434] Such determination, however, was not made by the Court in this decision. Counsel for Mr. al-Marri has filed for certiorari review in the Supreme Court of the United States.[435]

c. Treatment of Persons Designated Enemy Combatants in the Global War on Terror

aa. Torture and Inhuman Treatment

The unconventional war on terror with its widespread geographical reach, the frenzy generated by not capturing the infamous Osama Bin Laden, leader of Al Qaeda, the incapability of stopping terrorist acts in various parts of the world, even in areas controlled by the U.S., such as Iraq, may have helped bring about ideas of desperate means of extracting information from the suspected terrorists captured and detained. Vice President Dick Cheney was reported to have stated that the war on terror might compel the government to invoke "the dark side" when interrogating the detainees.[436] According to some sources, a calculated usage of debilitating techniques[437] to cause pain and induce confessions was designed and ordered to be undertaken, so that no known information could be withheld from the interrogators. The pictures of Abu Ghraib, although to be reviewed under a different legal regime, *i.e.* the Third Geneva Convention, highlighted the extent to which such "special measures" can go.

433 *Id.* at 275.

434 *Id.* at 277.

435 *At* http://www.aclu.org/safefree/detention/36861lgl20080919.html.

436 *See* "*The Vice President Appears on 'Meet the Press' with Tim Russert,*" Sept. 16, 2001, transcript *available at* www.whitehouse.gov/vicepresident/news-speeches/speeches/up20010916.html.

437 *See* discussion in Christopher L. Blakesley, Terror and Anti-Terrorism: A Normative and Practical Assessment 287-291 (2006).

Advocacy for torture warrants[438] even among academics, using the ticking bomb scenario[439] as justifying excessive use of physical pressure, were present even in the midst of the uproar of world-wide opposition. This opposition was first and foremost based on the absolute prohibition of torture, a *jus cogens* norm, firmly established in international law.[440] Western civilization has long condemned it as abhorrent and no such nation would concede to practicing it.[441] Other challengers would make a pragmatic argument, claiming that oftentimes confessions extracted under duress could produce false or unreliable intelligence, thus thwarting the very purpose of interrogation.[442] Others would point out that applying torture by one of the parties in a conflict by default brings about retaliation and revenge on the part of the other party.[443] In turn, that barbarity would not serve soldiers, who could end up prisoners of war in an armed conflict. While the first argument is a legal one, and this study discusses it at some length, the second argument could work for the legitimate interest of intelligence-gathering,[444] and the third is not necessarily viable when considering the other party involved in the war on terror. Actually, it would be delusional to expect Al Qaeda and other terrorists to reciprocate with humane treatment towards American soldiers, at a time when they have declared war against all Americans, and

438 *See* Alan M. Dershowitz, *Is there a Torturous Road to Justice*, Los Angeles Times, Nov. 8, 2001, at B 19.

439 CNN Access: Dershowitz, *Torture Could be Justified* (CNN television broadcast), March 16, 2003, transcript available at www.cnn.com/2003/LAW/03/03/cnna.Dershowitz .

440 *See supra* section on due process in peacetime and emergency too. *See also* Stefanie Schmahl, *An Example of Jus Cogens: The Status of Prisoners of War*, in The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes 41 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006): "the protection of life, the prohibition of torture and…the prohibitions on executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples, are regarded as being so essential that they remain prohibited at any time and any place." *Id*. at 55.

441 Many had actually protested even at the sight of hooded and goggled detainees. *See Outcry flares over rights: Guantánamo prisoners blindfolded, shackled*, The Miami Herald, Jan. 21, 2002, at 1A.

442 *See* Brian Ross and Richard Esposito, *CIA's Harsh Interrogation Techniques Described – Sources Say Agency's Tactics Lead to Questionable Confessions, Sometimes to Death*, ABC News, Nov. 18, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866 ; Brig. Gen. David R. Irvine, *Why Torture Doesn't Work*, AlterNet., Nov. 22, 2005, *available at* http://www.alternet.org/rights/ 28585/ (last visited on September 15, 2007). *See also* Margulies, *supra* note 201, at 29.

443 *Id*. at 29.

444 *Cf.* the case known as of the Tipton Three, the three detainees released in 2004 from Guantánamo. They were coerced into making confessions which were later disproved by British Intelligence. *See* Human Rights First, *Security Detainees/Enemy Combatants: Military Commission Trial Observation*, (section: On the Conditions of Defendants), last updated August 30, 2004, *available at* http://www.humanrights first.org/us_law/detainees/military_commission_diary.htm#day1 (last visited on September 6, 2004).

while they are wrapped up in bombs with which they consider it holy to blow up innocent victims as well as themselves.

However, the government designed such interrogating techniques which many called repugnant and torturous, while the government, nevertheless, considered them to be "safe, humane and professional."[445] The diametrically different stances resulted from varying minimum standards on the definition of torture and on what acts are actually prohibited. For the government, according to what are now known as the "torture memos,"[446] to employ torture would mean to inflict pain that is "excruciating and agonizing." This terminology is elementally different from "severe physical or mental pain or suffering" that constitutes the definition of torture for the purposes of the anti-torture statute of 1994.[447] That definition, it should be noted, is narrower than the one used in the Anti-Torture Convention, and had to be introduced as a reservation to the U.S. ratification of it.[448]

According to these memoranda, "[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of the bodily function, or even death. For purely mental pain or suffering to amount to torture … it must result in significant psychological harm of significant duration, e.g., lasting for months or even years."[449] This is the standard that the Office of the Legal Counsel in the Department of Justice set for the prohibition of

445 Margulies, *supra* note 201, at 85.

446 Assistant Attorney General Jay S. Bybee, "Memorandum for Alberto R. Gonzalez, Counsel to the President, re Standards of Conduct for Interrogation Under 18 U.S.C. Sections 2340-2340A," August 1, 2002, reprinted in The Torture Papers: The Road to Abu Ghraib 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

447 18 U.S.C. § 2340A (1994).

448 *See* U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990). Its paragraph II states:

> The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:
>
> (1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:
>
> (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (3) the threat of imminent death; or
>
> (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

449 The Torture Papers: The Road to Abu Ghraib, *supra* note 446.

torture, and consequently not many aggressive interrogation techniques would meet that standard. Actually they even listed those interrogation techniques that would be prohibited under the above torture definition, namely:

> 1) severe beatings using instruments such as iron barks, truncheons and clubs; 2) threats of imminent death, such as mock executions; 3) threats of removing extremities; 4) burning, especially burning with cigarettes; 5) electric shocks to genitalia or threats to do so; 6) rape or sexual assault, or injury to an individual's sexual organs, or threatening to do any of these sorts of acts; 7) forcing the prisoner to watch the torture of others.[450]

The memo further stated that the statute requires intent for an act to be considered torture, and if there is no such objective on the part of the defendant, then there is no crime. Accordingly, the interrogator who might even know that his action would inflict severe pain, but who does not have an "express purpose" of causing such a severe pain or suffering, is not committing a crime though he is not acting in good faith.[451]

But this was not acceptable for most of the public opinion worldwide. Such memo was labeled as "a disgrace,"[452] "the most clearly erroneous legal opinion,"[453] "far below the minimum standards of professional competence,"[454] and as rooted in "the 14th century, when an outlaw was treated like a wild beast,"[455] to mention but some of the mostly negative comments. Few considered the memo "standard lawyerly fare."[456] Human rights organizations also voiced their concerns constantly regarding abuse in detentions centers in Afghanistan, Guantánamo, and Iraq. In one of its statements, Amnesty International asked for senior accountability, noting that the Secretary of Defense approved the memorandum which permitted "such unlawful interrogation techniques as stress positions, prolonged isolation, stripping, and the use of dogs at Guantánamo Bay."[457] Referring to Secretary Rumsfeld's approval of such specific tac-

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450 *Id.* at 193.

451 *Id.* at 174-175. The memo writers, now known as Jay Bybee and John Yoo of the Office of Legal Counsel in the Department of Justice, concluded that in the final end, if the president, at his discretion, if he considered it necessary could order any sort of interrogation technique to be used, and in this case the interrogator would not be prosecuted even his acts constituted torture under the definition that they provided. *Id.* at 202-204.

452 Jeremy Waldron, *Torture and Positive Law: Jurisprudence and the White House*, *available at* www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf .

453 Harold Koh, *World Without Torture*, 43 Col. J. Transnat'l L. 641, 647 (2005).

454 David Luban, *Liberalism and the Unpleasant Question of Torture*, in The Torture Debate in America 57 (Karen J. Greenberg ed., 2005).

455 Ruth Wedgwood & James R. Woolsey, *Law and Torture*, Wall Street J., June 28, 2004, at A10.

456 Eric Posner & Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics*, Wall Street J., July 6, 2004, at A22.

457 Statement of Dr. William F. Schulz, Executive Director, Amnesty International USA, In Response to Secretary Rumsfeld, June 1, 2005, 1:31PM, *available at* http://www.amnesty-usa.org/annualreport/ newsupdate.html (last visited Sept. 15, 2007).

tics, Professor Paust noted that among the sixteen approved tactics were also those that are "patently illegal under Geneva and human rights standards."[458]

However, the definition of torture and what elements it included as a crime were totally differently delineated in the Department of Defense Military Commission Instruction No.2 of April 30, 2003,[459] under the subject "Crimes and Elements for Trials by Military Tribunals." Its definition of the crime of "torture," *inter alia*, lists the following elements:

1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;
2) The accused intended to inflict such severe physical or mental pain or suffering;
3) Such person or persons were in custody or control of the accused.[460]

Further on, it defined that "severe mental pain or suffering" is the *prolonged mental harm*[461] caused by or resulting from:

a) the intentional infliction or threatened infliction of severe physical or mental pain or suffering;
b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
c) the threat of imminent death; or
d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.[462]

"Severe physical pain or suffering" went undefined in this instruction.

Like the diametrically different views, and understandings of concepts, the pictures and photos served to the public were also a mixture of right and wrong. The public could see pictures of goggled and hooded, quasi-naked and leashed detainees, just as it could see reported sequences of film of the state-of-the-art prison Camp V

458 Jordan Paust, Beyond the Law: the Bush Administration's Unlawful Responses in the "War" on Terror 13 (2007). Paust further added that the Secretary of Defense sent out such public messages that "can abet criminal activity" in face of war time abuse when he told the Senate Committee investigating the interrogation abuses that the Geneva Conventions protection do not apply to those detained in Guantanamo "because they are all 'terrorists.'" *Id.* at 14.

459 *Available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf.

460 *Id.* para. 6(A)(11).

461 In the same section, "prolonged mental harm" was described to be "a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder." *Id.*

462 *Id.*

Delta in Guantánamo Bay, where a La-Z-Boy chair and coffee maker at a side table furnished the interrogation room in which the "custodial interviews" took place.[463] At the same time, human rights organizations would strongly believe that the "techniques authorized for use at Guantánamo Bay did include at one time forced nudity, stress positions, isolation up to 30 days, forced grooming, and inducing stress by the use of dogs," and that such coercive techniques could have resulted in forced confessions.[464] Additionally, there were several suicide attempts, some successful, which proved a deteriorating mental health of the detainees.[465]

Congress decided to respond to the problem by mandating what was allowed and what was prohibited in the treatment of detainees. On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005[466] that had just been agreed on by the U.S. House and Senate. The Act set up uniform standards for the interrogation of the detainees in the custody of the Department of Defense.

The Act mandated that no such persons "shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."[467] The next section mandated that regardless of nationality or location of detention, no one shall be subject to cruel, inhuman, or degrading treatment or punishment. The applicability of this prohibition knew no geographical limitation.[468]

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463 *Guantánamo*, Nightline, ABC TV Channel, June 26, 2006, 11:35PM. The journalist was filming the facility and interviewing the personnel, shortly after the news of the suicide of three inmates. Guantánamo, called by the journalist as the striking symbol of America's war on terror, was offering quite a different picture form those we were used to hear about. Mr. Paul Restor, head of the interrogation unit was explicitly condemning torture as a deliberate, sadistic infliction of pain which served no goal. He held that neither waterboarding nor threatening with dogs was used in Guantánamo. He maintained that all of those detained at Guantánamo present a real threat to the United States, and among them there were 15 bomb makers from Afghanistan and Iraq. Using the term "custodial interviews" instead of "interrogation," which according to the journalist had a negative connotation, Mr. Restor noted that vital information has been obtained through them. While he admitted that there were special plans and security measures regarding specific detainees, for those who cooperated there were prayer beads and checkers. The menu at Guantánamo showed meat Hallall certified, and some of the detainees were even growing vegetables.

464 *See* Human Rights First, *Security Detainees/Enemy Combatants: Military Commission Trial Observation*, (section: On the Condition of Defendants), last updated August 30, 2004, *available at* http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day1 (last visited on September 6, 2004).

465 *See* Don van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. Times, March 9, 2003. *See also U.S. Plans Mental Ward for Detainees*, Associated Press, March 7, 2003.

466 Title X of Public Law 109–148; 119 Stat. 2742.

467 DTA 2005, *supra* note 326, at Section 1002 (a).

468 *Id.* at Section 1003 (b). In paragraph (d) the following definition is provided: "Cruel, Inhuman, or Degrading Treatment or Punishment Defined- In this section, the term `cruel,

In Section 1004 provisions were made to protect the U.S. government personnel engaged in authorized interrogations when they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."

Section 6 of the Military Commissions Act of 2006 clarified even further:

> Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 …, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien detained by the United States who—
> (A) is currently in United States custody; and
> (B) has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[469]

The Department of Justice ultimately modified its infamous "torture memos" and returned to the standard under the Anti-Torture Act, even for Guantánamo detainees.[470] Reportedly, the CIA, in 2007, also clarified the limits of its interrogation techniques for terrorist suspects abroad.[471]

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inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."

469 So, as Professor Reisman puts it: "The Act eliminates existing means of challenge while not providing for alternative means of enforcing whatever prohibitions against torture it incorporates. Nor does the Act absolutely preclude the admissibility of evidence secured by torture." W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 Am. J. Int'l. L. 852, 854 (2006). Additionally, this lack of absolute prohibition of evidence obtained through coercion could raise arguments of the "last-in-time-rule" having MCA's provision supersede any contrary rule mandated in common Article 3 of the Geneva Conventions. For a discussion of this issue, concluding that "the courts [should] opt for the solution that preserves U.S. treaty commitments," see Carlos Manuel Vazquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 Am. J. Int'l. L. 73, 82 (2007).

470 First through consultation with the Defense Department resulting in a memorandum of March 6, 2003, *see* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2004, at A01; *see also* Dana Priest, *Justice Dept. Memo Says Torture 'May Be Justified,'* Washington Post, Sunday, June 13, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/ A38894-2004Jun13.html; and, ultimately, through a statute, the DTA 2005.

471 *See* Karen De Young, *Bush Approves New CIA Methods – Interrogations Of Detainees To Resume*, Washington Post, July 21, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/ article/2007/07/20/AR2007072001264.html.

UN Special Rapporteur Martin Scheinin concluded in his 2007 U.S. Mission Report:

> 33. As a result of an apparent internal leak from the CIA, the media in the United States learned and published information about "enhanced interrogation techniques" used by the CIA in its interrogation of terrorist suspects and possibly other persons held because of their links with such suspects. Various sources have spoken of techniques involving physical and psychological means of coercion, including stress positions, extreme temperature changes, sleep deprivation, and "waterboarding" (means by which an interrogated person is made to feel as if drowning). With reference to the well-established practice of bodies such as the Human Rights Committee and the Committee against Torture, the Special Rapporteur concludes that these techniques involve conduct that amounts to a breach of the prohibition against torture and any form of cruel, inhuman or degrading treatment. The Special Rapporteur notes that the United States understanding of cruel, inhuman or degrading treatment is what the United States Constitution prohibits as cruel and unusual punishment, not the relevant international standards as such. It is encouraging to see that the July 2007 Executive Order of the President now requires the Director of the CIA to ensure that interrogation practices are "safe for use", based upon professional advice, and that there is effective monitoring of the CIA interrogation programmes.[472] Nevertheless, the Executive Order retains the restrictive interpretations of "torture" and "cruel, inhuman, or degrading treatment".[473] The Special Rapporteur again reminds the United States that torture and cruel, inhuman or degrading treatment are equally prohibited in non-derogable terms by ICCPR article 7. …
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> 35. The Special Rapporteur welcomes the revision of the United States Army Field Manual in September 2006. Although this Manual clearly states that acts of violence or intimidation against detainees is prohibited, and that interrogation techniques must not expose a person to inhumane treatment, there are nevertheless aspects of the revised Manual (when compared to the earlier version) that cause concern. On the positive side, the revised Manual explicitly prohibits the use of waterboarding, something not expressly prohibited before. Nevertheless, a comparison of the two recent versions of the Army Field Manual could leave the impression that the present Manual neither authorizes nor prohibits, during the conduct of an interrogation, to slap a person being questioned, subject a person to extreme changes in temperature falling short of the medical state of hypothermia, isolate a detainee for prolonged periods, make use of stress positions, or subject a person to questioning for periods of up to 40 hours without sleep. The Special Rapporteur concludes that these techniques involve conduct that would amount to a breach of the prohibition against torture and any form of cruel, inhuman or degrading treatment. In order to remove any

472 Executive Order of the President of the United States, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 20 July 2007, section 3 (b) (iii) and 3 (c) (iv).

473 *Ibid*. sections 2 (c) and section 3 (b) (i) (A).

ambiguity, he expects the Government to make it clear that the enumeration of permitted interrogation techniques in the Manual is exhaustive.[474]

bb. Extraordinary Renditions

According to some news reports, there are also other anti-terrorism measures, some of them non-legislative in nature, that appear to have been undertaken after September 11.

The Administration declared right after September 11 that the U.S. was going to hunt terrorists wherever they were located, not merely within the jurisdiction of the U.S. International terrorism is a global phenomenon, and it is well known that planning, training and preparing for terrorist actions occurred mostly outside the U.S. Additionally, Section 2331 of Title 18 of U.S.C. for the purposes of Chapter 113, containing most of the general terrorism statutes, includes the following definition in subsection (1)(A): "the term *international terrorism* means activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State."[475] Thus it is safe to assume that at least some of the pertinent criminal statutes have provisions that provide for extra-territorial jurisdiction over criminal acts outside U.S. that could damage certain U.S. interests.[476]

Consequently, a number of actions have been taken by U.S. agents of the FBI or CIA in other countries,[477] mostly as regards information-gathering and investigation. Particularly, detention and interrogation of terrorist suspects abroad have been the subject of serious debate within and outside the U.S. Concerns over the usage of extreme interrogation techniques that could amount to torture or inhuman treatment, either directly or through surrogates,[478] the rendition of suspected terrorists to secret

474 Scheinin, U.S. Mission Report, *supra* note 131, paras. 33, 35.

475 This definition of terrorism drew the following comment by UN Special Rapporteur Martin Scheinin: "Title 18 of the US Code, in section 2331 (1), defines international terrorism as involving 'violent acts or acts dangerous to human life' without making a link to the consequences intended by such acts. Security Council resolution 1566 (2004) describes conduct that is to be suppressed in the fight against terrorism and requires, as one of three cumulative elements, that such conduct is restricted to that which is committed with the intent to cause death or serious bodily injury. The definition of domestic terrorism, under section 2331 (5), equally lacks this link." Scheinin, 2007 U.S. Mission Report, *supra* note 131, para. 40.

476 For arguments in favor of the applicability of universal jurisdiction see generally Albin Eser, *For Universal Jurisdiction: Against Fletcher's Antagonism*, 39 Tulsa L. Rev., 955 (2004), and A. Hays Butler, *The Doctrine of Universal Jurisdiction: A Review of the Literature*, 11 Crim. L. Forum 353 (2000). *See also* particularly Abrams, *supra* note 128, at 260.

477 *See* Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 Notre Dame L. Rev. 307 (2003).

478 *See* Jess Bravin, *Interrogation School Tells Army Recruits How Grilling Works; 30 Techniques in 16 Weeks, Just Short of Torture: Do They Yield Much?*, The Wall Street Jour-

CIA prisons in several countries, *incommunicado* detention, etc. are among the most serious allegations regarding U.S. agents acting abroad.

Press reports[479] about the rendition of terror suspects, rank-and-file and "high value detainees," to secret prisons in Eastern Europe for, mostly, interrogation purposes surfaced first in November 2005. On December 13, 2005, the Parliamentary Assembly of the Council of Europe appointed a Swiss Senator, Mr. Dick Marty, as its Rapporteur on these issues as they involved Council of Europe member states.[480] In early 2006, the European Parliament set up a 46-member Temporary Committee with the mandate to investigate the alleged existence of CIA prisons in Europe in which terrorist suspects had allegedly been detained and tortured.[481] On 24 April 2006, the Temporary Committee presented its draft interim report, with its Rapporteur, Mr. Claudio Fava, *inter alia*, speaking of "more than a thousand flights chartered by the CIA [that] have transited through Europe, often in order to carry out extraordinary renditions."[482] Mr. Marty submitted his first "draft" report entitled "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states" on June 7, 2006. Exactly one year later, on June 7, 2007, his second report is titled much more affirmatively: "Secret detentions and illegal transfers of detainees involving Council of Europe member states."[483] In the meantime, not only had President Bush acknowledged the existence of secret detention facilities,[484] as part of the

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NAL, April 26, 2002, at A1; Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASHINGTON POST, Dec. 26, 2002, at A1; Alan Cooperman, *CIA Interrogation Under Fire: Human Rights Groups Say Techniques Could be Torture*, WASHINGTON POST, Dec. 28, 2002, at A9.

479 These reports appeared first on ABC Television, in The Washington Post, and in statements by Human Rights Watch. Dick Marty, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Draft Report – Part II (Explanatory Memorandum), Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 7 June 2006, Doc. AS/Jur (2006) 16 Part II (hereinafter Marty I), *available at* http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf , para. 7.

480 *Id*. para. 16,

481 Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners (TDIP; http://www.europarl.eu.int/comparl/tempcom/tdip/default_en.htm).

482 LE MONDE, April 27, 2006, cited in Marty I, *supra* note 479, para. 13.

483 Dick Marty, Secret detentions and illegal transfers of detainees involving Council of Europe member states, Second Report (Explanatory Memorandum), Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 7 June 2007, Doc. AS/Jur (2007) 36 (hereinafter Marty II), *available at* http://media.washingtonpost.com/wp-srv/politics/ssi/full_report_marty_060807.pdf.

484 The White House, Office of the Press Secretary, "Remarks by the President on the Global War on Terror," Speech delivered in the East Room of the White House, September 6, 2006.

CIA's "High-Value Detainee" program,[485] Mr. Marty had accumulated ever more evidence to reach the following conclusions:

> 1. What was previously just a set of allegations is now proven: large numbers of people have been abducted from various locations across the world and transferred to countries where they have been persecuted and where it is known that torture is common practice. Others have been held in arbitrary detention, without any precise charges levelled against them and without any judicial oversight – denied the possibility of defending themselves. Still others have simply disappeared for indefinite periods and have been held in secret prisons, including in member states of the Council of Europe, the existence and operations of which have been concealed ever since.
>
> 2. Some individuals were kept in secret detention centres for periods of several years, where they were subjected to degrading treatment and so-called "enhanced interrogation techniques" (essentially a euphemism for a kind of torture), in the name of gathering information, however unsound, which the United States claims has protected our common security. Elsewhere, others have been transferred thousands of miles into prisons whose locations they may never know, interrogated ceaselessly, physically and psychologically abused, before being released because they were plainly not the people being sought. …
>
> 7. There is now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania. …
>
> 8. The secret detention facilities in Europe were run directly and exclusively by the CIA. To our knowledge, the local staff had no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter. The local authorities were not supposed to be aware of the exact number or the identities of the prisoners who passed through the facilities – this was information they did not "need to know." While it is likely that very few people in the countries concerned, including in the governments themselves, knew of the existence of the centres, we have sufficient grounds to declare that the highest state authorities were aware of the CIA's illegal activities on their territories.
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> 9. … We believe we have shown that the CIA committed a whole series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture.

485 *Cf.* UN Special Rapporteur Martin Scheinin's November 27, 2007 findings: "The existence of classified locations was confirmed by the President of the United States on 6 September 2006, when he announced the transfer of 14 "high-value detainees" from these locations to Guantánamo Bay. Although the President announced that at that time the CIA no longer held any persons in classified locations, he reserved the possibility of resuming this programme. Since then, one more "high-value detainee" has been transferred to Guantánamo Bay, and the whereabouts of many others are unknown." Scheinin, 2007 U.S. Mission Report, *supra* note 131, para. 37.

> 10. In most cases, the acts took place with the requisite permissions, protections or active assistance of government agencies. We believe that the framework for such assistance was developed around NATO authorisations agreed on 4 October 2001, some of which are public and some of which remain secret. According to several concurring sources, these authorisations served as a platform for bilateral agreements, which – of course – also remain secret.[486]

The reports also include various case studies, one involving Mr. Khaled El-Masri, a German citizen of Lebanese descent who, according to Mr. Marty's research, was abducted and interrogated in the former Yugoslav Republic of Macedonia, transferred to Afghanistan, where he was interrogated again and detained for four months, long after U.S. officials recognized that he was innocent, before he was spirited home to Germany via Albania.[487]

In his findings upon his visit to the U.S. in May 2007, UN Special Rapporteur Scheinin makes the following comments on the legal implications of such "extraordinary renditions:"

> 36. … Impermissible under international law is the "extraordinary rendition" of a person to another State for the purpose of interrogation or detention without charge. Rendition in these circumstances also runs the risk of the detained person being made subject to torture or cruel, inhuman or degrading treatment. Detention without charge or for prolonged periods even when charged, also amounts to a violation of articles 9 and 14 of the ICCPR and may constitute enforced disappearance. Furthermore, the removal of a person outside legally prescribed procedures amounts to an unlawful detention in violation of article 9 (1) of the ICCPR, and raises other human rights concerns if a detainee is not given a chance to challenge the transfer.
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> 37. The Special Rapporteur is aware of various sources pointing to the rendition by the CIA of terrorist suspects or other persons to "classified locations" (also known as places of secret detention) and/or to a territory in which the detained person may be subjected to indefinite detention and/or interrogation techniques that amount to a violation of the prohibition against torture or cruel, inhuman or degrading treatment. These reports suggest that such interrogation techniques may have been used, either directly by CIA agents or by others while in CIA presence.
>
> 38. In addition, the use by the CIA of civil aircraft for the transportation of persons subjected to extraordinary rendition, whether by contract or by the establishment of airlines controlled by it, is in violation of the Convention on International Civil Aviation. Again due to the refusal of the Acting General Counsel for the CIA to engage in any meaningful

486 Marty II, *supra* note 483, Introductory remarks – an overview, paras. 1-10.

487 Marty I, *supra* note 479, paras. 92-132; Marty II, *supra* note 483, paras. 272-315. This case has spawned a criminal and parliamentary inquiry in Germany as well as a civil lawsuit by Mr. El-Masri in the U.S. The state secrets doctrine on both sides of the Atlantic presents a high obstacle to the discovery of the truth. Marty II, paras. 292-293, 295, 303-310.

interaction, and in the light of corroborating evidence, the Special Rapporteur concludes that his visit supports the suspicion that the CIA has been involved and continues to be involved in the extraordinary rendition of terrorism suspects and possibly other persons. This conclusion is corroborated by the recent findings of the Committee against Torture in the case of *Agiza v. Sweden* and by the Human Rights Committee in *Alzery v. Sweden*, in both of which Sweden was found to have violated its human rights treaty obligations by handing over Mr. Agiza and Mr. Alzery to CIA agents in the course of their rendition to Egypt.[488] The Special Rapporteur also concludes that it is unlikely that the CIA would be able to run a global programme of rendition and detention of terrorist suspects without at least logistical support by the United States military authorities.[489]

cc. Extrajudicial Targeted Killings

Another pertinent issue concerns alleged extra-judicial killings abroad by U.S. agents. The only known statement of policy regarding this issue is an Executive Order of 1981 regarding United States Intelligence Activities which prohibits assassination on the part of any person employed by or acting on behalf of United States Government.[490] The same is prohibited for any agency in the intelligence community; they cannot participate nor request any person to commit targeted killings.[491] However, there have been several news reports contending that after September 11, the government, but also several scholars, have taken the stand that the ban on assassination would not apply in times of war, and would not prevent the U.S. from acting in self-defense.[492] Specifically, there are reports that President Bush has authorized the military

488 *Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003 (2005); and *Alzery v. Sweden*, Communication No. 1416/2006, CCPR/C/88/D/1416/2005.

489 Scheinin, 2007 U.S. Mission Report, *supra* note 131.

490 Executive Order 12333, 3 CFR 213 (1981). While arguing that this order does not apply to targeted killings of suspected terrorists, Major Tyler J. Harder still urges repeal of this prohibition. Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12333: A Small Step in Clarifying Current Law*, 172 Military L. Rev. 1 (2002). Others ask for the amendment of the EO 12333 so that targeted killings would not spur criticism. *See* Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 Duke L. J. 677 (2005). *See also* Boyd M. Johnson, III, Note, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 Cornell Int'l L. J. 401 (1992).

491 Though the terms "assassination" and "targeted killings" are found to be used interchangeably, scholars distinguish between them confirming that "assassination" is illegal under domestic and international law, while "targeted killings" are not. *See* Wachtel, *supra* note 490.

492 *See* Abrams, *supra* note 128, referring to David Johnston & David E. Sanger, *Yemen Killing Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002; *Senators Support CIA Anti-Terror Effort*, Reuters, December 15, 2002, 4:18pm; James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda: Bush Has Widened Authority of CIA To Kill Terrorists*, N.Y. Times, Dec. 15, 2002; *see also* Daniel Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency and International Law*, 30 Ga. J. Int'l. & Comp. L. 1 (2001). The moral component of such targeted killings is analyzed in Emanuel

and the CIA to "target and kill suspected terrorists without capture or trial."[493] The criteria for killing suspected terrorists are not public, but such action is reportedly allowed "if capture is impractical and civilian casualties can be minimized, based on "clear and convincing" evidence of the target's involvement in terrorist acts.[494] A pre-approved list of targets includes at least two dozen suspected terrorist leaders."[495] One such target, along with five men in his company, was killed by a U.S. missile in Yemen in 2002.[496]

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated in January 2003 that the executions in Yemen constituted an "alarming precedent" and a "clear case of extrajudicial killing."[497] The U.S. responded in April 2003 that the laws and customs of war applied to this situation and that "enemy combatants may be attacked unless they have surrendered or are otherwise rendered *hors de combat*. Al Qaeda terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances."[498] Human Rights Watch, interestingly, in its World Report for 2002, did not criticize the Yemen killings, since the target was "arguably a combatant, the Government apparently lacked control over the area, and there seemed to be no reasonable law enforcement alternative."[499] Another human rights expert has argued that a complex mix of international human rights law and international humanitarian law governs the "war on terror;" that states, including, before 9/11, the U.S., widely condemned, *e.g.*, Israel's targeted killings of suspected Palestinian terrorists; and that even under customary

Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 Temp. Int'l & Comp. L.J. 195 (2001).

493 Douglas Cassel, *International Human Rights and the United States Response to 11 September*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 251, 267 (C. Fijnaut, J. Wouters & F. Naert eds., 2004), with reference to James Risen & David Johnston.

494 *Id.*

495 *Id.* at 267-268.

496 *See* N.Y. Times, *supra* note 492 regarding the Yemen killings. In these articles it was reported that in Yemen, on November 3, 2002, a car full of suspected operatives was shot by a missile fired by a U.S. unmanned aerial vehicle, killing them all. The targeted suspect was an Al Qaeda operative in Yemen by the name of Qaed Salim Sinan al-Harethi, believed to have been involved in the U.S.S. Cole terrorist attack.. The reports also noted that the Yemeni government had unofficially provided intelligence. The reports also indicated that the CIA had not consulted law enforcement even though they could have interrogated Harethi regarding the U.S.S. Cole terrorist attack. *Id.*

497 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, U.N. Doc. E/CN.4/2003/3, 13 January 2003, para. 38.

498 Letter of 14 April 2003 from U.S. to Secretariat of U.N. Commission on Human Rights, enclosing response to 15 November 2002 letter from Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/2003/G80, 22 April 2003, at 5, cited in Cassel, *supra* note 493, at 273.

499 Cassel, *ibid.*

humanitarian law, in application, by analogy, of the 1977 Additional Protocol I to the Geneva Conventions, terrorists must be considered civilians, since combatants are those persons having "a right to participate directly in hostilities" (Article 43(2)), which terrorists do not have; as they are then, by necessity, civilians, they may not be attacked "unless and for such time as they take a direct part in hostilities" (Article 51(3)) – a factual issue unknown.[500] Again, much of the legal analysis depends on what standards are used to evaluate actions taken in the "global war on terror." The latest assessment was offered by the UN Special Rapporteur Scheinin in his 2007 Mission Report to the U.S.:

> 42. The Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, has reported on communications between himself and the United States concerning allegations of extrajudicial executions of various persons, including those suspected of having committed terrorist acts.[501] Such acts have occurred outside the territory of the United States and outside the context of actual hostilities related to an armed conflict. The Special Rapporteur reiterates that international human rights, including the rights to life and fair trial under articles 6 and 14 of ICCPR, apply extraterritorially to the conduct of State agents. He further emphasizes that while the targeting of a combatant directly participating in hostilities is permitted under the laws of war, there are no circumstances in which the targeting of any other person can be justified.[502]

d. Adjudication of Suspected Enemy Combatants in the Global War on Terror: The Role of Military Commissions

aa. Department of Defense Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

Following the President's Military Order of November 13, 2001, entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," the Department of Defense issued the Military Commission Order No.1 regarding "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," on March 21, 2002.[503]

This aim of the order was to implement policy, assign responsibilities, and prescribe procedures under President's Military Order, so as to ensure that any such individual receives a full and fair trial before a military commission.

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500 *Id*. at 268-272.

501 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Philip Alston, U.N. Doc. HRC/4/20/Add.1, 12 March 2007, *available at* http://domino.un.org/unispal.nsf/eed216406b50 bf6485256ce10072f637/ce5415ae89de571b852572b200533d85!OpenDocument.

502 Scheinin, U.S. Mission Report, *supra* note 131, para. 42.

503 DoD MCO No.1, March 21, 2002, *available at* http://www.defenselink.mil/news/rescinded.html.

Appointment of Military Commission. According to these procedures, one or more military commissions would be appointed from time to time by the Appointing Authority,[504] which could be the Secretary of Defense or a designee.[505]

Jurisdiction. A military commission was going to have *ratione personae* jurisdiction only over an accused individual or individuals subject to the President's Military Order alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority; *ratione materiae* jurisdiction over offenses that constitute violations of the laws of war and all other offenses triable by military commission.[506]

Personnel. A commission shall consist of at least three but no more than seven members, and one or two alternate members. In the section that deals with the appointment of the commission personnel an effort is noticeable to secure continuation of informed members in a case. So, in addition to members of the commission, as a rule, the alternate member or members shall attend all sessions of the Commission. That creates the opportunity that in case of incapacity, resignation, or removal of any member, after a trial has begun, an alternate member replacing the member shall be made to know the substance of all prior proceedings and evidence taken in that case. Members and alternate members shall be commissioned officers of the United States armed forces, while the Presiding Officer of the commission shall in addition be a judge advocate of any United States armed force. In defining the duties of the Presiding Officer, *inter alia*, this section in its paragraph (c) provides: "The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably."[507] It is important to note that members of the military commission will continue to report to their parent commands, and it is prohibited to consider or evaluate the performance of duty as member of the commission, when the evaluation reports of effectiveness or fitness are prepared for that member.[508]

The Chief *Prosecutor* has to be a judge advocate of any United States armed force, while the assistant prosecutors could also be special trial counsel of the Department of Justice. As far as their reporting relationships are concerned, the Chief Prosecutor

504 If he is not the Secretary of Defense, the Appointing Authority will report to the Secretary of Defense. *See* Department of Defense, Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel, April 30, 2003, Section 3 (A) (1).

505 DoD MCO 1, supra note 503, at section 2.

506 *Id*. at section 3. The Military Commission could also exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings. *Ibid.*

507 *Id*. at section 4 (A).

508 *See* Department of Defense, Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel, April 30, 2003, Section 3 (A) (8).

reports to the Deputy General Counsel (Legal Counsel) of the Department of Defense and then to the General Counsel of the Department of Defense.[509] The responsibilities of the Chief Prosecutor, prosecutors and assistant prosecutors are detailed in Military Commission Instruction No. 3.[510]

The Chief *Defense* Counsel has to be a judge advocate of any United States armed force. The Chief Defense Counsel reports to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.[511] The DoD procedures provide for one or more Detailed Defense Counsel to conduct the defense for each case before a Commission.[512] Each of them has to be a Military Officer who is a judge advocate of any United States armed force. Their responsibilities are delineated in the respective military commission instruction.[513]

The procedures provide the right of the accused to replace his Detailed Defense Counsel with another Military Officer who has been determined to be available, and even at his request to continue to have both in preparing his representation for trial. The accused also has the right to retain the services of a civilian attorney, but to no expense of the United States Government. Such a civilian defense counsel has to satisfy certain requirements, to be able to render the defense of the accused.[514] It should

509 Department of Defense, Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel, April 30, 2003, Section 3 (A) (3).

510 *See* Department of Defense, Military Commission Instruction No. 3, Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors, April 30, 2003.

511 DoD Military Commission Instruction No. 6, *supra* note 508, at Section 3 (A) (5).

512 "The duties of the Detailed Defense Counsel are: (a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and (b) To represent the interests of the Accused in any review process as provided by this Order." DoD MCO 1, *supra* note 503, at section 4 (C) (2).

513 *See* Department of Defense, Military Commission Instruction No. 3, *Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel*, April 30, 2003.

514 Such requirements include: "(i) [be] a United States citizen; (ii) [be] admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be prequalified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused." DoD MCO 1, *supra* note 503, at section 4 (C) (3) (b). *See also* Department of Defense, Military Commission Instruction No. 5, Qualification of the Civilian Defense Counsel, April 30, 2003,

also be noted that such an attorney might be precluded from participating in close proceedings of the Commission and also from access to any protected information. Additionally, existence of the civilian attorney does not exclude the Detailed Defense Counsel from the case.[515] He continues to be the representative of the accused through to the end of the process.[516]

Section 5 elaborates the procedures accorded to the accused, which include:

(a) possession of a copy of the charges in English and, if appropriate, in another language that the Accused understands, sufficiently in advance of trial to make it possible to prepare a defense
(b) presumption of innocence until proven guilty[517]
(c) a vote of guilty can only be cast by a commission member when he is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense
(d) at least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final
(e) the Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with any exculpatory evidence, subject to withholding of "Protected Information" and protection of state secrets
(f) the Accused shall not be required to testify during trial. No adverse inference can be drawn from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

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and two annexes to this instruction. One has to do with an authorization for release of information, and the other is an affidavit and agreement by civilian defense counsel. The latter annex deserves some attention. *Inter alia*, this agreement provides for "reasonable restrictions on the time and duration of contact…with [the] client." Also, the "communication with client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes….any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication….communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice. " DoD MCI No. 5, Annex B, April 30, 2003, at Section II (H) (I). See also that the Civilian Defense Counsel has to agree to "reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the presentation of my client to the extend that [the counsel] reasonably believe[s] necessary to prevent the commission of a future criminal act that [the counsel] believe[s] is likely to result in death or substantial bodily harm, or significant impairment of national security." *Id*., at (J).

515 *Ibid.*

516 DoD MCO 1, *supra* note 503, at section 4 (C) (4).

517 For concerns related to presumption of innocence as well as other fair trial guarantees in prosecuting terrorist suspects through military commissions see Helen Duffy, The 'War on Terror' and the Framework of International Law 417-428 (2005).

(g) at his request, the Accused may testify at trial on his own behalf and shall then be subject to cross-examination.
(h) the Accused may obtain witnesses and documents for his defense, to the extent necessary and reasonably available as determined by the Presiding Officer, subject to withholding of "Protected Information" and protection of state secrets.
(i) the Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.
(j) the Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution at trial.
(k) the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.
(l) the Accused may be present at every stage of the trial before the Commission, subject to rules for the protection of protected information and state secrets, unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.
(m) except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be subject to rules for the protection of protected information and state secrets
(n) the Accused may make a statement during sentencing proceedings.
(o) the Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.
(p) the Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer subject to rules for the protection of protected information and state secrets).
(q) the Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final.[518]

The rules governing conduct of the trial are included in section 6. During the pretrial stage, the preparation of charges is done by the prosecution which submits it to the Appointing Authority for approval. Once approved the Appointing Authority, and referred to the Military Commission for trial, the Prosecution notifies the accused by providing copies of charges, and also submits the same to the Presiding Officer of the Commission. In case of plea agreements, a written stipulation of fact, signed by the accused, particularly in cases of guilty pleas, and stating that the plea was voluntary and informed, is submitted to the Appointing Authority for approval. The commission has the power to summon witnesses, administer oaths or affirmations, question witnesses, require production of documents and other evidentiary material and designate special commissioners to take evidence.

518 DoD MCO 1, *supra* note 503, Section 5 (a-q).

In short, during trial, the duties of the commission, *inter alia*, include:

(1) Provide a full and fair trial.
(2) Proceed impartially and expeditiously, excluding irrelevant evidence.
(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order.[519] … A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.[520] … Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable.[521]

…

(5) As soon as practicable at the conclusion of a trial, transmit an authenticated copy of the record of trial to the Appointing Authority.

Rules governing *evidence* follow in Section D. Admissibility of evidence will be based the fact that it would have probative value to a reasonable person.

Production of Witnesses: The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative.[522]

Testimony of *witnesses* shall be given under oath or affirmation. The Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the

519 Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an ex *parte, in camera* presentation by either the Prosecution or the Defense. *Id*. at Section 6 (B) (3).

520 Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. *Ibid.*

521 Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial. *Ibid.*

522 "The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness." *Id.* at Section D, (2) (a).

weight to be given to the testimony of the witness. A witness testifying before the Commission is subject to direct examination and cross-examination. Badgering of witnesses or questions that are not material to the issues before the Commission are not permitted. Members of the Commission may question witnesses at any time. To ensure protection of witnesses and evidence the Presiding Officer may authorize any methods he deems appropriate, such as testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms. Other evidence that might have probative value to a reasonable person, could be considered. Such evidence could be: testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

Due to the nature of such proceedings, *protection of information* is considered of paramount importance. The clause covering this issue, *inter alia*, provides for acts of limited disclosure such as (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove.[523]

Another important rule concerns Protected Information as part of the record of trial. In order to ensure such protection "[a]ll exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings."[524]

*Conviction and sentencing***.** Upon finishing of trial proceedings, the members of the commission deliberate and vote in closed conference. An affirmative vote of two-thirds of the members is required for a finding of Guilty. An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members.[525] Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty. Such a sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death.[526] The Military Commission Instruction No.7, regarding

523 *Id*. at Section D (5) (b).

524 *Id.* at Section D (5) (d).

525 *Ibid*. at (f).

526 *Ibid.* at (g).

sentencing, provides: "[d]etention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission."[527] The same instruction describes several principles reasons to be kept in mind when determining a sentence, such as the punishment of the wrongdoer; protection of the society form the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing the same or similar offenses; and rehabilitation of the wrongdoer.[528]

The decision of the commission becomes final only when the President or, if designated by the President, the Secretary of Defense makes a final decision. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.[529]

The *review procedure* consists of two stages: first, there is the review by the Appointing Authority. If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel. If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

Second, the Review Panel[530] shall review the record of trial. In its discretion, it might review any written submissions from the Prosecution and the Defense. Within thirty days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.[531] The members of the Review Panel shall report to the Secretary of Defense.[532]

Final review is by the Secretary of Defense, who reviews the record of trial and the recommendation of the Review Panel. He might either return the case for further proceedings or, unless he is designated by the President to make the final decision, he would forward it to the President with a recommendation as to disposition.

527 Department of Defense, Military Commission Instruction No.7, Sentencing, April 30, 2003, at Section 3 (A).

528 *Id.* Section 3 (A).

529 DoD MCO 1, *supra* note 503, Section 6 (H) (2).

530 "The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge." *Id.* Section 6 (H) (4).

531 *Ibid.*

532 *See* Department of Defense, Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel, April 30, 2003, Section 3 (A) (8), *also* at Section 3 (A) (7).

If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense shall constitute the final decision, otherwise it is the President who makes the final review and hence decision.

It is important to make one more point as it relates to section 10 of these rules of procedure. It provides that "[f]ailure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person." At the same time, this order like the President's Military Order clarified that the order "is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person."

These rules and procedures were followed by numerous military commissions instructions (MCI) issued by the Office of the General Counsel of the Department of Defense. *Inter alia*, MCI No.2 described the crimes and their elements for trial by the Military Commission. It guarantees freedom from *ex post facto* laws: "No offense is cognizable in a trial by the military commission if that offense did not exist prior to the conduct in question."[533] The crimes enumerated in this instruction were only illustrative of applicable common law of war, and not an exhaustive, comprehensive list of crimes triable by the military commission.[534] Any defenses potentially available to the accused, such as self-defense, mistake of fact, and duress, carry the burden of proof on the accused or it will be presumed not to apply. The prosecution has the burden to establish beyond a reasonable doubt that the conduct constituting the offense was wrongful.[535] Violations of the laws listed in it were not subject to any statute of limitations.[536]

Amongst the definitions provided within the scope of the instruction, it is good to note the notions of "combatant immunity" enjoyed only by a lawful combatant for the lawful conduct of hostilities during armed conflict;[537] and the notion of "enemy" which includes "any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. 'Enemy' especially includes any organization of terrorists with international reach."[538]

533 Office of the General Counsel of the Department of Defense, Military Commission Instruction No.2, Crimes and Elements for Trial by the Military Commission, April 30, 2003, at section 3 (A).

534 *Id.* at Section 3 (C).

535 *Id.* at Section 4 (B).

536 *Id.* at Section 4 (C).

537 *Id.* at Section 5 (A).

538 *Id.* at Section 5 (B).

In defining crimes and elements, in addition to the substantive offenses where well-known war crimes are enumerated,[539] in a separate section there is a list of eight other substantive offenses, all specifically pertinent to war on terror, triable by the military commission, namely: hijacking or hazarding a vessel or aircraft; terrorism; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; aiding the enemy; spying; perjury or false testimony; and obstruction of justice related to military commissions.[540] It also provided that a "person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility."[541]

bb. Hamdan v. Rumsfeld

Based on the President's Military Order that authorized trial of unlawful combatants by military commissions, a few cases made it to the military commissions starting in late summer of 2004. Salim Ahmed Hamdan, Ibrahim Ahmed Mahmoud Al Qosi, Ali Hamza Ahmad Sulayman Al Bahlul, David Hicks were the first four detainees who were brought to trial before the military commissions starting on August 24, 2004. News reports of that time detailed serious flaws in the military commission proceedings.[542] Challenges of impartiality of commission members, their lack of legal competence, a chaos of rules, no meaningful independent appeal, were coupled with issues related to lack of adequate conditions and resources for the defense to prepare for trial, an absolute failed system of interpreting – those problems made headlines.[543]

539 These are the crimes listed in this MCI: willful killing of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or analogous weapons, using protected persons or property as shields, torture, causing serious injury, mutilation or maiming, use of treachery or perfidy, improper use of flag of truce, improper use of protective emblems, degrading treatment of a dead body, and rape. *Id.* at Section 6 (A).

540 *Id.* at Section 6 (B).

541 *Id.* at Section 6 (C). Such offenses were listed as: aiding and abetting; solicitation; command/superior responsibility-perpetrating; command/superior responsibility-misprision; accessory after the fact; conspiracy; attempt.

542 Condy Rice, a professor at Harvard was invited by the Tavis Smiley Show on WLRN (NPR), on September 14, 2004, at 7:40 PM. She was analyzing the trials before the military commissions and listed several reasons why she thought there was no fair trial in Guantánamo, *inter alia*: the judges do not know the jurisdiction of their tribunal; defendant's lawyers asks the judge whether he has read the Geneva Conventions and he answers "no;" those who the defendants appeal to are those who prosecuted them; tribunals were used 50 years ago, judges have no clue of their function; the President has named the defendant "enemy combatant," the judges appointed by his dependents are not going to presume him innocent; out of five judges, two has just come from the battlefield; four out of five judges have no law degree; Arabic translator does not speak the defendant's dialect.

543 One of the most vivid characterizations of the military commissions' work was provided by Ms. Deborah Pearlstein, Director of Human Rights First, U.S. Law and Security Pro-

gram, who observed the military commission trials at the invitation of the Department of Defense. Initially, she classified the issues as constituting four major problems: 1) Resources; 2) Interpreters; 3) Conditions of Defendants; 4) Lack of Legal Structure. As she observed the first four days of trials she made these observations and comments. On the *issue of resources* she noted that there was a total imbalance on the resources of the prosecution, who have a whole floor and real staff working for them, and of the defense, who all of the six share one office, lack supplies, and lack staff. The problem was even worse as it relates to interpretation. Not only did they not have any experience in legal proceedings and terminology, but some of the interpreters working with the defense counsels were previously involved in interpreting during interrogations at Guantánamo. She brings the example from the trial of Ali Hamza Ahmed Sulayman al Bahlul of Yemen, alleged to have been Bin Laden's armed bodyguard, who is accused of conspiring with Osama Bin Laden and others to commit terrorism. In trial, al Bahlul said that he wanted to represent himself. He announced that he was a member of al Qaeda and seemed to have wanted to make a further statement about September 11. Colonel Brownback, the Presiding Officer, was asking questions in order to assess whether the defendant could represent himself, but the translation seemed to create a complete confusion in the court room. Al Bahlul's answers were showing that he did not even understand questions. This had prompted Col. Brownback to order a recess and to start the proceedings of the next day by addressing the interpreters and instructing them how important it was for the trials that the interpretation and translation be accurate. On the issue of the conditions of the defendants, she first brought up concerns about the physical and psychological condition of at least one defendant, Salim Ahmed Hamdan, a native of Yemen. A psychiatrist who had examined him had written a sworn statement according to which the conditions of Hamdan's detention "make him particularly susceptible to mental coercion and false confession." Hamdan's lawyers had said that he had been in solitary confinement for eight months, and that he had lost 50 pounds since the. However, Ms. Pearlstein seemed to have been relieved when Hamdan entered the courtroom, neither in shackles nor chains, and she described that he "he burst into a huge beaming smile" when he saw his lawyer, Lt. Cmdr. Swift. The next day, as she describes the appearance of David Hicks before the military commission, a national of Australia, charged with counts of conspiracy to commit war crimes, including terrorism, attempted murder by an unprivileged belligerent, and aiding and abetting the enemy, she quotes Hicks' father to admit that his son looked well and seemed to have gained a few pounds. Terry Hicks had also added that he was mostly worried for his son's mental health, because of solitary confinement. David Hicks had told his father that he had not been abused in Guantánamo, but he was abused during his detention in Afghanistan. As to correspondence with his son, Terry Hicks had admitted that there had been correspondence but it had been censored, mentioning particularly that "all the love bits had been taken out." Those parts of family letters to David writing that "we love you" or "we support you" had been blackened out. In the case of Ahmed Mahmoud al Qosi of Sudan, the problem seemed to have been the risk of losing his detailed defense counsel Lt. Col. Sharon Shaffer, who had been given a different appointment. When finally that problem was solved, Shaffer was still in need of resources, additional counsel, and access to witnesses. As to the last issue she raised, *lack of legal structure* and continuing dysfunction of the process, she observed that a lot was being made up as the process developed. Rules were not clear, new rules kept popping up, a memorandum written by the Presiding Officer becomes the law instantly, there were no answers yet to important questions like what evidence could be introduced, whether

The government officials were also reported to have admitted such chaos in the proceedings.[544] When Hamdan's suit was decided in the District Court of the District of Columbia in favor of his being granted a writ of *habeas corpus*,[545] and was appealed to the D.C. Circuit Court, an order of holding in abeyance the cases that had already begun was issued. On June 29, 2006, the U.S. Supreme Court declared the cases before the military commissions established by the Executive Branch as unauthorized. The landmark case is styled *Hamdan v. Rumsfeld*.[546]

Hamdan, a Yemeni national and former bodyguard and personal driver of Osama Bin Laden, was captured in 2001 in Afghanistan and transferred to Guantánamo Bay in 2002.[547] On July 3, 2003, Hamdan was deemed by the President as eligible for trial before a military commission, and later, in July 13, 2004 he was charged[548] with conspiracy "to commit ... offenses triable by military commission."[549] A Combatant Status Review Tribunal (CSRT) determined that Hamdan's continued detention at Guantánamo Bay as an "enemy combatant" was warranted. Meanwhile, proceedings

a defendant could represent himself, and how was that going to happen, etc. However, she gives quite a positive account of the efforts of all of the lawyers involved. As she puts it, "… the lawyers on both sides, the Presiding Officer, the 'judge' and the 'jury'(the members of the commission panel) seem to be good, decent people, people who are trying to do the right thing when there is no possible right thing to do." She describes scenes that cause great concerns particularly as regards the impartiality and competency of the commission. She notes some of the members of the commissions were previously involved with logistics of bringing these detainees to Guantánamo, most of them had no idea of what "*ex post facto,*" or "jurisdiction," means, and some had not heard of the Geneva Conventions. She concluded that this "alternative legal system" that U.S. was trying to build was nothing but a failure. *See* Human Rights First, *Security Detainees/Enemy Combatants: Military Commission Trial Observation*, last updated August 30, 2004, *available at* http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day1 (last visited on September 6, 2004).

544 NY Times, Sept. 26, 2004, Pt. I, 26. *See also* Neal R. Sonnett, *Guantánamo: Still a Legal Black Hole*, 33(1) Human Rights *(magazine)* 8-9 (Winter 2006).

545 Hamdan v. Rumsfeld, 344 F.Supp.2nd 152 (D.D.C.2004).

546 Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).

547 *Id*. at 2753.

548 The charging document, in its paragraph 13 "lists four 'overt acts' that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the 'enterprise and conspiracy': (1) he acted as Osama bin Laden's 'bodyguard and personal driver,' 'believ[ing]' all the while that bin Laden 'and his associates were involved in' terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he 'drove or accompanied [O]sama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures,' at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps." Hamdan, at 2761.

549 *Id*. at 2753.

before the military commission commenced.[550] Hamdan filed *habeas* and *mandamus* petitions claiming first that the crime of conspiracy he is charged with is not triable by a military commission, as it is not a violation of the law of war, and second that the military commissions procedures violate military and international law.[551]

The Government first argued for lack of jurisdiction on the part of the Court based on the Detainee Treatment Act of 2005 which in its paragraph 1005(e)(1) provides that "no court…shall have jurisdiction to hear or consider … an application for … habeas corpus filed by … an alien detained … at Guantánamo Bay." Alternatively, if there were statutory jurisdiction, the Government, based on the case of *Councilman*,[552] argued for abstention, and asked for the application of the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings."[553]

Delivering the opinion of the Court, the Supreme Court Justice Stevens, held that:

(1) the Detainee Treatment Act (DTA) did not deprive the Supreme Court of jurisdiction.

The Court decided that it did not need to consider *habeas corpus* jurisdiction of the Court on constitutional grounds as Hamdan was arguing.[554] It rather found the ordinary principles of statutory construction sufficient to rebut the Government's theory in this case. It illustrates its points through numerous examples and references.[555]

The Court also challenged the second point made by the Government in this respect, according to which accepting this Court's jurisdiction would produce "'an absurd result' because it grants (albeit only temporarily) dual jurisdiction over detainees' cases in circumstances where the statute [DTA] plainly envisions that the District of Columbia Circuit will have '*exclusive*' and immediate jurisdiction over such cases."[556] But, for the Court, Hamdan is not contesting a final decision of a CSRT or military commission, hence no *absurdity*.[557] Denying the Government's motion to dismiss for lack of jurisdiction, the Court reasons: "There is nothing absurd about a scheme under which pending habeas actions – particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed – are preserved, and more routine challenges to final decisions

550 *Id.* at 2761.

551 *Id.* 2753.

552 420 U.S. 738.

553 Hamdan, *supra* note 546, at 2769.

554 Hamdan was drawing support from "*Ex parte Yerger,* 8 Wall. 85, 19 L.Ed. 332 (1869), in which, having explained that 'the denial to this court of appellate jurisdiction' to consider an original writ of habeas corpus would 'greatly weaken the efficacy of the writ,' *id.* at 102-103, we held that Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary. *See id.* at 104-105." *Hamdan*, at 2764.

555 For details, *see id.* at 2764-2768.

556 *Id.* at 2768.

557 *Id*. at 2768.

rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review."[558]

(2) Abstention was not appropriate.

The Court noted that the considerations in the *Councilman* case are not relevant in *Hamdan.* It argued that Hamdan was not a member of U.S. Armed Forces, "so concerns about military discipline do not apply … [and] … the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established. [Also] Hamdan has no right to appeal any conviction to the civilian judges of … the United States Court of Appeals for the Armed Forces."[559] Describing the review procedure of the military commissions as per Commission Order No.1, the Court concluded that "these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces, and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles."[560] The Court also considered that it was important for the parties to know in advance whether Hamdan could be tried by a military commission, alleged to have no basis in law and stripped of necessary procedural guarantees, so abstention could not be justified.[561]

Proceeding further on the merits of the case, the Court decided that:

(3) The military commission was not expressly authorized by any Congressional act.

The Court starts with some historical considerations regarding military commissions and, referring to noted expert Winthrop,[562] it points out that they are not included in the Constitution nor are they created by statute. It is military necessity, the exigencies of war that have invoked them. But for the Court, "exigency alone … will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need…[and] 'Congress and the President, like the courts, possess no power not derived from the Constitution'[563]"[564]

558 *Id.* at 2769.

559 *Id.* at 2771.

560 *Id.* at 2771.

561 *Id.* at 2772.

562 *See* W. Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920).

563 Referring to *Quirin,* 317 U.S., at 25.

564 Hamdan, at 2773. The Court further discussed the interplay between the President and the Congress, referring to Chief Justice Chase in *Ex Parte Milligan*, 4 Wall. 2, 121 (1866), which states: "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. … Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction

The Court finds it clear that neither the Authorization for the Use of Military Force (AUMF) nor the DTA "expands the President's authority to convene military commissions ... [though] we assume that the AUMF activated the President's war powers ... and that those powers include the authority to convene military commissions in appropriate circumstances, … there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ [Uniform Code of Military Justice]."[565] Neither can such an authorization come from the language of the DTA. Further on, using the four preconditions test described by Winthrop, and constituting the common law governing military commissions,[566] the Court finds no justification for convening a military commission of the *Hamdan* case type, because Hamdan's overt acts stretch over a period of five years, not during the war, nor in a theatre of war, nor do they violate the law of war. Also, the offense *per se* is not one triable by a law-of-war military commission. "These facts alone cast doubt on the legality of the charge and, hence, the commission."[567]

(4) The military commission's procedures violated the Uniform Code of Military Justice (UCMJ).

The Court observes that the UCMJ preconditions the use of military commissions by the President on compliance with the common law of war as well as with the UCMJ itself, as applicable, and with the "rules and precepts of the law of nations."[568]

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of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." *Id*. at 139-140, quoted in *Hamdan*, at 2773-2774. But the Court does not discuss whether "controlling necessity" constitutionally justifies convening of military commissions without being sanctioned by the Congress.

565 Hamdan, at 2775.

566 "First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." Winthrop 836. The "field of command" in these circumstances means the "theatre of war." *Ibid.* Second, the offense charged "must have been committed within the period of the war."*Id.* at 837. No jurisdiction exists to try offenses "committed either before or after the war." *Ibid.* Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." *Id.* at 838. Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Id.* at 839. Quoted in *Hamdan*, at 2777.

567 Hamdan, *supra* note 546, at 2778.

568 *Id.* at 2786.

But the Court finds fault with the military commission's procedures. So, *inter alia*, the Court discusses that an accused and his civilian counsel could be excluded from, and even precluded from, ever learning about the evidence presented at a part of the proceeding which is closed by the official who appointed the commission or by the presiding officer, on grounds of protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." While the appointed military defense counsel must be privy to these closed sessions, at the presiding officer's discretion, he could be forbidden to reveal to the client anything related to the closed session.[569]

The Court also challenges the fact that such rules permit the admission of *any* evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. The Court states that under this test "not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn."[570] Furthermore, if the presiding officer finds such evidence not probative, he could be overridden by a majority of other members of the commission.[571]

Under such circumstances, the Court disposes of the contention of the government that Hamdan can raise such challenges following a final decision of the commission. The Court observes that "because Hamdan apparently… may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's 'final decision before a federal court under the DTA… there *is* a 'basis to presume' that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been,* excluded from his own trial.… Under these circumstances, review of the procedures in advance of a 'final decision' - the timing of which is left entirely to the discretion of the President under the DTA - is appropriate."[572]

The Court noted that the procedures governing such military commissions historically have been the same as those governing courts-martial. However, this uniformity principle is not inflexible and does not preclude all departures from courts-martial procedures. Nevertheless, it requires that any such departure must be tailored to the exigency that necessitates it. That understanding is sanctioned in Article 36(b) of the UCMJ,[573] which provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be "uniform insofar as practi-

569 *Id.* at 2786.

570 *Id.* at 2786-87.

571 *Id.* at 2787.

572 *Id.* at 2788.

573 Article 36 (a) provides: "(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial

cable." But the Court found the "practicability" determination by the President to be insufficient to justify variances from the procedures governing courts-martial. "The President here has determined, [pursuant to the requirement of Art. 36(a)] that it is impracticable to apply the rules and principles of law that govern 'the trial of criminal cases in the United States district courts' to Hamdan's commission…. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial."[574] The Court sees no evidence of impracticability of court martial rules in this case, though it does not neglect the danger posed by international terrorism. The Court reasons: "The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present….Whether or not that departure technically is 'contrary to or inconsistent with' the terms of the UCMJ, … the jettisoning of so basic a right cannot lightly be excused as 'practicable.'"[575]

Consequently, the Court holds that the rules applicable in courts-martial must apply; Commission Order No. 1 deviates in many significant respects from those rules, and it necessarily violates Article 36(b); the rules governing Hamdan's trial are illegal.[576]

(5) The military commission did not satisfy the Geneva Conventions, and its procedures violate these Conventions.

The Court reaches this conclusion after observing that there is at least one provision which is applicable in this case, where we have to deal with no states parties to the Conventions. This is "Common Article 3 [which] provides that in a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,' certain provisions protecting '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by … detention.' … One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[577]

Thus this article requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The Court further refers to the commentary accompanying a provision of the Fourth Geneva Convention, which defines the "regularly constituted" tribunals to include "ordinary military courts" and to "definitely exclud[e] all special

of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." Hamdan, *supra* note 546, at 2890.

574 *Id.* at 2791.

575 *Id.* at 2792.

576 *Id.* at 2792-2793.

577 *Id.* at 2795.

tribunals."[578] It also refers to one of the Red Cross treatises which defines a "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country."[579] As Justice Kennedy would note, at a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice."[580]

The Court further elaborated upon the concept of the procedures that afford "all the judicial guarantees which are recognized as indispensable by civilized peoples," stating that "it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I)."[581] The Court finds that several provisions of Commission Order No. 1 dispense with the guarantees provided in Article 75, which are "indisputably part of the customary international law," and mentions, *inter alia,* that an accused must be present at trial and must have access to the evidence against him. If nothing else, "information used to convict a person of a crime must be disclosed to him." Consequently, the military commission procedures violate Article 3 of the Geneva Convention. While it does not challenge the Government's power to detain him for the duration of hostilities, reversing the case, the Court ultimately concludes that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[582] Thus, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

Four judges further concluded that:
(6) the conspiracy offense with which Hamdan was charged with is not an "offense… that by the law of war may be tried by military commissions."[583] This is not an act which military efficiency would ask for expeditious trial for,[584] it is more an "agreement" whose inception predated the September 11 attacks and the AUMF, so it could be a crime, but not one that by the law of war would be triable by military commission.[585] In this respect, they concluded as follows:

578 *Id.* at 2796-2797.

579 Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005).

580 Hamdan, *supra* note 546, at 2797.

581 *Id.* at 2797.

582 *Id.* at 2798.

583 *Id.* at 2759-2760.

584 Nor that this point can be claimed either, notes the Court, because it would be belied by the record: arrested in 2001, Hamdan was not charged until 2004. *Id.* at 2785.

585 *Id.* at 2785.

> At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war.[586] Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt.[587]

cc. The Military Commissions Act of 2006

After the Supreme Court's decision in *Hamdan v. Rumsfeld,*[588] which was based on the absence of Congressional authorization for the President's establishment of military commissions, the United States Congress quickly filled the perceived gap and passed the Military Commissions Act of 2006, stating in its findings that "[t]he military commission is the traditional tribunal for the trial of persons engaged in hostilities for violations of the law of war." The Act authorizes the President "to establish military commissions for the trial of alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses specifically made triable by military commission."[589] The scope of punishment and its execution remains the same as it had been provided in the President's Military Order.

The Act imposes upon the Secretary of Defense the duty to submit at the end of each year to the Committees on Armed Services of the Senate and the House of Representatives a report in unclassified form on any trials conducted by military commissions in that year.[590] It makes the distinction between lawful and unlawful enemy combatants. The latter is defined as "an individual engaged in hostilities against the

586 To that effect the Court expressly stated that "international sources confirm that the crime charged here is not a recognized violation of the law of war… And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." *Hamdan*, *supra* note 546, at 2784.

587 *Id*. at 2780-2781. The Court further quotes Winthrop: "[T]he jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts, i.e.,* in unlawful commissions or actual attempts to commit, and not in intentions merely" (*emphasis in original*)." *Ibid.*

588 126 S. Ct. 2749 (2006), *supra* note 546.

589 Pub. L. 109-366, 120 Stat. 2600 (2006), *supra* note 332, at section 3 (a).

590 *Id.* section 3 (e).

United States who is not a lawful enemy combatant."[591] The procedure of military commissions is set based on the procedure for trial by general courts-martial, but they are not similar and the latter do not govern the military commissions. The Act enumerates a number of provisions for the courts martial that do not apply to military commissions.

The Act expressly provides that "[a] military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Conventions."[592] However the Act now mandates that the Geneva Conventions are not a source of rights, an issue left open by the Supreme Court in *Hamdan*: "No alien enemy unlawful combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights at his trial by military commission."[593] The jurisdiction *ratione personae* covers only alien unlawful enemy combatants and not the lawful enemy combatants, who can only be tried by the regular courts martial established under Chapter 47, the Uniform Code of Military Justice. Jurisdiction *ratione materiae* is the same as in the Military Order, and *ratione temporis* for the military commissions covers punishable acts and war crimes before, on or after September 11, 2001.

The authority to convene military commissions remains the same as in the President's Military Order, that is the Secretary of Defense or his designee, and the membership of these commissions remains the same as in the Department of Defense Military Commissions Order No. 1.[594] It is important to note that the Act mandates that "No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case."[595] There will be one military judge detailed to each commission.[596] The judge detailed to a military commis-

591 (3) "LAWFUL ENEMY COMBATANT. – The term 'lawful enemy combatant' means an individual who is: (A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States." 10 U.S.C. 47A, Military Commissions, § 948a. Definitions, (3).

592 *Id.* § 948b. Military commissions generally, at (d).

593 *Id.* at (f).

594 However, this Act adds certain criteria that these potential members must be "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.* at 948i. Who may serve on military commissions, at (b).

595 *Ibid.*

596 "A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title (article 26 of the Uniform Code of Military Justice) as a military judge in general courts-martial by the Judge Advocate." *Id.* § 948j. Military judge of a military commission, at (b).

sion may consult with the members of the commission only in the presence of the accused, trial counsel, and defense counsel. He may not vote with the members.[597] To ensure independence of the military judge, the convening authority of a military commission is prohibited to review any report concerning the effectiveness, fitness, or efficiency of a military judge as it relates to his performance of duty as a military judge on the military commission.

The Act mandates that the military defense counsel shall be detailed as soon as practicable after presenting of charges.[598] Also the accused will be notified of charges against him as soon as practicable. The Act further provides for the qualifications of the prosecution and defense personnel, court reporters, and interpreters. It raises the number of military commission members to at least five.

It prohibits compulsory self-incrimination at a proceeding before the commission, and admission of statements obtained by torture. The Act differentiates between disputed statements obtained before and after the Detainee Treatment Act of 2005, which provided that information had to be excluded if it was obtained by cruel, inhumane or degrading treatment, and leaves it up to the discretion of the judge to decide on the criteria of its admissibility.[599]

Procedures and rules of evidence were to be the same as the ones governing the courts-martial trials, unless the Secretary of Defense, in consultation with the Attorney General, makes such exceptions from the procedures and rules of evidence applicable in general courts-martial "as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need."[600] Such exceptions might, *inter alia*, include: admission of evidence seized outside of the U.S. despite lack of search warrant or authorization; admission of a statement of the accused despite alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title;

597 *Ibid.* at (d).

598 *Id.* § 948k. Detail of trial counsel and defense counsel, at (3).

599 "A statement obtained before December 30, 2005 (the date of the enactment of the Detainee Treatment Act of 2005), in which the degree of coercion is disputed may be admitted only if the military judge finds that: (1) the totality of the circumstances renders it reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence." Whereas, "[a] statement obtained on or after December 30, 2005 (the date of the enactment of the Detainee Treatment Act of 2005), in which the degree of coercion is disputed may be admitted only if the military judge finds that: (1) the totality of the circumstances renders it reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission of the statement into evidence; and (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

Id. §948r. Compulsory self-incrimination prohibited; statements obtained by torture and other statements, at (c) and (d).

600 *Id*. § 949a. Rules (b).

more exceptions are provided as to evidence.[601] Admission of hearsay evidence is given more definition compared to DoD MCO No. 1.

The rights of the accused include: to examine and respond to all evidence; to be present at all sessions, unless otherwise provided; to the assistance of counsel, including detailed defense counsel and civilian defense counsel at his expense, if he so chooses;[602] to self-representation if he knowingly and competently waives the assistance of counsel; a reasonable opportunity to obtain witnesses and other evidence; access to exculpatory evidence; to be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, also observing *in dubio pro reo*.

As regards double jeopardy the Act provides: "No person may, without his consent, be tried by a military commission under this chapter a second time for the same offense."

Protection of classified information is provided in the same manner as it was in the DoD MCO No. 1 rules of procedure and evidence.

The Act extensively mandates prohibition of unlawful influencing action of the military commissions.[603] Conviction and sentencing can only be made by concurrence of two thirds of the members present at the time of vote, and in cases of death penalty all members present at the time of vote must have concurred. In death penalty cases, the commission must consist of at least 12 members, unless in extreme impossibility to provide the number, in which case the minimum number will be five members. Life imprisonment or conviction of more than ten years can only be made by a vote of three fourths of the members present at the vote. Cruel and unusual punishments are prohibited.

Post-trial procedures.[604] Review of findings and sentence is done by the Convening Authority, who receives all such in written form. The accused has the right to submit matters for consideration by the Convening Authority, within twenty days; he might waive this right in writing. The Convening Authority is not required to take any action, but at his sole discretion he may dismiss any charge or specification by setting aside a finding of guilty; may change a finding of guilty to a guilty for a lesser charge; may order a proceeding in revision or rehearing; at his sole discretion he may approve, disapprove, commute or suspend the sentence in whole or in part, but may not increase a sentence.

The Act also provides for an appeal to the Court of Military Commission Review, a court established by the Secretary of Defense, composed of one or more panels, each panel having no less than three appellate military judges. The accused may appeal from a decision of a military commission, and the court may act only in matters of law.

601 *See* for further details § 949a. Rules.

602 Requirements for the civilian defense counsel provided in this Act are the same as the ones provided in the DoD MCO No. 1, *supra* note 503.

603 *See* MCA, *supra* note 332, at § 949b. Unlawfully influencing action of military commission.

604 *Id.* Subchapter VI, Post-Trial Procedure and Review of Military Commissions.

The last resort, after having waived or exhausted the other reviews, lies with the review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court shall have the exclusive jurisdiction to determine the final validity of any judgment by the military commission.

Ultimately, the Supreme Court of the United States may review the final judgment of the United States Court of Appeals for the District of Columbia Circuit, but only by writ of certiorari. This appellate process is considered to be quite advanced even compared to the courts-martial appellate process. So, in the courts-martial's setting, the first appeal is addressed to the Service Court of Criminal Appeals, then to the Court of Appeals of the Armed Forces, then to the Supreme Court. In the military commissions setting, the first appeal goes to the Court of Military Commission Review, the next level is the D.C. Circuit, and then to the Supreme Court. That means that the defendant gets the standards of an Article III court since the second appellate level, while in the courts-martial system that standard is only reached when the defendant takes his appeal to the Supreme Court.[605]

In sum, while many rules and procedures remain the same as the ones issued pursuant to the President's Military Order, the novelty is, mostly, that the prior merely regulatory rules have been elevated to a statutory scheme and standard.

dd. The Manual for Military Commissions of January 2007

Pursuant to the Military Commissions Act of 2006, which provided statutory authority to try unlawful combatants for violations of the law of war, the Department of Defense was authorized to promulgate a manual with new procedures governing the military commissions, known as the Manual for Military Commissions, which was to be presented back to the Committees on Armed Services of the Senate and the House of Representatives.

In a press briefing, the Department of Defense summarized these rules, which were the result of inter-departmental and inter-agency efforts.[606] As required by the Military Commissions Act of 2006 (MCA), the manual is presented to be a comprehensive set of pretrial, trial and post-trial procedures, with crimes and elements, as well as methods of proof for cases triable by military commissions, permeated by fairness and meeting the statutory standards. This Manual for Military Commissions (M.M.C.) consists of four parts: I, Preamble; II, Rules for Military Commissions (R.M.C.); III, Military Commission Rules of Evidence (Mil. Comm. R. Evid.); and IV, Crimes and Elements. In the forward to the manual, the Secretary of Defense, Robert M. Gates states: "The M.M.C. applies the principles of law and rules of evidence in trial by general courts martial so far as I have considered practicable or consistent

605 DoD Press Briefing on New Military Commissions Rules, with the Principal Deputy General Counsel, Mr. Dan Dell'Orto, and the legal advisor to the Office of Military Commissions, Brigadier General Thomas Hemingway, January 18, 2007 1:30 PM EST, transcript *available at* http://www.defenselink.mil/ transcripts/transcript.aspx?transcriptid=3868.

606 *Id.*

with military or intelligence activities, and is neither contrary to nor inconsistent with the MCA."[607]

The MCA provides for a convening authority to be either the Secretary of Defense or his designee, and The Honorable Susan Crawford, former chief judge of the United States Court of Appeals of the Armed Forces, was designated by the Defense Secretary as the convening authority for military commissions.[608] The manual provides that the alien[609] unlawful enemy combatants,[610] suspected of war crimes and certain other offenses will be prosecuted before the military commissions, which, according to the government, operate under the same pattern as the regularly constituted courts, assuring in this way all the indispensable judicial guarantees. The military commissions have jurisdiction only over unlawful enemy combatants. For purposes of jurisdiction

607 While this statement seems to be true, for Human Rights First, the MCA *per se* contains provisions that violate the U.S. Constitution, the laws of war and international human rights standards for detention and trial. *See* Human Rights First, *Analysis of Proposed Rules for Military Commissions Trials*, *available at* http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited on September 15, 2007).

608 Press briefing, *supra* note 605.

609 The reference is made to "aliens" as contrasted to "citizens" who undergo a different treatment regarding their adjudication. For a philosophical analysis of this issue, see generally Guantánamo Bay and the Judicial-Moral Treatment of The Other (Clark Butler ed., 2007). As to similar issues regarding terrorism-related policies and their impact upon immigrants and asylum seekers, particularly in Europe, *see generally* Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe (Anneliese Baldaccini & Elspeth Guild eds., 2007).

610 The definition provided in the manual for the unlawful enemy combatant is "(A) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (B) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense." M. M. C., Part II, Chapter I, Rule 103. Whereas the meaning of the term "Co-belligerent" as used in this definition is "any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy." *Ibid.*

Human Rights First criticized this definition as overbroad and potentially subjecting to military trials "thousands of people including civilians." It considered this definition of "unlawful enemy combatant" as having "far-reaching and negative consequences for U.S. and international law," and as "blurring the fundamental distinction the laws of war make between combatants and non-combatants and between types of armed conflict." Human Rights First, *Analysis of Proposed Rules for Military Commissions Trials*, *available at* http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited on September 15, 2007).

for trial by a military commission under the MCA, such a status is established by the Combatant Status Review Tribunal or other competent tribunal.[611]

The Preamble of the Manual notes that in the spirit of the MCA, the Manual for Military Commissions follows the Manual for Courts-Martial both in form and in substance,[612] subject to exceptions deemed necessary to accommodate military operational and national security considerations and interests reflected in the MCA. Accordingly, the rules and procedures in the Manual for Military Commissions apply the principles of law and the rules of evidence used in general courts-martial, subject only to practicability and consistency with military or intelligence activities. This issue still remains the most debated one. Critics observe that in numerous provisions dealing with classified information there is little room, if any, for the defendant to challenge such evidence or the basis for its classification as such. Such evidence is particularly important when exculpatory and cannot really be handled as such when only seen in substitute form.[613] So government's claim that tailoring these rules according to courts-martial standards does not only "ensure protection of classified information, but extend to the accused all the "necessary judicial guarantees" as required by Common Article 3, remains still arguable. However, no better method of dealing with classified information seems to have been offered. So, particularly in the circumstances of potentially dealing with ardent and unscrupulous terrorists, some trust could be given to the government's avowal that "these rules represent a delicate balance similar in concept, but different in detail from those provided in the Manual for Courts-Martial."[614]

For the purposes of this study, it would be impracticable to analyze all the very detailed and technical rules contained in the manual, so written below is a list of summarized provisions connoting both the government's sense about the manual, and some criticism surrounding the manual.

611 M. M. C., Part II, Chapter II, Rule 202 (b). "The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals." *Ibid.* Criticism on this issue considers the CSRT procedure "a deeply flawed system," first, because the definition they use is different from the one in MCA and also much broader, second, such status is based on secret evidence, or even evidence obtained under duress, third, there is no presumption of innocence as they presume as accurate the government's secret evidence. The possibility to rebut such evidence on the part of the detainee is severely limited. Fourth, there is no legal assistance afforded; fifth, witnesses from outside of Guantánamo are denied. *See* Human Rights First, *Analysis of Proposed Rules for Military Commissions Trials*, *available at* http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf .

612 *See* Preamble (1), Manual for Military Commissions (2007), *available at* http://www.defenselink. mil/news/d20080213manual.pdf.

613 Human Rights First, Analysis of Proposed Rules for Military Commissions Trials, *available at* http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited on September 15, 2007).

614 Preamble (2), Manual for Military Commissions (2007), (hereinafter M.M.C.) *supra* note 612.

- discretion by and deference to independent military judges, who will serve as presiding officials and who will ensure fairness. In contrast with the old DoD rules, the judge's independence is better ensured; he cannot be overruled by the commission members. He has the same authority that a judge could have in a trial by any military tribunal.
- notification of charges to the accused "as soon as practicable" and "sufficiently in advance of trial to prepare a defense," in English and "if appropriate, in another language that the accused understands."[615]
- an independent defense function to represent defendants zealously[616] and protect against even the appearance of unlawful influence or conflict of interest; the opportunity for the accused to have civilian defense counsel at his expense (the detailed counsel is "associate counsel" unless excused from the case.)[617] Good standards of attorney-client privilege.[618]
- the presumption of an accused's innocence, and the requirement that the prosecution prove its case beyond a reasonable doubt;
- a jury system comparable to that used in general courts-martial;
- a requirement that the accused be provided, in advance, evidence to be introduced against him or her at trial;
- prohibition against admitting classified evidence outside the presence of the accused, but under certain restrictions for the purposes of national security. These provisions

615 *Id.* Part II, Chapter III, Rule 308 and Chapter VI, Rule 602..

616 That seems to be the case even when a military defense counsel is representing the defendant. In one of the very latest cases, *U.S. v. Khadr, infra* note 632, after the commission dismissed the charges for lack of jurisdiction, the military defense counsel, Colonel Dwight Sullivan was quoted to have said for New York Times: "How much more evidence do we need that the military commission process doesn't work?" after he had described the commission process as lacking international legitimacy and legal authority. William Glaberson, *Judge Throws Out Charges in Guantánamo Prisoner Case*, N.Y. Times, June 4, 2007.

617 M. M. C., *supra* note 612, Part II, Chapter II, Rule 502 (d) (2) and Rule 506 (a).

618 This is important considering that among the worst flaws of the system was also lack of the attorney-client privilege. The ABA had noted that Hamdi's lawyer, public defender Dunham "had to act without speaking to Hamdi from the time of his appointment until earlier this month." "This lack of access violates the most fundamental requirements of a lawyer-client relationship." *See* Molly McDonough, *Lawyers Blast Talk with Terror Suspect: Monitoring Meant 'No Attorney-Client Privilege,' Hamdi Lawyer Says*, ABA J. Report, February 27, 2004, *available at* www.abanet.org/journal/ereport/f27padilla.html (last visited on February 27, 2004). However, the government has stated that allowing lawyers to meet with their clients was just "a matter of discretion." Georgetown law professor Viet D. Dinh, formerly of the Justice Department, approves of this government stand by stating "The circumstances of access must accommodate the necessities of the military in order to gather intelligence and to mitigate the threat posed by these and other terrorist suspects." *Ibid.*

have invited criticism[619] regarding the possibility on the part of the government of the withholding of classified evidence, and inability of defense to challenge that and also the basis for such classification. It is provided that a lot of such evidence will be let up to the judge only to decide on allowing withholding and asking for substitutes, while defendant and his lawyer will not be allowed to be present in such discussions.

- a reasonable opportunity for the accused to obtain evidence and witnesses;
- formal rules of evidence, consistent with federal and courts-martial practice, with those exceptions required to be consistent with the Military Commissions Act of 2006;
- safeguards to protect the rights of confrontation;
- right to be present at trial: at the arraignment, the time of the plea, and every stage of the trial, *voir dire* and challenges of members, the announcement of findings, sentencing proceedings, and post-trial sessions;[620]
- protection from self-incrimination;
- protection of most common law evidentiary privileges;
- suppression of statements obtained by torture or in violation of the Detainee Treatment Act of 2005; whereas, statements obtained through coercion and cruel, inhuman and degrading treatment have as threshold the date of the above act are left up to the judge to decide to admit them if they are "reliable," "sufficiently probative," and its admission is "in the interest of justice."
- a requirement that the prosecution provide exculpatory evidence to an accused consistent with federal and courts-martial practice;
- a multi-layered and independent appellate system. An accused will have access to the Court of Military Commission Review, the Circuit Court for the District of Columbia, and the Supreme Court of the United States. However, it has been rightly criticized[621] that this appeals system restricts the scope of judicial review. Like the MCA, the Man-

619 "Upon the request of the government, the judge may exclude both the defendant and his lawyer from the process in which the government argues to the judge that classified information should be withheld. The defendant may also be prevented from seeing portions of the government's legal filings regarding why the evidence cannot be disclosed and from participation in the discussion between the government's attorney and the judge. Regular courts-martial procedures require both the defendant and his counsel to be present at all proceedings determining the classification of information. (-)Unlike courts-martial rules, the government has no duty to disclose classified information that could result in a more lenient sentence for the defendant. (-)The judge is specifically permitted to limit the scope of examination of witnesses on the stand, which could hamper the ability of the defense to challenge a witness's testimony or basis for classification. (-)The ability of the defendant to fully present his case is made more difficult by a provision that allows the government to withhold not just classified information, but also the sources, methods, or activities by which the evidence was obtained." Human Rights First, *Analysis of Proposed Rules for Military Commissions Trials*, *available at* http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited on September 15, 2007).

620 M. M. C., *supra* note 612, Part II, Chapter VIII, Rule 804 (a).

621 Human Rights First, Analysis of Proposed Rules for Military Commissions Trials, *available at* http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf .

> ual restricts the scope of judicial review. The Court of Military Commission Review reviews only on matters of law that could have "prejudiced a substantial trial right" of the defendant. Consequently there is no consideration of errors of fact.

The DoD believed that the Manual for Military Commissions, implementing the Military Commissions Act of 2006, has "established the most comprehensive legal framework for the prosecution of war criminals in U.S. history."[622]

Journalists asked questions regarding the admission of hearsay evidence,[623] classified evidence,[624] death penalty,[625] and the time and place[626] of the sitting of these commissions. The DoD representative noted that even cases that had already started before would have to charge again based on the Military Commissions Act of 2006. There were 10 such cases, and there about 14 in different preparatory stages, and about 60 to 80 cases seemed to be well evidenced on violations of the laws of war

622 Press briefing, *supra* note 605.

623 Mr. Dell'Orto addressed this issue as follows: "The statute provides for the admissibility of hearsay evidence to take into account, I think, the unique conditions under which evidence will be obtained on the battlefield. And so we are in accordance with the statute in doing that. Certainly both sides having the opportunity to admit hearsay levels the playing field, if you will, on that particular issue, but both sides, again, will be able to attack the credibility of the witnesses or the reliability of that evidence. And the only evidence that will be submitted before the members ultimately will be evidence that the judge determines to be reliable and probative." *Id.*

624 To which the DoD representative answered: "With respect to classified evidence... the statute provides for – and the manual then further lays out the procedures for – by which the government would provide for the judge to make rulings as to whether certain matters should either be redacted, certain summaries should be provided, or other substitutes used for the classified evidence if the government was resisting putting that evidence into – before the court. And so the judge will control much of that. Ultimately, with the government deciding whether it – or the judge deciding whether the substitute will meet the needs of the defense and the members, and if he were to say, "Look, you haven't done enough to provide enough substance in this," then the government would have to go back and decide whether it will then have to respond by either not offering that evidence or perhaps making another decision as to how to proceed with the case." *Id.*

625 The explanation of the DoD representative was that "there must be a charge that is eligible for a death penalty… the government must prove not only the commission of the offense, the guilt of the accused of a death penalty-qualified offense, but also must prove aggravating factors associated with that offense. The membership of the court must be 12 members, and they must find unanimously the accused's guilt of the offense, the aggravating factors, and then unanimously agree on a sentence." *Id.*

626 It was noted that the cases for 14 high-profile detainees will need more time to be brought to trial due to the extreme complexity, whereas other cases would be starting to come up soon. DoD Press Briefing, *supra* note 605. *Also see* M.M.C., *supra* note 612, Part I, Chapter II, Rule 201 (A) (3), "The jurisdiction of a military commission with respect to military government or the law of war is not affected by the place where the military commission sits…" While the commissions could be convened anywhere, the DoD representative observed that Guantánamo would still be the most convenient facility for that purpose. *Id.*

that could at some point go to trial. As per the DoD representative, "compared to international settings, this process is a very, very fair process."[627]

This completes the saga of the prescription of the law, the forming and the shaping of the rules and procedures to govern the much contested military commissions.

ee. Practice Under the Military Commissions Act

After the Military Commissions Act of 2006 was passed by Congress, a new era started for trials before military commissions. At that time, according to high officials of the Department of Defense, there were about ten cases to go before the commissions very soon, and about eighty more wouldn't take long before being brought to trial.[628] Slated as one of the very first defendants in such trials, David Hicks entered into a plea bargain with the Convening Authority and he was released and repatriated to Australia.[629] The newly constituted military commissions now have rendered decisions, though not with finality yet, in two cases, which initially ended in dismissals for lack of jurisdiction. As of the time of this writing, there are a total of nineteen cases before the military commissions with twenty four defendants.[630] One of these cases, known as the September 11 Co-Conspirators, includes five defendants,[631] amongst which is Khalid Sheikh Mohammed, the self-proclaimed mastermind of the September 11 attacks. However, only two of these cases had moved towards the end of the proceedings, namely *Khadr* and *Hamdan*.

The case of *United States of America v. Omar Ahmed Khadr*[632] was originally dismissed on all charges for lack of jurisdiction by military commission judge U.S. Army Colonel Peter E. Brownback III. He acted on his own initiative, and not upon a motion by the defense. The ground for lack of jurisdiction was the fact that the defendant was only determined to be an "enemy combatant" by the CSRT, not an "unlawful enemy combatant" as required by the Military Commissions Act. The judge observed

627 DoD Press briefing, *supra* note 605.

628 *Id.*

629 *See* Josh White, *Australian's Plea Deal was Negotiated Without Prosecutors*, Washington Post, April 1, 2007, at A07. *See also* Amnesty International U.S.A., *Another Day in Guantanamo*, *available at* http://www.amnestyusa.org/document.php?lang=e&id=ENGAMR510552007, (last visited on September 15, 2007).

630 *See* U.S. DoD website on Military Commissions: http://www.defenselink.mil/news/commissions.html, last visited on October 4, 2008. They are: Ibrahim Ahmed Mahmoud al Qosi, Salim Ahmed Hamdan, David, M. Hicks, Omar Ahmed Khadr, Mohammed Jawad, Ali Hamza Ahmad Suliman al Bahlul, Ahmed Mohammed Ahmed Haza al Darbi, Mohammed Kamin, Ahmed Khalfan Ghailani, Noor Uthman Mohammed , Jabran Said Bin al Qahtani, Ghassan Abdullah al Sharbi, Sufyian Barhoumi, Mohammed Hashim, Binyam Ahmed Mohamed, Abdal-Rahim Hussein Muhammed Abdu Al-Nashiri, Abdul Ghani, Obaidullah, plus the five September 11 co-conspirators mentioned *infra* note 631.

631 The September 11 co-conspirators, notified of charges since April 30, 2008, are: Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarek Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, Mustafa Ahmed Adam al Hawsawi. *Available at* http://www.defenselink.mil/news/commissionsCo-conspirators.html (website last visited on October 4, 2008).

632 United States of America v. Omar Ahmed Khadr, Order on Jurisdiction, June 4, 2007.

that Congress in drafting the Act had not "anticipated that the military commission would make the lawful/unlawful enemy combatant determination,"[633] but had given it jurisdiction only when the "CSRT finds that a person is an unlawful enemy combatant." Only then, "the provisions of the MCA come into play."[634] "[I]n the MCA, Congress denominates for the purpose of establishing jurisdiction two categories of enemy combatants – lawful and unlawful. A military commission only has jurisdiction to try an unlawful enemy combatant."[635]

Thus the military judge challenged the assumption that the military commission could be considered a competent tribunal that could establish whether the person brought before the commission is an unlawful enemy combatant. He stated that he is "ruling that the military commission is not the proper authority, under the provisions of the MCA, to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr."[636]

Reportedly, the Pentagon disagreed with the decision, and vowed to appeal this decision. A military official was quoted to have said that "This is just a semantic decision, is the way we are viewing it."[637] Actually right after, on June 8, 2007 the prosecution submitted a Motion for Reconsideration noting that "the dismissal of all charges and specifications was in error and that personal jurisdiction has been sufficiently established over Omar Ahmed Khadr."[638] It further added that "in the absence of a prior dispositive administrative determination of military commission jurisdiction, the Military Commissions Act ("MCA") requires that the Prosecution be given the opportunity to establish jurisdiction through the introduction of evidence before the Military Commission."[639] The prosecution argued in this motion that "Congress deemed those historical CSRT determinations sufficient to establish Military Commission jurisdiction."[640] Further on, the Prosecutor, Jeffrey D. Groharing, Major in the U.S. Marine Corps, referred to the Military Commissions Manual as an authoritative

633 *Id.* at para. 8 (a).

634 *Id.* at para. 7.

635 *Id.* at para. 4.

636 *Id.* at para. 11.

637 William Glaberson, *Judge Throws Out Charges in Guantánamo Prisoner Case*, N.Y. Times, June 4, 2007.

638 *U.S. v. Khadr*, Prosecution Motion for Appropriate Relief, Motion for Reconsideration, June 8, 2007. *Available at* http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20(June%208).pdf (last visited on September 15, 2007).

639 *Ibid.* (Motion for Reconsideration)

640 *Id.* at para. (q). The motion reasoned: "If the Military Judge's interpretation of the statute were correct, Congress's inclusion of CSRT determinations "before [or] on . . . the date of the enactment of the Military Commissions Act of 2006" would be a nullity. As the Supreme Court has recognized, to "read" a term "out of the statute . . . would violate basic principles of statutory interpretation" New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661 (1995).... There is no evidence that Congress expected the Department of Defense to conduct new CSRTs, or hold new hearings before other tribunals, for each and every member of al Qaeda charged with a war

interpretation of the MCA noting that the "Manual analyzed the Combatant Status Review Tribunal standard at the time of the MCA's enactment and provided that, due to the prior determination of the United States "that members of al Qaeda and the Taliban *are* unlawful combatants," CSRT decisions before the MCA's enactment would suffice to establish jurisdiction."[641]

Denying the Motion for Reconsideration, Military Judge Brownback argued: "The M.C.A. makes clear that only certain persons may be tried by a Military Commission, and those persons must be alien *unlawful* enemy combatants. This makes sense in light of certain requirements of international law – lawful enemy combatants must be tried by other types of tribunals. The term 'unlawful' is not excess baggage and it is not mere semantics; it is a critical predicate to jurisdiction."[642]

The military commission adjudicating Hamdan came to a similar conclusion.[643] The White House disagreed with the content of these decisions, whereas the Office of Military Commissions described the rulings as indications of the commissions' independence.[644]

Following the denial of the Motion for Reconsideration, the prosecution filed an appeal with the United States Court of Military Commission Review (CMCR)[645] requiring remanding of the case for hearing to the trial court.[646] On September 24, 2007, the U.S. CMCR agreed, stating that Judge Brownback "abused his discretion in deciding this critical jurisdictional matter without first fully considering" the government's evidence,[647] and sent the case back to Judge Brownback for further consideration.[648] The appeals court agreed that the law written by Congress did say that

crime. Thus, the CSRT determination that an individual is an "enemy combatant," should constitute a determination that the individual is an unlawful enemy combatant…" *Ibid*.

641 *Id.* at para. (r).

642 U.S. v. Khadr, Disposition of Prosecution, Motion for Reconsideration, P 001, June 29, 2007, p.3. *Available at* http://www.defenselink.mil/news/jun2007/KhadJudge%20Denies%20Recon(June%2029).pdf.

643 *See infra* at 663 *et seq.*

644 Michael Sung, *US military judge drops charges against second Guantánamo detainee,* Jurist, June 5, 2007, *available at* http://jurist.law.pitt.edu/paperchase/2007/06/us-military-judge-drops-charges-against_ 05.php.

645 The Khadr defense lawyers challenged the composition of the USCMCR arguing that the three appellate military judges were illegally appointed. According to them, Defense Secretary Robert Gates instead of appointing judges personally as required by the MCA 2006, had delegated these appointments to a deputy. *See* U.S. v. Khadr, in the USCMCR, Appellee's Motion to Abate Proceedings, Case No. 07-001, July 19, 2007. *Available at* http://www.defenselink.mil/news/courtofmilitarycommissionreview.html.

646 U.S. v. Khadr, in the Court of Military Commission Review, Case No. 00000001, July 4, 2007, *available at* http://www.defenselink.mil/news/jul2007/KhadrPros%20USCMCRAppeal%20(July%204).pdf.

647 William Glaberson, *Court Advances Military Trials for Detainees*, N.Y. Times, Sept. 25, 2007, at http://www.nytimes.com/2007/09/25/washington/25gitmo.html.

648 *Id.*

finding by a military panel that a detainee was an "unlawful" enemy combatant was a prerequisite for prosecution. But the judges said Congress intended the Guantánamo courts to apply usual procedures of military courts, including "the common procedures used before general courts-martial permitting military judges to hear evidence and decide factual and legal matters concerning the court's own jurisdiction over the accused appearing before it."[649] Thus, the court went on, the trial judge could hear the government's evidence that a detainee was an unlawful combatant, including, for example, a fighter who does not wear a uniform and conceals his weapons.[650] While the prosecutors after the *Khadr* appeals court decision started considering filing charges against other detainees, possibly as many as 80, the defense was considering whether to appeal the decision to the United States Court of Appeals for the District of Columbia Circuit.[651] On October 9, 2007, Khadr petitioned this Court for review of the CMCR's decision.[652]

The *Khadr* case continued nevertheless before the military commission, on November 28, 2007, when Military Judge Brownback issued the Schedule for Trial, which established May 5, 2008 as the date for assembly and *voir dire* of members in Guantanamo Bay.[653] However, numerous motions of law as well as evidentiary motions were filed, and respective rulings made. Several sessions of the Military Commission were conducted in March, April and May 2008. Judge Brownback confronted the prosecution on numerous issues, such as rejecting its narrow view of its discovery obligations and granted defense requests in connection with discovery matters. He also rejected repeated requests by the prosecutor, Major Jeff Groharing of the U.S.

649 *Id.*

650 *Id.*

651 William Glaberson, *Court Advances Military Trials for Detainees*, N.Y. Times, Sept. 25, 2007, at http://www.nytimes.com/2007/09/25/washington/25gitmo.html.

652 The United States Court of Appeals for the District of Columbia Circuit heard the case on April 15, 2008, and issued its decision on June 20, 2008. *Kadhr v. United States*, No. 07-1405 (D.C. Cir. 6/20/2008) (D.C. Cir., 2008). The opinion was delivered by Chief Judge Sentelle, who dismissed Khadr's petition for lack of jurisdiction. That petition had asked the D.C. Circuit Court of Appeals to address certain procedural issues before the military commission at Guantánamo. Relying on the MCA, the D.C. Circuit Court notes that its jurisdiction would only come into play after a final judgment by the military commission has been reached, and after all other MCA appeal options have been exhausted. Upon analyzing the issues the Court concluded: "There is no comparable significant public interest implicated here. Instead, Khadr has pointed solely to the interest that the public has in ensuring that all criminal proceedings are just. That interest does not warrant our interruption of this criminal proceeding just because it is a military commission. This Court will have opportunity to review this procedural decision post-judgment if necessary and can then determine whether the commission properly determined its jurisdiction and acted in conformity with the law. The collateral order doctrine does not authorize us to make those determinations now." *Id.*

653 *Final Trial Schedule (MCTJ),* November 28, 2007, *available at* http://www.defenselink.mil/news/ commissionsKhadr.html (last visited September 27, 2008).

Marine Corps, to set a trial date before the completion of discovery.[654] In its *Motion to Dismiss UI [Unlawful Influence] of Military Judge*, the defense notes that during the May 8, 2008 session of the Commission, Judge Brownback "threatened to abate the proceedings if the prosecution did not provide certain discovery matters relating to Mr. Khadr's detention at JTF-GTMO by 22 May 2008." It further claimed that during this same session, Judge Brownback had stated that he had been "badgered and beaten and bruised by MAJ Groharing since the 7th of November to set a trial date" for this case.[655] Judge Brownback granted a defense request to continue submission of "evidentiary motions," which were to be heard on the next session of the Military Commission, which was at that time scheduled for 18 June 2008. The prosecution considered these motions "untimely" and urged Judge Brownback to reject them.[656]

However, on May 29, 2008, the Chief Trial Judge, Col. Ralph Kohlmann, USMC, relieved Judge Brownback from his duty in this Military Commission, and detailed Col. Patrick Parrish, JAGC, USA, as military judge. A Pentagon Spokesman described the replacement as a result of a "mutual decision between the Judge and the Army."[657] Khadr's military defense lawyer, Lt. Cmdr. William C. Kuebler, found the replacement of the judge to be "very odd," and was reported to have said that "[t]he judge who was frustrating the government's forward progress in the Khadr case, is suddenly gone."[658] Judge Brownback's replacement was considered a "political meddling" in the process by a Human Rights Watch observer.[659] Since then, at least another 13 motions were submitted by the defense, including, *inter alia,* a motion to suppress out-of-court statements by the accused due to coercive interrogation (D063), a motion for appropriate relief on the basis that certain evidentiary rules are as-applied ex post facto violations (D066), motion to dismiss for lack of judicial independence (D067), motion to dismiss for violation of the Sixth Amendment right to a speedy trial (D068), and the last one to the date of this writing, motion to dismiss unlawful influence – removal of military judge (D073),[660] *i.e.* Judge Brownback's replacement. In this last motion the defense concludes: "The available evidence creates a clear and unequivocal appearance of unlawful influence exercised over the proceedings of this Commission. The specter of military justice's 'mortal enemy' has appeared and dismissal is the

654 *Motion to Dismiss UI of Military Judge* (Defense Motion To Dismiss (Unlawful Influence – Removal of Military Judge), 31 July 2008, *available at* http://www.defenselink.mil/news/commissionsKhadr.html.

655 *Id.,* also referring to: *Judge threatens to suspend war court trial*, Miami Herald, 8 May 2008; *Khadr probe details could have scuttled case: lawyer; Judge threatens to suspend trial*, Calgary Herald, May 9, 2008.

656 *Id.*

657 William Glaberson, *Army Judge Is Replaced For Trial Of Detainee*, N.Y. Times, May 31, 2008, *available at* http://www.nytimes.com/2008/05/31/washington/31gitmo.html?ref=nationalspecial3.

658 *Id.*

659 *Id.*

660 All posted on the DoD website in the month on August 2008, and *available at* http://www.defenselink. mil/news/commissionsKhadr.html.

appropriate remedy to ensure basic fairness and restore public confidence in these proceedings and the military commission process as a whole."[661] Khadr's trial is now scheduled to start on October 8, 2008.[662]

On June 4, 2007, the case of *United States of America v. Salim Ahmed Hamdan*[663] before the military commission led by military judge U.S. Navy Capt. Keith J. Allred had also been dismissed for lack of jurisdiction on the part of the commission.[664] On May 10, 2007, Hamdan was charged under the Military Commissions Act and referred to the military commission to be tried as "alien unlawful enemy combatant." In this case, too, the defendant was designated solely "enemy combatant" by the Combatant Status Review Tribunals, which operates under the definition of "enemy combatant" and is not charged with determining whether the detainee is an "alien unlawful enemy combatant." On the other hand, military commissions established under the MCA only have jurisdiction over "alien unlawful enemy combatants." The defendant challenged the jurisdiction of the commission that he was not determined by a competent tribunal to be an "unlawful enemy combatant," and that he was entitled to POW rights until his status has been determined.[665]

Despite government claims, the commission reasoned that the CSRT designation of the detainee as "enemy combatant" could not amount to the necessary designation for commission's jurisdiction. The CSRT procedure of 2004 was set up to assess the validity of continued detention. The Military Commissions Act of 2006 specifically establishes for the military commission to have limited jurisdiction, *i.e.* only over "unlawful enemy combatants." So the commission clarified that the status of the defendant is yet to be defined, because, as of June 4th, 2007, he is "either entitled to the protections afforded to a Prisoner of War, or is an alien unlawful enemy combatant subject to the jurisdiction of a Military Commission, or he may have some other status."[666] Then it added that the government had failed to determine the status of the defendant as an unlawful enemy combatant within the meaning established by the Congress, and accordingly subject to the jurisdiction of the military commission.

On December 20, 2007, Military Judge Allred decided upon the final trial schedule for *voir dire*, assembling the commission and trial to be from May 28 to June 8,

661 *Motion to Dismiss UI of Military Judge* (Defense Motion To Dismiss (Unlawful Influence – Removal of Military Judge), 31 July 2008, *available at* http://www.defenselink.mil/news/commissionsKhadr.html.

662 *Khadr legal team loses another bid to have charges dismissed*, The Canadian Press, September 5, 2008. *Available at* http://www.cbc.ca/world/story/2008/09/05/khadr.html. See also David G. Savage, *Hamdan case sets stage for bigger trials at Guantanamo*, Los Angeles Times, Aug. 8, 2008, *available at* http://www.latimes.com/ news/nationworld/nation/la-na-ksm8-2008aug08,0,350881.story.

663 United States of America v. Salim Ahmed Hamdan, Decision and Order—Motion to Dismiss for Lack of Jurisdiction, June 4, 2007.

664 *Id.*

665 *Id.*

666 *Id.*

2008.[667] Once the *Boumediene* decision was issued, the defense moved for a nine-week additional continuance of the schedule trial date from July 21 to September 22, 2008, under the rationale that the recent decision raised questions of potential broader constitutional rights for detainees. The prosecution opposed the motion noting that the defense had already been granted a continuance of five weeks. On June 26, 2008, the Commission denied this motion, confirmed the trial date of July 21, 2008 and established a deadline of July 2, 2008 for the defense to submit any new motions in light of *Boumediene*.[668]

Subsequently, a number of defense motions were submitted, *inter alia*, the April 4, 2008 motion to suppress out-of-court statements of the accused based on coercive interrogation practices. Decided on July 20, 2008, this motion was partly granted for some of the statements of the accused in Panshir and Bagram, because of "the highly coercive environment and conditions" under which they were made,[669] but the motion was denied as to statements made in Guantánamo. The Commission noted that while Hamdan was exposed to a variety of coercive influences, some of them "were rationally related to good order and discipline, … [others were a] result of his own misconduct or disciplinary measures, … [or] to encourage his cooperation with camp rules and procedures."[670] The Commission further noted that the coercive practices and techniques that were "in the air" had no impact in the particular case. Only "command influence in the air" was not enough; consequently, convinced by a preponderance of evidence, the Commission decided that no coercive techniques had influenced Hamdan's statements in Kandahar or Guantánamo.[671]

The defense had no success either in its July 2, 2008 motion to dismiss for denial of a speedy trial. Denying this motion, the Commission ruled that the accused had not been denied a speedy trial under the Constitution, even if assumed that Hamdan had such right under the Constitution.[672] As to whether the accused has actually been denied a speedy trial, the Commission discussed the length and motives for the delay of Hamdan's trial. As to the length of delay, the Commission highlighted the fact that the accused was not detained by law enforcement but by the armed forces, and that he had been captured in battlefield in Afghanistan, so his detention until July 3, 2003 was merely considered an incident of war. On that date, the President of the U.S. announced that Hamdan and others would be tried by military commissions. This act

667 Final Trial Schedule (MCTJ), December 20, 2007, *at* http://www.defenselink.mil/news/commissions Hamdan.html.

668 Ruling on Motion for Additional Continuance (D-042), June 26, 2008, *available at* http://www. defenselink. mil/news/D-042%20Final%20Ruling.pdf.

669 Ruling on Motion to Suppress Out-of-Court Statements of the Accused Based on Coercive Interrogation Practices (D-029), and on Motion to Suppress Statements Based on Fifth Amendment (D-044), July 20, 2008, Summary and Decision, para.3, *available at* http://www.defenselink.mil/news/commissionsHamdan.html.

670 *Id*. at para. 4.

671 *Ibid*.

672 Ruling on Motion to Dismiss for Denial of Speedy Trial (D-046), Conclusion and Ruling, July 20, 2008.

triggered a lengthy judicial and legislative journey. Thus, being a detainee of a lengthy and on-going conflict in Afghanistan, as well as the leading figure in successful federal litigation against the U.S.'s ability to detain him, topped with the complexity of the case, the worldwide search for evidence, the problématique of classified information, security and clearance issues, and a large array of administrative components in preparation for trial – these factors are, according to the Commission, all elements that weighed in favor of the Government.[673]

Additionally, the Commission observed that there has been only one request for speedy trial on the part of the defense, and that has been granted. Moreover, the defense had affirmatively waived the right to speedy trial on the record, just as it had moved for continuances several times, generously granted by the Commission.[674] It further observed that there can be no prejudice for detention when the reason is trial. It further added that it is favorable to the Government that it had brought to Guantánamo at least eight high-ranking Al Qaeda leaders who could provide exculpatory evidence on behalf of Hamdan.[675] Ultimately, the motion to dismiss for violation of speedy trial was rejected.

The Commission also ruled on the defense motion to dismiss charges without prejudice for failure to obtain indictment from a grand jury and failure to provide for trial by jury.[676] In this motion the defense noted that the Supreme Court in *Boumediene* "laid out the analytical framework for determining the extraterritorial applicability of other constitutional rights as well," so they claimed that the Fifth and Sixth Amendments rights were applicable to Hamdan, detained in Guantánamo Bay.[677] This claim was not shared by Military Judge Allred, who on behalf of the Commission denied the motion to obtain an indictment by grand jury and trial by petit jury, as the Fifth and Sixth Amendments do not readily apply in Guantánamo. The Commission analyzed six factors to support its decision: (1) the accused was found to be an alien unlawful enemy combatant by a full, fair, public, and two-day adversarial hearing, represented by counsel, calling his own witnesses, cross-examining prosecution's witnesses, and determined by a military judge who was not only based on the MCA's statutory definition of "unlawful combatant," but had also evaluated his status at a Geneva Convention Article 5 Status hearing, held over the prosecution's objection; (2) the site of his apprehension and detention weighs against a finding that he enjoys constitutional rights; *Boumediene* had reached the same conclusion; (3) substantial practical arguments weigh against providing jury trials to Guantánamo detainees; in this respect, as it quotes Amendment VI, the Commission, *inter alia*, argues that if a jury trial was to be held, it has to be "an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law…," and this is absolutely "impracticable to hope for Afghan jurors"

673 *Id*. Paras. on Length and Reasons for Delay.

674 *Id*. Para. on Demands for Speedy Trial.

675 *Id*. Para. on Prejudice.

676 D-048, submitted on July 2, 2008, *at* http://www.defenselink.mil/news/commissions-Hamdan.html.

677 *Id*. at para. 5 (A).

in the same way as it will be to establish a new scheme for "international jury duty;" (4) the alternative remedy provided by the Congress, instead of grand and petit jury trial, is not significantly less protective, and also acceptable for trial of U.S. military personnel; the Commission compares, in this respect, Common Article 3 of Geneva Conventions that provide less protection for unlawful combatants than Articles 12-125 applicable to POWs; (5) jury trials or grand jury indictments are not a necessity to prevent injustice in the trial of detainees in Guantánamo, because the substitutes created are still "fair" though providing fewer protections than the Law of Armed Conflict provides; (6) ultimately, the application of Fifth and Sixth Amendments' guarantees regarding jury indictment and trial would be anomalous and impractical in Guantánamo Bay. Regarding the "anomalous" factor, the Commission referred to the "carefully crafted international scheme" established to grant more protection to lawful combatants (POWs), than to unlawful combatants. POWs are not granted trial by jury, and if now this would be granted to unlawful combatants, it would constitute "preferential treatment," and it would "discourage compliance with the law of war."[678]

The trial started as scheduled on July 22, 2008. At that time, it was reported that legal experts had noted that it would be "difficult to find objective jurors from a U.S. military that is engaged in a global battle against terrorism."[679] However, the final result seemed to prove the contrary. On August 6, 2008, a military panel found Salim Ahmed Hamdan guilty of providing material support to terrorism, on five of eight specifications of material support to terrorism, numbers 2, 5, 6, 7 and 8. He was acquitted on the charge of conspiracy.[680] The government had hoped that for the crime he was convicted he would face up to life in prison. The Department of Defense had further emphasized the process beyond sentencing, paying particular attention to the several steps of judicial review: "After the trial is complete his case will receive an automatic review by the Convening Authority, who will evaluate the legal sufficiency of the findings and appropriateness of the sentence. Hamdan will still be represented by counsel and have the opportunity to submit matters for consideration on his behalf. Then his case will receive an automatic review by the Court of Military Commission Review. Thereafter, he could appeal to the Court of Appeals for the District of Columbia and the Supreme Court."[681] It further added that while U.S. "is committed to holding dangerous terror suspects accountable for their actions," the medium used, *i.e.* the military commissions, afforded "all the necessary judicial guarantees which are recognized as indispensable by civilized peoples for purposes of Common Article 3 of the Geneva Convention."[682] Moreover, they were a mechanism

678 *See* Ruling on Motion for Indictment and Trial by Jury (D-048), July 20, 2008, at 3-7, *available at* http://www.defenselink.mil/news/commissionsHamdan.html.

679 Jerry Markon, *Witness: Hamdan Had 2 Missiles When Arrested*, Washington Post, July 23, 2008, at A12.

680 *See* Detainee Convicted Of Terrorism Charge At Military Commission Trial, DoD Press Release, August 6, 2008. *Available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12118.

681 *Id.*

682 *Id.*

that served "justice to those accused of law of war violations while keeping the United States, friends and allies safe from those determined on carrying out attacks on civilian populations and coalition forces."[683]

To everyone's surprise, on August 7, 2008, the military commission consisting of six jurors, sentenced Hamdan to five years and a half in prison, with credit for the sixty-one months and eight days in detention. This sentence was only based on the charge for providing material support for a terrorist organization, whereas he was acquitted on the most serious charge of conspiracy.[684] Prosecutor John Murphy had asked for thirty years, and disappointed at the decision was reported to have said that Hamdan is "'a hardened al Qaeda member' who should 'not get one day less than 30 years,' a penalty 'so significant that it forecloses any possibility that he renews his ties with terrorism.'"[685] Numerous comments followed. Some noted that the civilian courts have been much harsher in sentencing for providing material support to terrorists, as they referred to John Walker Lindh, who, after a plea bargain in the U.S. District Court of Alexandria, Virginia, was sentenced to twenty years in prison,[686] as well as to Ali al-Timimi, a Muslim spiritual leader in Falls Church, who had received a life sentence in 2005 for charges on inciting his followers to join the *jihad* against the United States.[687] It was also noted that this decision does not change his status as prisoner, so his fate is still unclear; the administration might hold detainees until "the campaign against terrorism is deemed over."[688] Still other commentators noted that the sentence showed that the process is fair, appropriate and independent.[689] However, human rights organizations had other evaluations. A Human Rights Watch observer stated: "This was a case of a fair-minded panel of military officers operating in a fundamentally unfair system."[690] Whereas, Matt Pollard, legal adviser for Amnesty International, had noted that the proceedings that led to Hamdan's conviction had "fundamentally failed to meet international fair trial standards," and he had further argued: "To impose any penalty based on it therefore could only aggravate the

683 *Id.*

684 *See Hamdan Sentenced by Military Commission,* Amnesty International, August 8, 2008, *available at* http://www.amnesty.org/en/news-and-updates/news/hamdan-sentenced-military-commission-20080808. *See also* William Glaberson, *Bin Laden Driver Sentenced to a Short Term*, The New York Times, Aug. 7, 2008, *available at* http://www.nytimes.com/2008/08/08/washington/08gitmo.html?_r=1&oref=slogin.

685 Jess Bravin, *Bin Laden Driver's Sentence Signals Doubts About Cases*, Wall Street J., Aug. 8, 2008, *available at* http://online.wsj.com/article/SB121811582864120531-email.html.

686 *Id.*

687 Jerry Markon & Josh White, *Bin Laden Driver Gets 5 ½ Years in Prison; U.S. Sought 30*, Washington Post, Aug. 8, 2008, at A01.

688 *Id*.

689 David G. Savage, *Hamdan case sets stage for bigger trials at Guantanamo*, Los Angeles Times, Aug. 8, 2008, *available at* http://www.latimes.com/news/nationworld/nation/la-na-ksm8-2008aug08,0,350881. story.

690 *Id*.

injustice of the trial and the other human rights violations during his many years of unlawful detention."[691]

691 Amnesty International, *supra* note 684.

CHAPTER VI Appraisal of Domestic Measures under International Law

The domestic model chosen for discussion and analysis in this paper is the United States. Consequently, when scrutinizing the domestic measures adopted to counter terrorism under international law, we have to bear in mind that the United States is a party to the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT) as well as the four Geneva Conventions of 1949. The U.S. is not a party to the Inter-American Convention on Human Rights (IACHR), though the Inter-American system of human rights protection remains relevant in light of the fact that the Inter-American Declaration on Human Rights, which enshrines many of the provisions included in the convention, has largely come to be considered at least regional customary international law. In any event, the U.S. is bound by universal customary international law, which, as documented in previous chapters, provides for quite a number of due process guarantees. Additionally, the study up to now has revealed circumstances that deal with a complexity of criminal proceedings stemming from war or war-like events as well as normalcy situations, albeit a heavily charged normalcy as it relates to criminal activity. Consequently, in addition to human rights law referred above, the laws of war, *i.e.,* humanitarian law standards may also come into play.

A. The Applicable Legal Regime: General Framework

After September 11, 2001, the U.S. President declared a Global War on Terror. In this particular context, however, the laws of war as written down in the Hague and Geneva conventions have been argued not to apply to the conflict with Al Qaeda, with which allegedly most of the Guantánamo detainees are affiliated. The Administration reasons as follows:

1. The Geneva Conventions generally do not apply. With the exception of common Article 3, they apply only to international armed conflicts, *i.e.* conflicts between states, and al Qaeda is not a state.
2. The Third Geneva Convention on the treatment of prisoners in time of war does not apply, more specifically, because the requirements of its Article 4 are not fulfilled. Thus, they are not to be considered lawful combatants.
3. The Fourth Geneva Convention is said not to apply because the terrorists are not part of the protected civilian populations but they are to be considered unlawful combatants.

4. Common Article 3 of all four Geneva Conventions does not apply as this is an international conflict and not a "non-international" armed conflict.

According to the logic of the U.S. Administration, there is thus a legal vacuum, which is only filled with a relatively vague promise of "humane treatment," which was further circumscribed by the precept of "military necessity," which allowed "the gloves to come off."[1] In *Hamdan v. Rumsfeld*, the U.S. Supreme Court has, however, considered Common Article 3 to be applicable to the war on terror.[2] Right after that decision, Deputy Secretary of Defense Gordon England sent a memorandum to all military branches mandating that all DOD personnel adhere to Common Article 3 standards.[3] The view that Article 3 applies, as a minimum, to all armed conflicts, is shared by a high-ranking official of the ICRC, who also considers Article 3 part of not only customary law, but also *jus cogens*.[4]

1 Cofer Black, former director of the CIA's Counterterrorism Center, testifying before a joint session of the Senate and the House Intelligence Committees, September 26, 2002. Referred to in Kenneth Roth, *Justifying Torture*, in 184 Torture 184, 192 (Kenneth Roth & Minky Worden eds., 2005).

2 126 S.Ct. 2749, 2795-96 (2006): "The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.' ... That reasoning is erroneous. The term 'conflict not of an international character' is used here in contradistinction to a conflict between nations. … Common Article 3 … affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory. … Common Article 3, then, is applicable here."

3 "The Supreme Court has determined that Common Article 3 of the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda….You will ensure that all DOD personnel adheres to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3." Memo quoted in Howard Ball, Bush, the Detainees, and the Constitution: the Battle over Presidential Power in the War on Terror 84 (2007).

4 Hans Peter Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct,* 28 Int'l Rev. Red Cross, Jan.-Feb. 1988, at 38, 44-45: "[T]he substance of common Article 3, based on customary law, is part of *jus cogens* … binding on all states. Consequently, the obligations stated under Article 3 transcend that article's field of application; they are valid for all forms of armed conflict. The International Court of Justice…confirmed this in its judgment in the case of *Nicaragua versus the United States* … [where] it reached the conclusion that Article 3, as part of customary law, constitutes a 'minimum yardstick' applicable to all armed conflicts." Other scholars have joined the opinion that the core of Article 3 might have attained the status of *jus cogens,* while they disagree with the methodology used by the International Court of Justice in arriving at the conclusion that Article 3 constitutes customary law. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348, 357-358 (1987).

Under Common Article 3, the following acts, committed against the persons mentioned above, *are and must remain prohibited at all times and in all places:*

a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
b) *taking of hostages;*
c) *outrages upon personal dignity, in particular, humiliating and degrading treatment;*
d) *the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

Another way of approaching the issue would be the path taken by the ICJ in the *Nuclear Weapons*[5] and *Palestinian Wall*[6] *Opinions*. It stated that the law of war does no longer constitute a separate and exclusive legal regime juxtaposed to the law of peace, including the law of human rights. It sees the law of war as *lex specialis* to the law of human rights, which is the *lex generalis*. This means that if the provisions of the law of war do not cover a particular set of facts, the general law, *i.e.* human rights law applies. In some cases, both areas of the law apply. In our case, according to the Administration, the laws of war were not considered applicable in the war against terror – a stance disavowed, however, by the Supreme Court.

If Common Article 3 applies, the protections most at issue in the War on Terror possibly relate to "cruel treatment and torture," "outrages upon personal dignity, in particular, humiliating and degrading treatment," "murder of all kinds," and sentencing or execution without prior adjudication by a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." These provisions contain concepts the meaning of which has been fleshed

5 *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 240 (Adv. Op. of 8 July), para. 25: "[T]he protection of the International Covenant of 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. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."

6 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 178 (Adv. Op. of 9 July), para. 106: "More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: 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 these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

out mostly by the implementation and interpretation of human rights law, as we see parallel prohibitions of "torture," "cruel, inhuman or degrading treatment" in human rights treaties, *e.g.*, in Article 7 ICCPR, the right to life, as in Article 6 ICCPR, and the requirement of a "competent, independent and impartial tribunal established by law," as provided for, with essential fair trial guarantees, *e.g.*, in Article 14 ICCPR. It is no coincidence that the authoritative ICRC statement on Customary International Humanitarian Law, published in 2005,[7] not only agrees that human rights law applies at all times, including during armed conflict, but that it includes references to human rights instruments, documents and case law to "support, strengthen and clarify analogous principles of humanitarian law."[8] Conversely, human rights committees, commissions and courts have addressed situations of armed conflict using the paradigms of their human rights treaties, often in the context of treating wars and war-like situations as emergencies, triggering a special, reduced, core regime of human rights guarantees, as exemplified by Article 4 ICCPR.[9]

Customary international humanitarian law would include the mandate to treat civilians and persons *hors de combat* humanely[10] and the prohibition of the murder of civilians,[11] torture, cruel or inhuman treatment and outrages upon personal dignity, in particular, humiliating and degrading treatment,[12] enforced disappearances[13] as well as arbitrary deprivations of liberty.[14] In addition, "[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees."[15]

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7 Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). It must be noted, however, that in November 2006, the U.S. responded to this study of the ICRC, *inter alia*, by expressing its concern that the study frequently fails to apply the state practice test in a rigorous way, particularly by not placing enough emphasis on "actual operational practice by States during armed conflict,…[and] to the practice of specially affected states…," just as it merges "the practice and *opinio juris* requirements into a single test." The U.S. letter to the president of the ICRC makes specific mention of Additional Protocols I and II to the Geneva Conventions as containing "far-reaching provisions … that reflected ground-breaking and gap-filling" rules rather than prescriptions of customary international law. *See* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 101 Am. J. Int'l. L. 636, 639-641 (2007). Scholars, however, have found this study to be "relevant" and "essential" particularly as it aimed at identifying "the customary rules of international humanitarian law that govern when one or more of the parties to a conflict have not acceded to one or both Additional Protocols to the Geneva Conventions." *See, e.g.*, Theodor Meron, *Revival of Customary Humanitarian Law*, 99 Am. J. Int'l. L. 817, 833 (2005).

8 1 Customary International Humanitarian Law, *supra* note 7, at 299.

9 *Id.* at 300-305.

10 *Id.* at 306, Rule 87.

11 *Id.* at 311, Rule 89.

12 *Id.* at 315, Rule 90.

13 *Id.* at 340, Rule 98.

14 *Id.* at 344, Rule 99.

15 *Id.* at 352, Rule 100.

Based on both "international humanitarian law and human rights law," the following rules, according to the ICRC, constitute such essential fair trial guarantees:[16]

- the right to be tried by a regularly constituted[17] court offering the essential guarantees of independence and impartiality;
- the right to be presumed innocent until proven guilty;
- the right of the accused to be informed without delay of the nature and cause of the accusation against him;
- the right before as well as during the trial to all necessary rights and means of defense, including sufficient time and facilities to prepare the defense;
- the right to defend oneself or to be assisted by a lawyer; the right to free legal assistance if the interests of justice so require; the right to communicate freely with the lawyer;
- the right to trial without undue delay;
- the right to examine witnesses;
- the right to assistance of an interpreter;
- the right not to be convicted of an offence except on the basis of individual penal responsibility;
- the right to be tried in one's presence;
- the right not to be compelled to testify against oneself, or to confess guilt;
- the right to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- the right to have the judgment pronounced publicly;
- the right to an appeal;
- the right not to be punished twice for the same act by the same party;
- and the right not to be accused or convicted for an act not designated a crime at the time it was committed, as well as not receiving a heavier penalty than prescribed at the time the act was committed.[18]

16 That would not necessarily mean that these guarantees in their entirety are *lex lata* in an emergency or war-like situation, as specified later.

17 A court is "regularly constituted" if it "has been established and organized in accordance with the laws and procedures already in force in a country." *Id*. at 355. Such "regularly constituted" tribunals include "ordinary military courts" and "definitely exclud[e] all special tribunals." *Hamdan v. Rumsfeld, supra* note 2, at 2796-97, referring to commentaries on the Geneva Convention.

18 1 Customary International Humanitarian Law, *supra* note 7, at 354-374, Rules 100-103, with reference, *inter alia*, to Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; Article 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; Articles 105-108 of the Geneva Convention Relative to the Treatment of Prisoners of War; Articles 71-73 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949; common Article 3 of the four Geneva Conventions; Article 75(4) of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

These rights under Common Article 3 as well as customary international humanitarian law very much parallel the pertinent general law of human rights. In the case of the U.S., as far as human rights treaty law is concerned, it is particularly the ICCPR and the CAT that provide such parallel guarantees for any person detained by the U.S. This parallelity and the fact that international human rights law is far more detailed in its formulation and interpretation of the relevant concepts justifies the primary recourse to human rights law in the case at hand.

The September 11 international terrorist attack can be readily conceived as an extraordinary situation, bearing an exceptional threat to the life of the nation. In substance, one can classify such a situation as an emergency.[19] Consequently, as a minimum, the special human rights law created to deal with emergencies would apply. This goes to the guarantees of fair trial as well. Such guarantees, as outlined and discussed in this study, show that there is an inter-regional and universal consensus on minimum standards of due process in times of emergency. The section below compares essential elements of these emergency-proof minimum standards of due process to the pertinent measures taken by the U.S. in fighting global terrorism.

However, some argue that a number of due process guarantees offered during normalcy have been considered to be derogable during times of emergency. Such rights are the right to a public trial, the right to a trial without undue delay, the right to examine prosecution witnesses. The right to have a lawyer of one's choice has sometimes been deemed to be derogable as well, particularly in cases that have to do with terrorism in order to avoid any communication between the detained and the terrorist organization.[20]

Under this prism, the section at hand will evaluate how much attention is given by the U.S. to due process guarantees enshrined in international human rights law

International Armed Conflicts; and Article 6 of Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

19 By Presidential Proclamation No. 7463 of September 14, 2001, the United States declared a "national emergency by reason of certain terrorist acts," *supra* at 327, n. 184, but it did not invoke Article 4 ICCPR. One might recall that the same situation was handled in a more formal way by the U.K. In 1998, the U.K. issued a derogation order informing the Secretary General of the Council of Europe that because of an international terrorist threat to the national security of the U.K. due to presence of foreign nationals suspected of terrorist acts, "a public emergency, within the meaning of Article 15 (1) of the Convention, exists in the United Kingdom." Human Rights Act 1998 (Amendment No. 2) Order 2001/4032. Such a public emergency was only lifted on February 21, 2001, to be reinstated again after September 11, 2001. However, there were arguments that such an emergency, and actions taken on that basis, were not justifiable because the 9/11 attacks were not directed against U.K. nationals. *See* Christoph Grabenwarter, *Right to a Fair Trial and Terrorism*, in Les Nouvelles Menaces Contre la Paix et la Sécurité Internationales 211, 219, 225-226 (A. Pedone ed., 2004).

20 For an argument on why the derogation of such rights could be justified in emergency situations, see Jaime Oraá, Human Rights in States of Emergency in International Law 116-117 (1992).

as it deals with international terrorism, particularly regarding cases where suspected terrorists are prosecuted by military commissions, and regarding cases where they are considered war captives, and indefinitely detained. It will further assess the applicability and legal implications of a state of emergency to this situation.

B. Application of International Law to the U.S. Global War on Terror

1. General Considerations

As seen throughout this study, a certain perplexity has unfolded, both in the U.S. and around the world, as to how international terrorism should be treated: as a crime, albeit a heinous one and one of unprecedented scale and scope, or as a war, not only on the U.S., but on Western values and liberal democracy. The fact that all this time, since September 11, 2001, this controversy has continued, makes it quite difficult to determine what standards are to be applied. Caught up in this legal confusion, and the simultaneous existence of emergency, war and normalcy, sorting out what was done right and what went wrong is not an easy task.

Right from the start, it became obvious that, in treating the suspected terrorists, there was going to be a usage of all the four options that Secretary Rumsfeld had laid out early on: trial before especially established military commissions; trial in U.S. regular criminal courts following the *Moussaoui* precedent, respecting the due process guarantees of the Constitution; repatriation of suspected terrorists for prosecution in their home countries; or continued detention while additional intelligence was gathered.

Amongst these options, the trials in U.S. criminal courts did not raise any concerns as to potential and actual violations of international and domestic due process guarantees. Moussaoui, Walker and Padilla were all tried and convicted in regularly constituted U.S. courts using regular procedures, albeit through carefully balancing certain aspects of the process due such accused.[21] The process of repatriation of suspected terrorists for prosecution in their home countries also ran smoothly, unless suspected torture in any such countries came to the fore. What shook the legal system internally and brought home criticism also from across the borders were the issues of lawfulness and necessity of military commissions, as well as the indefinite detention and treatment of the captives of the war on terror. Early on, outbursts flared against leaving the prisoners "indefinitely beyond the reach of any legal regime"

21 *See, for instance,* United States v. Moussaoui, 382 F. 3D 453 (4th Cir. 2004), where the court had to weigh government's national security interests against the Sixth Amendment right of the defendant to obtain witnesses' testimony, concluding that the latter prevailed. *Id*. at 474. Nevertheless, the court proposed a measured approach which directed the District Court to provide written substitutions for witnesses' potential testimony, as an adequate remedy. *Id*. at 476-477. Circuit Judge Roger L. Gregory dissented, noting that such substitutions were not responses to Moussaoui's questions in live testimony, nor would the jury be able to judge on the credibility of such written testimonies, without even seeing the witnesses. *Id*. at 486.

and gloomy predicaments surfaced: such acts "would put America, pre-eminently a nation of laws, itself outside the law."[22] Was this, however, a sound prediction?

Observing due process while preempting destruction caused by terrorists, who in turn aim to cause indiscriminate maximum human suffering in a most spectacular way, is no doubt quite a mission for any democratic government. Balancing these ultimately conflicting goals is a multifaceted and hard job, but vital to a democratic society, even in a situation of war.

2. The Global War on Terror: A State of Emergency?

On the part of the U.S. Administration, there was never the slightest doubt as to what was actually going on. Plain and simple, the answer rang sharp: *war*.

> I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.[23]

The courts did not appear to think differently either, for as long as combat was going on in Afghanistan. And in war it is the law of war that governs. Habeas corpus, for example, was not available, at least to foreign combatants off U.S. sovereign territory. This was the state of affairs until *Rasul* and *Boumediene* when the Supreme Court decided to evaluate the statutory legality and, ultimately, the constitutionality of such exclusion. A suspension of habeas corpus had happened before under Lincoln's presidency. Military commissions were established to try the unlawful enemy combatant captives. That was *prima facie* acceptable. After all, in war it is the military that takes over to render justice for war crimes. Indefinite detention of captives was ordained. At first sight, just as it should be: for as long as war goes on, the danger and harm to the troops in the field has to be restrained. Extraordinary renditions and targeted killings were reported to have taken place. Arguably, some elements of such practices would be common in a war that is being fought and has to be won.

Others, however, objected to this logic, arguing that the U.S. was waging a war ungoverned by the laws of war. The same U.S. that had already contributed to the stock of law disciplining war, responding to a need which was considered essential long ago

22 Michael Elliott, *Welcome to Camp X-Ray*, TIME – In Partnership with CNN, Jan. 20, 2002, *available at* http://www.time.com/time/magazine/article/0,9171,195299,00.html.

23 President George W. Bush, State of the Union, January 20, 2004, *available at* http://www.whitehouse. gov/news/releases/2004/01/20040120-7.html.

by Immanuel Kant.[24] On Kant's track, in the United States, Francis Lieber undertook a mission to codify a regime of rules in warfare which resulted in President Lincoln's General Orders No. 100.[25] In time, this Lieber Code would come to constitute the roots of what was later called humanitarian law with its norms well established in military doctrine, both internationally and in the U.S. The humane treatment of prisoners is one of these norms.[26] The act of refusing to accept the applicability of the Geneva Conventions, which the U.S. is a party to, and to the protocols that the U.S. is not a party to, but which are largely considered to have become customary international law, placed the U.S. on uncertain legal ground, a ground which before long started shaking. Besides scholarly opinion and political opposition worldwide, U.S. courts began to have second thoughts on the legality of government actions in this war. While, all along, the courts in the U.S. did not question the existence of a war, they did question and interfered to rectify the lack of application of well established rules that govern this situation of crisis.[27] Violations of due process guarantees were found and remedies were offered.

24 "The law of armed conflict is the single aspect of the law of nations that gives us the most trouble to conceptualize and to suggest a law for this lawless situation (*inter armes silent leges*) without contradicting ourselves; however, it would have to be this: war must be waged in accordance with such principles as will make it possible to emerge from this natural condition of states (in their external relations with one another) and progress into a lawfully ordered one." Immanuel Kant, Grundlegung zur Metaphysik der Sitten 57 (1785), translated by and found in Scott Horton, *Military Necessity, Torture, and the Criminality of Lawyers*, in International Prosecution of Human Rights Crimes 169, 170 (Wolfgang Kaleck et al. eds., 2007).

25 *Laws of War: General Orders No. 100 – Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863. *Available at* http://www.yale.edu/lawweb/avalon/lieber.htm.

26 *See* General Orders No. 100, Art. 56: "A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity." *See also* Art. 75: "Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety." Whereas Art. 80 states: "Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information." *Supra* note 25.

27 *See Rasul v. Bush,* 542 U.S. 466 (2004), dealing with habeas corpus; *see particularly Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), para 515, referring to detention as a "fundamental and accepted … incident to war;" *see also* Khalid v. Bush, 355 F.Supp.2d 311, (D.D.C.2005), para. 320, stating that the "AUMF does nor place geographic parameters on the President's authority to wage this war against terrorism; *see also* In Re Guantánamo Detainee Cases, 355 F.Supp.2d 443 (D.D.C. 2005), adopting Judge Robertson's conclusion in the *Hamdan case,* reasoning that the "Geneva Conventions are self-executing."

As stated above, this study puts forward that in the limbo between war and normalcy, the standards developed by international courts and monitoring organs of human rights law governing times of emergency would be the perfect touchstones for appraising the international legality of the U.S. response to terrorism. The invocation of the derogations allowed in emergency could affect all the rights, except the ones considered non-derogable. It has been argued, however, that such an emergency is only legitimate for a certain period of time, and that the U.S. did not adhere to the strict procedure required to be followed by the state so that the necessary international accountability would be achieved. Although the U.S. declared a "national emergency" on September 14, there has been no official notification of the international community of the proclamation of the state of emergency, no detailed enumeration of the rights to be suspended or derogated from, no grounds for any such suspensions or derogations, and definitely no time frame predicted for such derogations to last. Ultimately, while this procedure that would normally imply a certain degree of international supervision was never followed, the arguments seem to converge on one point: the situation we found ourselves in is far from a clear-cut one, and whatever one decides to call it, any brief labeling of it would be overly simplistic.

Still, a thorough analysis of the September 11 terrorist attacks on New York, the Pentagon, and in Pennsylvania, the numerous other failed attempts,[28] as well as the unprecedented international institutional responses and the world-wide consensus, in light of ICCPR's Article 4, paragraph 1,[29] as well as Article 15 of the ECHR, and Article 27 of the IACHR, leads us to conclude that such a situation, *substantively*, could be considered to constitute a "public emergency which threatens the life of the nation."[30] Such an emergency would establish the declaring state's authority under the

28 Satisfying, thus, the first basic condition: a situation threatening the life of the nation. *See* HRC, General Comment No. 29 on Art. 4 ICCPR (2001), U.N. Doc. GAOR, A/56/40 (vol. I), at 202, para. 2.

29 Article 4(1) ICCPR reads:

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

30 The European Court of Human Rights, in particular, has contributed greatly to establishing standards regarding states of emergency as related to terrorism in Ireland and the United Kingdom, and it has amply clarified the meaning of the phrase "threatening the life of the nation." In the *Lawless* case, the Minister of Justice resorted to extrajudicial detention of persons suspected of engaging in activities prejudicial to the State. The Court found public emergency in Ireland as threatening the life of the nation for several factors: – the existence in its territory "of a secret army engaged in unconstitutional activities and using violence to attain its purpose;" – "the fact that this army was also operating outside the territory of the State, thus seriously jeopardizing the relations of the Republic of Ireland with its neighbor;" – "the steady and alarming increase in terrorist activities from the autumn 1956 and throughout the first half of 1957." What convinced the Court of the existence of an imminent danger to the life of the nation was a homicidal ambush carried

Covenant to "take measures derogating from [its] obligations" under pertinent human rights agreements, albeit only "to the extent strictly required by the exigencies of the situation," respecting this way the principle of proportionality[31] which is common to derogation and limitation powers, with due regard to duration, geographical coverage and material scope of the state of emergency and any accompanying measures of derogation. An emergency cannot be invoked to justify derogations in the event of a remote or hypothetical menace to the life of the nation; such an exceptional danger must be imminent – as the ECtHR would argue. The temporary character of an emergency situation is also a clear element of its definition in all systems of human rights protection.[32]

Under Article 4(3) of the Covenant, a state party wishing to derogate from its provisions "shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated."[33] The U.S. never formally invoked and communicated a state of emergency under the

out in Northern Ireland close to the border with the Republic, which proved continuous "unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland." Under this reasoning, and in the light of terrorist activities looming over the U.S., the administration seems to pass the test on the necessity for emergency. *Supra,* Chapter IV.A.1.

31 The Inter-American Court has advised that "the measures that may be taken in any of these emergencies must be tailored to 'the exigencies of the situation,' [and] what might be permissible in one type of emergency would not be lawful in another." IACtHR, Advisory Opinion OC-8/87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8, at 39, para. 22.

32 However, "temporariness" of the emergency situation has not always been a historical fact. For instance, the State of Israel has submitted such a notification to the Secretary General on 3 October 1991, explaining that "[s]ince its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens...." 1 Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 2003 191 (2003). This state of emergency has been regularly renewed every year – since May, 1948 when it was established for the first time. Other states, like Peru, have submitted over eighty such notifications, making emergencies a kind of regular state of affairs. *See generally* for a good discussion on derogation under Article 4 of the ICCPR as well as on the classification of terrorism as a state of emergency, Angelika Siehr, *Derogation Measures under Article 4 ICCPR with Special Consideration of the "War Against Terrorism,"* 47 German Y.B. Int'l. L. 545-593 (2004).

33 Article 4(3) ICCPR reads:

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

In order to successfully invoke Article 4, the State party must have "officially proclaimed a state of emergency." HRC, General Comment No. 29, *supra* note 28, para. 2.

ICCPR it to the pertinent authorities, probably assuming that the ICCPR, as part of the human rights regime, did not apply in a situation that the U.S. government was calling a "war." Consequently, the U.S. also failed to conform to the requirements of duration, geographical coverage and material scope of the state of emergency, and its resulting derogations.

If the U.S. had invoked such an emergency, the ICCPR's emergency human rights treaty regime would have formally come into play. Without such declaration, the customary emergency human rights regime is still applicable, based on the inter-regional and universal consensus on pertinent human rights and their limits as discussed in the chapters above. Both the treaty and the customary law emergency human rights system, however, carry with them the well-known risk of the abuse of the state's right to emergency on behalf of national security, by expanding the letter and spirit of permissible limitations. Some scholars argue that both emergency and normalcy limitations "form a legal continuum," and are not necessarily to be regarded as two distinct categories of limitations; probably also based on the opinion of the Inter-American Court of Human Rights that concluded that the Convention does not allow for a suspension in the absolute sense, but has to do only with the scale and effectiveness of the exercise of such rights.[34] This study, however, takes the position that such limitations constitute two different legal regimes, one pertinent to peace and normalcy and the other applying in states of emergency. Normalcy and emergency are each governed by a different set of rights and limitations; sometimes they overlap, but they are still distinct and separate from each other. If they were to constitute a continuum, then there would not be much of a problem in transitioning from one to the other and *vice-versa*. This would leave room for abuse on part of the interested state in prolonging the life span of emergencies. As stated above,[35] the effect of such continuum theory could be a net loss for the prospect of an order of human dignity, as it would tend to minimize the fundamental distrust that any government should encounter when it contemplates taking the ultimate step of declaring an emergency, a step that should only be taken when all other measures available to resolve a situation endangering the survival of an order committed to human rights and fundamental freedoms have been exhausted or have no conceivable chance of success.

3. Application of the Substantive Emergency Human Rights Regime

Let us recapitulate what common understanding, if any, exists in the jurisprudence of international organs governing human rights law, as regards the process due in times of emergency. The law on the books does not help us in this respect: due process as

34 Anna-Lena Svensson-McCarthy, *International Law of Human Rights and States of Exception – With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, in 54 Int'l Studies in Human Rights 49, 721 (1998). *See also* IACtHR, Advisory Opinion OC-8-87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8, at 37, para. 18.

35 Chapter IV, *supra*, at note 16.

such is not listed expressly as a non-derogable right in any of the universal or regional conventions.[36] Thus, what could procedurally have ensured more protection for the right to life and for freedom from torture, which remain among the most violated in many emergency situations, is actually missing from the text of the treaty. Still, the treatment of terrorist suspects before and after their arrest as well as their adjudication merits further review in the emergency human rights context.

Under the ICCPR and the IACHR, albeit not under the ECHR, the *right to recognition as a person before the law* is a non-derogable right which guarantees the possibility to bring complaints before the courts. This is a right of all persons before the law, regardless of their nationality or lack thereof. Domestic law is thus required to ensure, even in emergencies, effective remedies and the accessibility of judicial recourse for any alleged violations, committed by anyone on a state party's territory, or under their jurisdiction. Effective judicial and procedural safeguards must always be present in order to ensure the protection of non-derogable rights – they are inherent in such rights, as recently noted in General Comment 29 on Article 4. The American Convention places the right to juridical personality above all rights, and sees it as a precondition to enjoy and meaningfully exercise the rest of the rights. These judicial guarantees were included in the non-derogation clause of the IACHR due to a proposal from the U.S. delegation in the Second Plenary Session of the San José Conference. Moreover, according to the *travaux préparatoires*, the U.S. delegation had proposed and insisted several times to include as non-derogable the right to freedom from arbitrary detention and the right to a fair trial, proposals ultimately not adopted in the Convention's final text.[37] Access to courts without delay as well as the availability of full review by a higher tribunal of a criminal conviction and sentence were recently ranked highest in a list of basic principles as elements of best practice in complying with the right to a fair trial while encountering terrorism.[38] Particularly, the important judicial guarantee of access to courts without delay to determine the lawfulness of detention was considered to be a fundamental safeguard which cannot be abrogated, even by way of derogation in emergency situations. As stated before, procedural requirements to prevent arbitrary deprivation of liberty have been found by case law to be functionally non-derogable though not listed in the non-derogable rights provisions. Such procedural guarantees include the right of a person to be informed promptly of the reasons for his arrest, the right of the person deprived of his liberty to be brought promptly before a judge or other officer authorized to exercise

36 Article 4(2) ICCPR lists the expressly stated emergency-proof guarantees:

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

For all due process guarantees the HRC considers to be emergency-proof, see HRC, General Comments No. 29 and 32, as discussed *supra* in Chapter IV.A.1.

37 *See* Oraá, *supra* note 20, at 93-94.

38 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, U.N. Doc. A/63/223, 6 August 2008 (*hereinafter* Scheinin Report 2008), para. 45(a).

judicial power, and the right of a person deprived of liberty to challenge the lawfulness of his or her detention.[39]

In addition, the *right to an effective remedy*, also provided for in Article 2(3) of the ICCPR, specifies a basic principle for the enjoyment of rights and it remains a responsibility of states even in emergency situations.[40] The right to juridical personality would be futile without effective remedies including recourse to courts for alleged violations. These provisions need to be taken into account when discussing, in more detail, the treatment of persons suspected of international terrorism and their adjudication.

a. Indefinite Detention to Prevent Future Acts of Terrorism or to Investigate Past Such Acts

Universal standards have been unambiguously clear in guaranteeing that governments may "in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance … through arbitrary deprivations of liberty."[41] Accordingly, persons deprived of their liberty have an unquestionable right to challenge the lawfulness of their arrest and detention, through *habeas corpus* or similar relief.[42] International standards require that this right be available at all times, including in states of emergency.

In the Inter-American system, one finds the most elaborate discussion on *habeas corpus* and other judicial guarantees. As seen in other sections, the right to protection from arbitrary detention, *incommunicado* detention and indefinite detention remains one of the most vulnerable rights in times of emergency. Enforced disappear-

39 *See supra* Chapter IV.B. *See also* General Comment No. 29, *supra* note 28, para. 16: "The principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency." *Ibid.*

40 In General Comment No. 29, referring to Article 2(3), the HRC clarifies: "This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of their procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant, to provide a remedy that is effective." The HRC further asked states to "establish effective remedies in legislation that are applicable during a state of emergency," wherever they are lacking. *Supra* note 28, at 206, para. 14, and at 43, para. 10.

41 *Id.* at 205, para. 11.

42 In the drafting phase of the ICCPR, Mrs. Eleanor Roosevelt had considered that, among all guarantees against arbitrary detention, the writ of *habeas corpus* should be made non-derogable, while she opposed the inclusion as non-derogable of the rest of guarantees of Article 9. She based her arguments on the fact that such guarantees were already included in the Geneva Conventions, which had been recently approved. The successor of René Cassin, Mr. Leroy Beaulieu, taking a more radical approach, opposed altogether the inclusion as non-derogable of Article 9, on the same grounds as used by Roosevelt. Hence, *habeas corpus,* too, remained off the list. Oraá, *supra* note 20, at 89.

ances or *incommunicado* detention beyond the reach of even the ICRC – eleven of such cases are known, but even larger numbers are reported –, violate human rights law, and also create ample opportunity for torture. Closed detention sites in Afghanistan and elsewhere arguably cast a huge shadow of lawlessness on U.S. Government actors involved.[43]

The Inter-American Commission has early on expressed itself against indefinite detention as a violation of human rights even in states of emergency,[44] when dealing

43 According to a scholarly analysis, the existence of a program of "secret detention and secret renditions" outside the United States has resulted in numerous detained persons whose names and whereabouts went undisclosed, and this could potentially "lead to civil and criminal sanctions" as a result of the violation of the "customary and *jus cogens* prohibition of forced disappearances." *See* Jordan Paust, Beyond the Law: the Bush Administration's Unlawful Responses in the "War" on Terror 35 (2007).

Recently, on December 20, 2006, the General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance. Its Article 1 mandates that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance." The U.S. not only refused to sign the treaty, but simultaneously issued a statement not only expressing its disappointment with the draft, but also adding numerous concerns and reservations to be placed on record, considering the long list of such reservations still "non-exhaustive." So, to mention but a few, the U.S. noted that "the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law; … the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard; … Article 4 on criminalization should not be read to require various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, unworkable in, for example, a federal system such as our own; … Article 5 requiring criminalization of crimes against humanity is vague, aspirational in nature, and inappropriate as an operative treaty provision. The United States agrees with the statement in paragraph 106 of the Report that Article 5 would 'not create any additional obligations on States to accede to particular instruments or amend their domestic legislation;' … the United States interprets Article 6(2) to establish no criminal responsibility on the part of an individual unaware of participating in the commission of an enforced disappearance; … Article 17 on standards for and access to places of detention retains the possibility of conflict with constitutional and other legal provisions in the laws of some States; accordingly we would interpret the term 'any persons with a legitimate interest' in Articles 17, 18, and 30 in accordance with the domestic law of a State; … Article 18 on access to information similarly retains the possibility of conflict with constitutional and other legal provisions of a State and sets unreasonable standards guaranteeing information." *See U.S. Statement on the Draft Convention on Enforced Disappearances*, Geneva, June 27, 2006, *available at* http://www.usmission.ch/Press2006/0627U.S.StatementonForcedDisappearances.html (last visited on February 16, 2008).

44 "No domestic or international legal norm justifies, merely by invoking this special power, the holding of detainees in prison for long and unspecified periods, without any charg-

with a violation of criminal law. The Court would support this view by noting that judicial review and judicial "[g]uarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof,"[45] and that, in times of emergency, the non-derogable rights are such rights in need of judicial protection. The Court explains that the term "*judicial*" "can only refer to those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency."[46] Certain essential judicial guarantees indispensable for the protection of the non-derogable rights give "expression to the procedural institution known as '*amparo*', which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention."[47] The right to challenge the lawfulness of detention, in the Court's view, is just one component of "*amparo*."[48] The Court is adamant that "the concept of due process of law … should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention,"[49] and it concludes that "the principles of due process of law cannot be suspended in states of exception" and finds them "necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees."[50]

When the writ of *habeas corpus* had been completely suspended without ensuring any other procedure to challenge the lawfulness of detention,[51] the Court responded that *habeas corpus* and *amparo* are "indispensable for the protection of the human

es being brought against them for violation of … criminal law, and without their being brought to trial so that they may exercise the right to a fair trial and to due process of law." It has also encouraged states "to limit detentions carried out in states of emergency to a brief period of time and always subject to judicial review." OAS, The IACHR: Ten Years of Activities (1971-1981) 318 (1982).

45 The Court further stated: "The States Parties not only have the obligation to recognize and to respect the rights and freedoms of the persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms." IACtHR, Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8, at 40-41, para. 25.

46 *Id.* at 42, para. 30.

47 *Id.* at 42-43, para. 32.

48 *Id.* at 44, para. 34.

49 IACtHR, Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights), Series A, No. 9, at 35, para. 29.

50 *Id.* at 35, para. 30.

51 Oraá, *supra* note 20, at 111.

rights that are not subject to derogation,"[52] and also most important "to preserve legality in a democratic society."[53] The Court further argued: "In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. … [E]xperience 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."[54] The Commission has also held the position that due process is a fundamental guarantee which cannot be derogated from even in states of emergency.[55]

In this context, at least until June 12, 2008, the U.S. was in violation of international standards as it denied *habeas corpus* or equivalent court relief regarding the legality of their detention for aliens suspected of terrorist activities. However, in *Boumediene v. Bush*,[56] the United States Supreme Court found the exclusion of habeas corpus by paragraph 7 of the MCA to be unconstitutional, and it restored the essence of habeas corpus relief to unlawful alien enemy combatants on territory under full U.S. control, the details of which have to be worked out by the courts. Simultaneously, Article 26 of the ICCPR, the right to enjoy these rights without discrimination, could be considered to have been violated by the MCA: Only alien unlawful enemy combatants, even if they were permanent residents of the U.S., were denied the right to challenge the legality of their detention in court. This difference in treatment was not justified. Equal protection of the law guaranteed in Article 26 extends, at a minimum, to all rights contained in the ICCPR.

Additionally, even when invoking emergency measures, states are not necessarily excused from observing all their other obligations under international law, *i.e.* under customary international law, other international treaty law and humanitarian international law.[57] Consequently, a number of due process guarantees, though not listed

52 Advisory Opinion, Judicial Guarantees in States of Emergency, *supra* note 49, at 35, para. 30.

53 Advisory Opinion, Habeas Corpus, *supra* note 45, at 48, para. 42.

54 *Id.* at 44, paras. 35-36. In the same paragraphs, the Court explains that "[t]his conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments." *See also* Neira Alegría et al. v. Peru, IACtHR, Judgment of January 19, 1995, OAS Doc. OAS/Ser.L/V/III.33, Doc. 4, Annual Report of the Inter-American Court of Human Rights 1995, at 60, para. 84.

55 IACHR, Report on Argentina (1985), at 26. *See also* IACHR, Report on Guatemala (1983), at 18.

56 128 S.Ct. 2229 (2008).

57 Such obligations might be included in certain articles of the Geneva Conventions and their Protocols; the ILO Conventions on Forced Labor, Freedom of Association, Equal

in Article 4, are nevertheless non-derogable because of their being entrenched either in emergency-proof customary international law or in humanitarian law. Enforced disappearances *per se* violate a number of rules of customary international law, such as, *inter alia,* the prohibition of arbitrary deprivation of liberty, the prohibition of torture and other cruel or inhuman treatment, as well as the right to freedom and personal safety, and the right to a just and public trial.[58] We had mentioned above that enforced disappearances are also deemed a crime against humanity under the Statute of the International Criminal Court.[59] Thus, crimes of enforced disappearances, and *incommunicado* detention discussed in the section on extraordinary renditions to "classified locations" may have been committed[60] if the necessary elements of the crime, including intent, can be proven. However, the U.S. is not a state party to the ICC, thus its citizens cannot be reached by this new international body designed to achieve complementary accountability for international crimes.[61]

As discussed *supra*, human rights jurisprudence has also established that a number of procedural requirements that prevent arbitrary deprivations of liberty have been found to be functionally non-derogable, though they are not listed among the non-derogable rights provisions. Such procedural guarantees include the right of a person to be informed promptly of the reasons for his arrest, the right of the person deprived of his liberty to be brought promptly before a judge or other officer authorized to exercise judicial power, the right of a person deprived of liberty to challenge the lawfulness of detention. In the context of counter-terrorism law and practice, compliance with international law of human rights is considered a *must*, particularly as regards judicial hearings to challenge the lawfulness of detention, as well as periodic judicial review in cases of continued detention for investigative or preventive

Rights of Workers (that are ratified by overwhelming majority of states and lack emergency clauses); the 1951 Geneva Refugees Convention and its 1967 Protocol; the African Charter of Human and Peoples' Rights that does not contain an emergency clause; the Inter-American Convention on Human Rights that has a longer list of non-derogable rights, etc.

58 24th International Conference of the Red Cross (Manila, 1981).

59 Article 7(1)(i) of the Rome Statute. Its definition is delineated in Article 7 (2)(i) as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

60 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum, Mission to the United States of America, U.N. Doc. A/HRC/6/17/Add.3 (22 November 2007) (*hereinafter* Scheinin, U.S. Mission Report), at 17-18.

61 In the *travaux préparatoires* for the ICC Statute, the war crime of "torture" was seen as no different whether the act of torture was committed in an international armed conflict or in a non-international armed conflict. *See* Knut Doermann, Elements of War Crimes under the Rome Statute of the International Criminal Court 401 (2003).

detention, even outside criminal proceedings.[62] Therefore, indefinite detention without proper judicial review had placed the U.S. outside the law for a number of years.

In contrast to the HRC and the Inter-American Court, the European Court of Human Rights has accepted far-reaching extraordinary powers of arrest and detention, including internment, without the possibility of judicial review, particularly in connection with the situation in Northern Ireland. Despite this seeming inconsistency in standards universally and regionally, this paper would consider the jurisprudence of the ECtHR as quite influential in the context of terrorism, as it has dealt with numerous such cases. According to the early standards of the ECtHR, the U.S. practice of administrative detention[63] *per se* would not necessarily violate international law, even when extended over several years. This is how the ECtHR reasoned in the Northern Ireland context:

> [E]xtrajudicial deprivation of liberty was necessary from August 1971 to March 1975…. [and it was] directed against the IRA as an underground military force … which was creating ...a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom. … [N]ormal legislation offered insufficient resources for the campaign against terrorism and … recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for."[64]

However, the number of guarantees afforded in the U.K.[65] far surpassed the ones in the U.S., at least before the *Hamdi* and *Rasul* cases.[66]

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62 Scheinin Report 2008, *supra* note 38, para. 45(a).

63 "[T]he administrative detention…of individuals suspected of intending to take part in terrorist activities appeared, despite its gravity, to be a measure required by the circumstances." Lawless Case (Merits), ECtHR, Judgment of 1 July 1961, Series A, No. 3, at 58, para. 36. The suspect had been detained for five months without being brought before a judge.

64 Ireland v. United Kingdom, ECtHR, Judgment of 18 January 1978, Series A, No. 25, at 80-82, paras. 212-214.

65 Lawless, *supra* note 63, at 58, para. 37. See also the case of *Brannigan* where the Court was satisfied with certain guarantees: – "the remedy of habeas corpus … to test the lawfulness of the original arrest and detention;" – the fact that "detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest;" – the fact that "within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear … that … the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld;" – and the fact that "detainees are entitled to inform a relative or friend about their detention and to have access to a doctor." Brannigan and McBride v. United Kingdom (A 258-B), 17 Eur. H.R. Rep. 539 (1993).

66 *Id.*

As discussed in previous sections, preventive detention *per se* could (a) inherently bear no intent to charge and criminally prosecute a detainee, (b) occur outside the judicial process, often without judicial review, and (c) could feature indefinite detention.[67] While the characteristic enshrined in (a) does not in itself violate international law, the features (b) and (c) challenge internationally recognized standards of due process.

Article 5(1)(c) ECHR allows for preventive detention, when reasonably considered necessary to prevent a person from committing an offence. It is "*not adopted to a policy of general prevention* directed against an individual or a category of individuals who … present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of preventing a concrete and specific offense."[68] In no circumstance does it provide for extrajudicial detention. On the contrary, "the object of Article 5 [is] … to ensure that no one should be dispossessed of his liberty in an arbitrary fashion."[69] The same article, in its paragraph 3, requires that "anyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought *promptly before a judge or other officer authorized by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to release pending trial." Any challenges of this requirement on the part of the governments have been rejected since the *Lawless* case,[70] and no grounds for any doubt is left as to the requirement that the person deprived of his liberty must be brought before a competent judicial authority. Otherwise, "anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention."[71] Implications of such an arbitrary power "would lead to conclusions repugnant to the fundamental principles of the Convention."[72] Hence the necessity to minimize the menace of arbitrariness by providing the judicial control mandated in Article 5(3).[73]

67 Claire Macken, *Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR*, 10 Int'l J. Hum. Rts. 195, 204 (2006).

68 Guzzardi v. Italy, No. 00007367/79, ECtHR, Judgment of 6 November 1980, para. 102.

69 *Id*. para. 102.

70 Lawless v. Ireland (No. 3), No. 00000332/57, ECtHR, Judgment of 1 July 1961.

71 *Id.* at para. 14. The Court has stated that Article 5(3) "intends to avoid the arbitrariness and to secure the rule of law requiring a judicial control of the interference by the executive." Igdeli v. Turkey, No. 00029296/95, ECtHR, Judgment of 20 June 2002, para. 27.

72 Lawless, *ibid.*

73 *See* Brogan and Others v. United Kingdom, ECtHR, Judgment of 29 November 1988, Series A, No. 145-B, at 32, para. 58. Some judges would, however, argue, regarding the substantive grounds for detention: "Compliance requires that the purpose of the arrest must be to bring the person arrested before the competent legal authority on reasonable suspicion of having committed a specified offence or offences. The Convention does not permit an arrest for the purposes of interrogation in the hope of getting enough information to ground a charge." *Id.* Judges Walsh and Salcedo dissenting.

In turn, Article 5(3) generally sets two obligations for the governments when resorting to Article 5(1)(c): the detainee has to be brought promptly before an authority with judicial power and is entitled to trial within reasonable time or release pending trial. The first element circumvents prolonged and arbitrary detentions.[74] We discussed above the meaning given by the Court to the word "promptly."[75] Even when dealing with detention of suspected terrorists the Court has held that it cannot justify "dispensing altogether with *prompt* judicial control."[76] However, others have held that "to suppress terrorism the executive needs extraordinary powers."[77] The second element, the entitlement of trial within reasonable time, would materialize only in circumstances when charges are actually brought against the detainee. Many a time, there are no such charges pressed, as preventive detention is not based on any criminal charge, thus there is no absolute obligation on the state to bring charges against a detainee.[78] Hence, there is an inherent limitation to the right to trial within a reasonable time for the persons deprived of their liberty under preventive detention.[79] In a counter-terrorism setting, the judicial review of detention, which takes place either for investigative purposes or on mere preventive grounds, outside of criminal proceedings, remains mandatory. As to the issue of the frequency of such a review exercised by a judicial authority, one might have to wonder whether the "*every seven days*"[80] regularity is actually beyond the ability of the detaining power, which is also waging a challenging strife against international terrorism. A more realistic approach

74 R. Clayton & H. Tomlinson, The Law of Human Rights 500 (2000). The authors distinguish between three grounds for detention provided for in Article 5 (1) (c), namely when a person is reasonably suspected of having committed a crime; when it is reasonably considered necessary to prevent a person from committing an offence; when reasonably considered necessary to prevent a person from fleeing after having committed an offence. *Id.* at 488.

75 *Supra* Chapter II, A.2. a., at notes 270-277.

76 Klass and Others v. Germany, No. 5029/71, ECtHR, Judgment of 6 September 1978, para. 61.

77 Brogan and Others v. United Kingdom, *supra* note 73, Judge Martens dissenting, para. 3. His opinion differed from that of the majority of the Court as "to the weight to be attached to terrorism, or rather to the liberty to be left to Governments to cope with that and similar scourges of our times, especially where the individual's right to liberty is concerned… Terrorism – and particularly terrorism on the scale obtaining in Northern Ireland – is the very negation of the principles the Convention stands for and should therefore be combated as vigorously as possible. It seems obvious that to suppress terrorism the executive needs extraordinary powers, just as it seems obvious that Governments should to a large extent be free to choose the ways and means which they think most efficacious for combating terrorism." *Id*. at paras. 2-3.

78 *See* Macken, *supra* note 67, at 213-214.

79 *Cf.* Deweer v. Belgium, (A/35), 2 Eur. H.R. Rep. 439 (1979-1980), in which the Court held that the right to have a criminal charge determined by a court can be subjected to implied limitations (*e.g.*, the authorities may legitimately decide not to prosecute or to discontinue the proceedings).

80 *See* Scheinin Report 2008, *supra* note 38, para. 45 (a).

would be to consider the frequency of judicial review of detention on a case by case basis, in light of the magnitude of each state's involvement in counter-terrorism actions.

b. Extrajudicial Targeted Killings

The non-derogability of the right to life means that states must neither participate in, nor condone, arbitrary or extrajudicial killings, and must investigate and prosecute any allegation to that effect. This would apply to targeted killings referred to in Chapter V.B.3.c. However, such killings would be permissible according to the laws and customs of war[81] "for lawful subjects of armed attack in appropriate circumstances,"[82] in as long as they occur within the context of actual hostilities, against enemy combatants in an armed conflict. Consequently, terrorists who are attempting to directly commit hostile acts in war would fall under this category. Still, the targeted killing of individuals outside the battlefield, would run counter to human rights law, and be in breach of state obligations.[83] According to Common Article 3(1)(a) of the Geneva Conventions, the "murder of all kinds" of "[p]ersons taking no active part in the hostilities" "are and shall remain prohibited at any time and in any place whatsoever." The same is true, according to Common Article 3(1)(d), for the "carrying out of executions without previous judgment pronounced by a regularly constituted court."

Additionally, a number of detainees are reported to have died in Afghanistan, Iraq, Guantánamo and maybe elsewhere, when in U.S. custody. In a number of such cases, the investigations by the Army and Navy have concluded that their death was the result of a homicide.[84] Col. Joe Curtin, a Pentagon spokesman, was reported to have said: "The Army is absolutely committed to getting to the truth involved in each of these cases. One case is one too many. We are aggressively investigating allegations of detainee abuse."[85] Such acts warrant serious efforts on the part of the state in establishing respective personal accountability of government officials, as well as those

81 Article 15(2) of the European Convention expressly states: "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war…"

82 Letter of 14 April 2003 from U.S. to Secretariat of UN Commission on Human Rights, enclosing response to 15 November 2002 letter from Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. E/CN.4/2003/G80, 22 April 2003, at 5, cited in Douglas Cassel, *International Human Rights and the United States Response to 11 September*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 251, 273 (C. Fijnaut, J. Wouters & F. Naert eds., 2004).

83 *See* Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, criticizing the United States for lack of accountability in its war on terror, Press Release of March 28, 2007, *available at* http://www2.ohchr.org/english/issues/executions/index.htm. *See also* Scheinin, U.S. Mission Report, *supra* note 60, para. 42. The latter had further urged the U.S. "to ensure that it does not participate in the extrajudicial execution of any person including terrorist suspects." *Id.* para. 64.

84 Douglas Jehl & Eric Schmitt, *The Conflict in Iraq: Detainees; U.S. Military Says 26 Inmate Deaths May Be Homicide*, N.Y. Times, March 16, 2005, at A1.

85 *U.S. Counts 108 Deaths in Custody in Iraq, Afghanistan*, L.A. Times, March 17, 2005, at A-7.

acting on its behalf; otherwise, the state would have to be considered in breach of its obligation to respect and ensure everyone's right to life, particularly the right to life of those under its immediate custody.

c. Torture and Cruel, Inhuman or Degrading Treatment

The right to freedom from torture, cruel, inhuman and degrading treatment or punishment, considered not only a non-derogable right and part of customary law, but having arguably attained the status of *jus cogens*,[86] is at all times protected, during war or at peacetime. The international standards both on the books and in jurisprudence are well established: torture as well as cruel, inhuman and degrading treatment, or punishment is strictly prohibited altogether. This prohibition is not just hortatory: it is a legal obligation on every single state. Common Article 3(1)(a) of the Geneva Conventions outlaws the "mutilation, cruel treatment and torture" of "[p]ersons taking no active part in the hostilities." Neither emergency situations nor the fight against terrorism would justify torture or any form of inhuman treatment. This limit is definite and no government should venture to cross it. The U.K. Administration in 1972, for example, resorted to what was infamously known as the "five techniques" to interrogate terrorist suspects.[87] This issue reached the European Court of Human Rights, which classified these techniques as inhuman treatment, and thus unlawful according to the Convention.[88] Obviously, under the international standard established by the European Court, torture and inhumane treatment would not pass the legality test, even when employed as a counterterrorist measure in cases "threatening the life of a nation." On a universal level, the Committee against Torture (CAT) has found interrogation practices employed in some cases by the Israeli General Security Service (GSS) to be in violation of Article 16 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and as amounting to torture as defined in Article 1 of the Convention. The doctrine of necessity was not allowed to limit the absolute prohibition on torture.[89]

86 Rosalyn Higgins, *Derogations under Human Rights Treaties*, 48 Brit. Y.B. Int'l L. 281, 282 (1976-1977); Nigel S. Rodley, The Treatment of Prisoners under International Law 110-116 (1999); Theodor Meron, Human Rights and Humanitarian Norms as International Law 23 (1991).

87 Under the Civil Authorities Act (Special Powers) of 1922 immense power was transferred to the executive government. The administration invoked this Act in 1972. The "five techniques" included wall-standing, hooding, deprivation of sleep, very limited sustenance, and subjection to loud and persistent neutral sound, which when applied cumulatively were believed to work well on those who resisted interrogation. *See* C. Warbrick, *Emergency Powers and Human Rights: The UK Experience*, in Legal Instruments in the Fight against International Terrorism, *supra* note 82, at 361, 371

88 Ireland v. United Kingdom, *supra* note 64, paras. 165-168.

89 A good analysis of three decisions of the Israeli High Court of Justice referred to in CAT's Report of May 9, 1997, can be found in Eyal Benvenisti, *The Role of National Courts in Preventing Torture of Suspected Terrorists,* 8 Eur. J.Int'l L 596-612(1997). Evaluating these decisions and the CAT Report from the moral, institutional and legal dimensions, Benvenisti concludes that the conceptual approach which prohibits torture in an abso-

In the U.S. since 1863, the Lieber Code banned torture even in times of war: "Military necessity does not admit of cruelty – that is, the infliction of … torture to extort confessions."[90] The issue of public security in the age of terrorism has somehow shaken the absolute prohibition of state torture, at least its definition, and its consequences have successfully infiltrated our judicial systems as well. The tendency to change the application of the law of evidence by encouraging a greater reliance on confessions has possibly opened the door to the acceptance of evidence obtained under duress, including torture. The U.S. has, however, constantly declared that it does not resort to torture and that the captives have always been treated humanely.[91] Actually, in a similar context, the allegations of degrading treatment of prisoners in Abu Ghraib, described as "disgraceful conduct by a few American troops who dishonored our country and disregarded our values,"[92] have been condemned, investigated and prosecuted by the U.S., though many have argued that such investigations were not carried out to the fullest extent possible.[93]

As far as torture is concerned, allegations of a number of interrogation techniques that could amount to torture have not been decided upon by courts[94] in the U.S. The use of certain methods of coercive interrogation in trying to extract information

lute manner suits better the international instruments, whereas a self-defense approach, including scenarios of a ticking bomb, could be more effectively employed by domestic decision-makers. He personally calls for a general prohibition of "particularly brutal methods," but distinguishes those from the "harsh treatment of detainees which does not amount to clear examples of torture." *Id.* at 611.

90 Lieber Code (1863), Article 16. Actually the doctrine of military necessity was defined in Article 14 of the Lieber Code: "[A]s understood by modern civilized nations, it consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."

91 Note President Bush's statement of July 2004 on the U.N. International Day in Support of Victims of Torture: "America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture…in all territory under our jurisdiction. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere." Weekly Compilations of Presidential Documents 40 (July 5, 2004), at 1167-1168.

92 Reed Brody, *The Road to Abu Ghraib: Torture and Impunity in U.S. Detention*, in Torture 145, 146 (Kenneth Roth & Minky Worden eds., 2005).

93 Several scholars and human rights organizations observed that these prosecutions "shifted the blame downwards," and that the investigations have been incomplete and did not reveal the reality of an environment of lawlessness in the policy making at the highest ranks. Reed Brody, *supra* note 92, at 151-154. *See generally* Dinah Pokempner, *Command Responsibility for Torture*, in Torture, *id.* at 158-172; *see also* Kenneth Roth, *Justifying Torture*, in Torture, *id.* at 191-196. For more on the debate, *see* Torture: A Collection (Sanford Levinson ed., 2004); *see also* contributions to a symposium by Case School of Law on "Torture and the War on Terror," 37 Case W. Res. J. Int'l L. 145-555 (2006).

94 John Hutson cautions that the courts are not necessarily "the most capable of dealing with … tremendously important issues," because, first, they face only issues that come to them, and, second, even for those issues that do come before them, the courts are bound by the law, while there are moral, social, practical considerations that are more important

to benefit public security has not been brought to the judicial test, and we are left with a defense of such techniques as "professional interrogation" on the part of the Administration, and the labeling of the same techniques as torture by human rights advocates and some scholars. This lack of adjudication leaves rooms for different interpretations on what exactly constitutes torture. "Waterboarding" is the most controversial of such techniques,[95] that also include stress positions, sleep deprivation etc. It is still not officially or judicially confirmed precisely which, if any or all of such techniques were actually used,[96] even when most of them were authorized. Notably, Attorney General Nominee Michael Mukasey in his confirmation hearing before the U.S. Senate Judiciary Committee, "adamantly refused to declare waterboarding illegal," in the face of government sources saying, as the New York Times reports, that the technique "was used in 2002 and 2003 by C.I.A. officers questioning at least three high-level terrorism suspects."[97]

The existence of different definitions of the term, some of them conceiving of it so narrowly that its prohibition is rendered almost meaningless; the U.S. Senate's reservation to the Convention Against Torture necessitating "severe physical or mental

than the law. *See* John Hutson, *Why Not the Courts?*, 37 Case W. Res. J. Int'l L. 365 (2006).

95 *See* Douglas Jehl, *Questions Are Left by C.I.A. Chief on the Use of Torture*, N.Y. Times, March 18, 2005, quoting Porter Goss, the C.I.A. director as defending "waterboarding" in his testimony before the Senate as a "professional interrogation technique." "Waterboarding" is described as follows: "a prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning instantly leads to almost instant pleas to bring the treatment to a halt." *See* Howard Ball, Bush, the Detainees, and the Constitution: The Battle over Presidential Power in the War on Terror 76-77 (2007).

96 A recent report of the Justice Department that investigated the FBI in its interrogation techniques found that the FBI did not engage in harsh interrogations of suspected terrorists detained in Guantánamo, Afghanistan or Iraq. Adherence to the "rapport building" with the detainees as the best technique to gather intelligence and prohibition of coercion, abuse and threats was the practice of the FBI since its decision of August 2002. According to this report, there were however a "few incidents" that ran counter to the procedures. Such incidents included isolation of detainees form human contact, or giving them "a drink of water" forcefully and inappropriately, short chaining them etc. However, it was reported that other agencies might have been involved in using harsh interrogation techniques. *See* Terry Frieden, *Inquiry Clears FBI in Harsh Interrogations*, CNN Politics.com, May 20, 2008, *available at* http://www.cnn.com/ 2008/POLITICS/05/20/fbi.interrogations/index.html.

97 Scott Shane, *Nominee's Stand May Avoid Tangle of Torture Cases*, N.Y. Times, Nov. 1, 2007, *at* http://www.nytimes.com/2007/11/01/washington/01mukasey.html?ref=washington: "Waterboarding is a centuries-old interrogation method in which a prisoner's face is covered with cloth and then doused with water to create a feeling of suffocation. It was used in 2002 and 2003 by C.I.A. officers questioning at least three high-level terrorism suspects, government officials say."

pain or suffering," including, in the latter case, "prolonged mental harm;"[98] the lack of judicial clarification on a case-by-case basis of the alleged torturous techniques; and, most importantly, the lack of solid facts on what interrogation techniques were used and in what frequency – all these factors do not provide solid ground for an ultimate legal conclusion on the U.S.'s employment of torture or inhuman and degrading treatment – a conclusion made even more complicated by the conceptual difference between those two terms.[99]

However, this study takes the stand that a number of techniques mentioned in the so-called "torture memos," do amount to inhuman and degrading treatment, and some also to torture under the international standards as seen in the jurisprudence discussed in the chapters above. It remains the duty of the U.S. to investigate such allegations, to clarify the distinction between necessary, but legal methods employed to interrogate terrorists, and ones that amount to torture.[100] Addressing the issue of

98 The reservation to Article 1 of the CAT reads, in pertinent part: "[T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality." *Available at* http://untreaty.un.org/ENGLISH/bible/englishinternet bible/partI/chapterIV/treaty14.asp. Also note that when ratifying the ICCPR in 1992 and CAT in 1994, the U.S. government understood the prohibition of torture to mean the same as the requirements of the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution. If an interrogation technique was unconstitutional when used within the U.S., it would also be deemed in violation of these conventions, if employed by the U.S. anywhere. Consequently, the violation cannot be washed away by former Attorney General Alberto Gonzales interpreting the U.S. reservation to mean permission to employ cruel, inhuman or degrading treatment of non-Americans outside the U.S. borders. *See* Alberto Gonzales, written reply to Senate questions quoted in Kenneth Roth, *Justifying Torture*, *supra* note 93, at 193.

99 Within the European System, certain interrogation techniques were brought up to the Court: wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink, which were used in many interrogation centers in Northern Ireland. The Court found that the combined and premeditated use "for hours at a stretch" of those "disorientation" or "sensory deprivation" techniques "amounted to a practice of inhuman and degrading treatment," and violates the Convention. *See* Ireland v. United Kingdom, *supra* note 64, paras. 167-168.

100 Many such techniques such as sleep deprivation, exposure to hot and cold temperatures, stressful positions, forced standing known to have been used by the U.S. have been criticized by the U.S. when employed by other countries. This and a detailed enumeration of techniques employed by the U.S. and other countries compared can be found in Tom Malinowski, *Banned State Department Practices*, in Torture, *supra* note 92, at 139-144.

the need for quality intelligence gathered from the detainees, and the arguments that the Geneva Conventions have been rendered quaint in the war on terror,[101] Senator McCain, presently the Republican Candidate for President, noted that "nothing in the Geneva Conventions precludes directed interrogations. They do, however, prohibit torture and humiliation of detainees, whether or not they are deemed POWs. These are standards that are never obsolete—they cut to the heart of how moral people must treat other human beings."[102]

Moreover, the fact that the U.S. administration has revised the definition used in the "torture memos" of what constitutes torture, to bring it closer to the standards commonly accepted,[103] as well as the fact that the DTA makes a distinction between testimony obtained before and after the application of this act, leads one to the conclusion that some certain practices involved in the interrogation of the captives of the "war" on terror do amount to cruel and inhuman treatment, and possibly torture. An absolute ban on such practices when interrogating the terrorism suspects would solve the issue of potential abuse by the interrogators, but it will not solve the issue of the "ticking time bomb" scenario and potential liability of the officer who would disobey the ban in order to save, say, thousands of lives.[104] Neither might it receive wholesale approval of the general public in the age of terror we live in. Moreover, the governments, even the most democratic ones, are not known to care too much about the

101 Or, for that matter, even the claim of the Yoo-Delahunty memo that "customary international law, whatever its source and content, does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law" – a "patent nonsense" as Professor Paust would label this claim. Paust, *supra* note 43, at 20 & note 173.

102 John McCain, *Respecting the Geneva Conventions*, Wall Street J., June 1, 2004, reprinted in Torture, *supra* note 92, at 156-157. *See also* Michael Ignatieff, *Evil Under Interrogation: Is Torture Ever Permissible?*, Op-ed, Fin. Times (U.K.), May 15, 2004, arguing that our fear of terrorism should not lead us to lose our loyalty to law and also our morality: "… we need to widen out our reflections, think about the moral nihilism of torture and why – this is most painful question – torture remains a temptation, even a supposed necessity, in a war on terror." *Ibid.*

103 *See* Department of Justice Office of Legal Council, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, December 30, 2004, Memorandum Opinion for the Deputy Attorney General. This opinion interprets the federal criminal prohibition against torture codified at 18 U.S.C. §§ 2340-2340A. It supersedes in its entirety the August 1, 2002 opinion of this Office entitled Standards of Conduct under 18 U.S.C. §§ 2340-2340A. That statute prohibits conduct "specifically intended to inflict severe physical or mental pain or suffering." This opinion concludes that "severe" pain under the statute is not limited to "excruciating or agonizing" pain or pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death." The statute also prohibits certain conduct specifically intended to cause "severe physical suffering" distinct from "severe physical pain." *Available at* http://www.usdoj.gov/olc/2004opinions.htm .

104 Michael Ignatieff, *Moral Prohibition at a Prize*, in Torture supra note 92, at 18, 24-25.

limits of moral absolutism[105] when public security is thought to be at stake.[106] From a human rights perspective, the use of "coercive interrogation" tantamount to torture has undermined the protection of human rights globally, and the universal ban on torture has suffered a great setback. Additionally, outsourcing the treatment of "high value detainees" to countries who use torture for "aggressive interrogation,"[107] violates a state's obligations regarding the prohibition of torture. If so far we have been arguing that the prohibition of torture constitutes a *jus cogens* norm, U.S. state practice, followed by a number of other countries, may have severely limited the reach, if not threatened the existence, of that global untouchable.[108] Still, violations of the law do not invalidate the law itself; at least the verbal consensus on the illegality of torture remains intact.

Similarly, commenting on Article 10(1) of the ICCPR, which states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person," the HRC observed that this prescription expresses a norm of general international law and thus is not subject to derogation in emergency situations,[109] even though it is not listed in Article 4. The IACHR is the only treaty to include the right to humane treatment as a non-derogable right. It offers such protection in Article 27(2) of the American Convention. The wording of Article 5(2) is the same as Article 10(1) of the ICCPR. The IACtHR found a violation of Article 5(2) in the appearance in Peruvian courts of the arrested "either blindfolded

105 Philosophers like Michael Levin had built the case for torture since 1982, by testing his claim through informal polls, and then writing: "I am advocating torture as an acceptable measure for preventing future evils…Paralysis in the face of evil is the greater danger." Then he predicted: "Someday soon a terrorist will threaten tens of thousands of lives, and torture will be the only way to save them. We had better start thinking about this." The Phenomenon of Torture: Readings and Commentary 227-229 (William F. Schulz ed., 2007).

106 *See* the argument by John Yoo, former Deputy Assistant Attorney General: "[I]t seems to me that if something is necessary for self-defense, it's permissible to deviate from the principles of Geneva [including the prohibition of torture]." Quoted in Paust, *supra* note 43, at 29. Also, President Bush, after he signed into law Senator John McCain's legislation that prohibited torture, he asserted that he could interpret the law within his duties as a Commander-in-Chief, possibly even ignore the law if national security would necessitate it. *See* Christopher L. Blakesley, Terror and Anti-Terrorism: A Normative and Practical Assessment 289 (2006). For an interesting take on this scenario in the context of Israel, see Eyal Benvenisti, *The Role of National Courts in Preventing Torture of Suspected Terrorists, supra* note 89.

107 Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib 46 (2004). *See also* Dan Bilefsky, *European Inquiry Says C.I.A. Flew 1000 Flights in Secret*, N.Y. Times, April 27, 2006.

108 As lamented by, *inter alia*, W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 Am. J. Int'l L. 2006, 852, 860 (2006).

109 HRC General Comment No. 29, *supra* note 28, at 205, para. 13(a). *See also* Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 96 (1989), considering this right part of customary international law.

or hooded, and either in restraints or handcuffs."[110] Humane treatment of persons deprived of their liberty is also a rule of customary international law binding on all states.[111]

The Inter-American Court of Human Rights has also specified that even in times of emergency, the state must guarantee human rights for all people, even for those deprived of liberty, and it holds the state accountable for the conditions in detention facilities.[112] The conditions under which the detainees were initially held at their arrival in Camp X-Ray in Guantánamo sparked a great amount of controversy. The prisoners were shown on arrival wearing goggles, ear muffs, masks and gloves, which the U.S. had said were for "security precaution," and were kept in cells open to outside elements.[113] Such conditions were below the U.S. minimum standards for convicted prisoners.

Restriction of the right to freedom of thought, conscience and religion is not deemed to help ameliorate the emergency situation. Consequently, it is a non-derogable right, guaranteed even for those in custody. The right to freedom of religion also includes non-interference and respect for the religion of those detained on grounds of terrorist activities. Allegations of ridiculing the religion of Muslim detainees,[114] if proven to be true, would also constitute a violation of this non-derogable right.

The privilege against self-incrimination is closely linked to the prohibition of torture, cruel, inhuman and degrading treatment. Any statements obtained through abusive interrogation techniques during criminal investigation or intelligence gathering, should render the trial unfair if admitted into evidence. The ambiguity that surrounds testimony obtained before the DTA and its admission into evidence before the military commissions, when deemed "reliable" and "in the interest of justice," raises issues of unfairness.[115]

Finally, "extraordinary renditions" are ultimately not permissible in international law, largely because of the fact that they create the real risk of torture or other cruel and degrading treatment for persons. Such a practice, thought to have been em-

110 Castillo Petruzzi et al. v. Peru, IACtHR, Judgment of May 30, 1999, Series C, No. 52, at 218, para. 192.

111 Customary International Humanitarian Law, *supra* note 7, at 306-308. *See also* Restatement (Third) of Foreign Relations Law of the United States, § 702, which includes torture, cruel, inhuman or degrading treatment or punishment, as well as prolonged arbitrary detention, murder or causing disappearance of individuals, when practiced, encouraged or condoned as a matter of State policy; Ian Brownlie, Principles of Public International Law 537 (6th ed. 2003).

112 *See* Castillo Petruzzi, *supra* note 110, at 219, para. 195.

113 BBC News, Sunday, 20 January, 2002, *at* http://news.bbc.co.uk/2/hi/americas/1771816.stm.

114 For an account of foreign media on this issue, see *Desecration Allegation: Difficult to 'Pacify Enraged Muslims'*, May 19, 2005, *available at* http://www.globalsecurity.org/military/library/news/2005/05/wwwh 50519.htm.

115 *See* Scheinin Report 2008, *supra* note 38, at 31-32, para. 45(d).

ployed by the CIA, raises issues of unlawful conduct on the part of the U.S. and must be prohibited.

d. Adjudication before Military Commissions

The military commissions as sketched out in President Bush's original order have been justified under domestic law by reference to his powers as Commander-in-Chief of the armed forces and two decisions of the Supreme Court: *Ex parte Milligan* and *Ex parte Quirin*. The procedures of these military commissions have now been ratified by Congress in the Military Commissions Act. *Ex parte Milligan* related to military tribunals used in the Civil War. The U.S. Supreme Court ruled there, rather restrictively, that military tribunals can be used only in extraordinary situations, as "in foreign invasion or civil war, [when] the courts are actually closed, and it is impossible to administer criminal justice according to law … [amid] military operations."[116] The Supreme Court thus overturned the conviction of a civilian by a military commission because the defendant was not a citizen of an occupied territory, and the courts in his state were functioning. In similar circumstances, when courts were operating, the Supreme Court struck down the use of military commissions to try civilians.[117] In *Ex parte Quirin*, however, the trial of eight Nazi saboteurs by a military tribunal in wartime was allowed, even when the ordinary courts were functioning.[118] There have been arguments against this decision serving as precedent for the Guantánamo detainees: in the present case, there is no declaration of war against Afghanistan, which would differentiate this case from *Ex parte Quirin*, and the ordinary criminal courts are fully functioning. Others argued that *Ex Parte Quirin* is not an "attractive precedent," [119] as the Roosevelt Administration employed a different procedure only three years later, when trying two other German spies.[120] In 2007, the UN Special

116 *Ex parte* Milligan, 4 Wall. 2, 18 L.Ed. 281.

117 Duncan v. Kahanamoku, 327 U.S. 304 (1946).

118 *Ex parte* Quirin, 317 U.S. 1 (1942).

119 For an analysis and criticism of the procedure in *Ex Parte Quirin*, see Louis Fisher, Nazi Saboteurs on Trial: A Military Tribunal and American Law 205-208 (2003). Fisher notes that the eight German spies were charged, assigned defense attorneys, subjected to a trial, and allowed to challenge the tribunals' jurisdiction before the Supreme Court. Furthermore, both the time frame of the use of military commissions and the number of people apprehended and potentially tried by the commissions differ greatly from Roosevelt's 1942 and 1945 precedents.

120 *Id.* at 138-144. The military order issued by President Roosevelt in January 12, 1945 differed from his order of 1942 in the fact that Roosevelt did not name the members of the counsel (prosecution or defense). The military commission was appointed by the commanding generals. The trial record went to the office of Judge Advocate General as the final reviewing authority, and not to Roosevelt; the venue also changed. Decades later, in 1970, the Department of Defense prepared a study regarding military commissions that were planned to try ex-servicemen for violations of the laws of war in Vietnam. Professor Paust notes that this study envisioned that judges serving in military commission would be former federal judges to ensure that convictions would not be challenged for lack of due process guarantees. The study further asked for specific protections equivalent to

Rapporteur recommended that military "commissions be disestablished," but he immediately added the qualification to use ordinary civilian courts to try terrorist suspects "wherever possible."[121] Such a disclaimer could be inferred to mean that it is not always possible to try these alleged terrorists in civilian courts. As seen in previous chapters, the ICCPR does not prohibit trial of civilians in military courts. In the same vein, the HRC in General Comment No. 32 on Article 14, however, urges that such trials be conducted in compliance with guarantees of Article 14, which cannot be modified because of the character of the court concerned. At the time of this writing, the military commissions in Guantánamo continue to function regularly, and on the above basis, they do not *prima facie* constitute unfair administration of justice. The U.S. can argue that such trials are "exceptional," "necessary" and "justified by objective and serious reasons," satisfying this way the requirements of General Comment 32. However, certain due process guarantees that are deeply rooted in treaty and customary law and that cannot be derogated from even in times of emergency could be more vulnerable in trials before military commissions. Some of the guarantees most at risk are probably the impartiality and independence of judges, presumption of innocence due to prolonged detention, the right to necessary means of defense including time and facilities, access to the file of the prosecutor, particularly to exculpatory evidence, right to cross-examination, the right to obtain witnesses on his behalf.

The potentiality of capital punishment raises important issues as to the fairness of the adjudication process. According to the HRC, "any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [fair trial] and 15 [prohibition of *ex post facto* laws]."[122] Under such standards, by initially declining access to court for the terrorist suspects, the U.S. has arguably violated their non-derogable right to juridical personality, and the genuine possibility of protecting other non-derogable rights such as freedom from torture. Being non-derogable in its entirety, freedom from torture further mandates that any statements or confessions obtained in breach of this right, cannot be admitted into evidence in any proceeding covered by Article 14, even in times of emergency. Moreover, since capital punishment can

courts-martial because "both logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible." *See* Paust, *supra* note 43, at 101.

121 Scheinin, U.S. Mission Report, *supra* note 60, para. 59. He had further suggested that those accused of war crimes be tried before military courts-martial. *Id*. para. 60.

122 General Comment 29, *supra* note 28, at 206, para. 15. *See also* General Comment 32 on Article 14 of the ICCPR, July 27, 2007, which confirms the very same position, at para. 6. The concern about States conforming with the requirement of fair trial guarantees as mandated in Article 14 of the ICCPR has been addressed many times by the HRC by its monitoring under the state reporting procedure. *See generally* Ineke Boerefijn, The Reporting Procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee (1999), especially at 122, 312, 323-324 dealing with the U.S. reservations to several articles of the ICCPR, resulting in an "unsatisfactory application of the Covenant throughout the country." *Id*. at 325.

be imposed by the military commissions, the international standards on emergency situations require full and rigorous applicability of all fair trial guarantees.[123]

A few more of such standards have been enumerated by the HRC, and they particularly require that "[o]nly a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished,"[124] even in emergencies. In the context of military commissions in Guantánamo, a potential imposition of a death penalty punishment under the MCA is likely to be in violation of the right to life guaranteed in Article 6 of the ICCPR if the fair trial guarantees of Article 14 are not rigorously applied and the review on appeal is limited only to matters of law.[125] A long time in detention without charges, particularly as a terrorist suspect classified as an "unlawful enemy combatant," has the side effect of jeopardizing the presumption of innocence, hence also a fair trial. The UN Special Rapporteur has even asked for the abandoning of such categorization.[126] As a matter of fact, even some of the detainees who could have been released from Guantánamo have not been able to return to their countries, nor have they been accepted by third parties,[127] for the simple reason of the stigma of a terrorist as the ultimate "culprit" that attaches to them.

A number of other issues related to the adjudication of terrorist suspects before military commissions have called for particular caution. The open administration of justice is, however, not one of them. Though characterized by heightened national security concerns, the media and representatives of several organizations, including human rights ones, have been allowed to attend trials before military commissions. Additionally, while disclosure of exculpatory evidence and the prosecutor's materials

123 *See* Scheinin Report 2008, *supra* note 38, para. 45 (i): "In countries where terrorist crimes remain subject to the death penalty, the State is obliged to ensure that fair trial rights under article 14 of the Covenant are rigorously guaranteed." In a prior report, the Special Rapporteur had recommended that "the imposition of the death penalty be excluded for military commissions or courts martial." Scheinin, U.S. Mission Report, *supra* note 60, para. 60.

124 HRC General Comment No. 29, *supra* note 28, at 206, para. 16.

125 *See supra* note 123.

126 Scheinin, U.S. Mission Report, *supra* note 60, para. 55.

127 These problems have led the Special Rapporteur to ask for particular measures to possibly protect such detainees as refugees: "In particular, the Special Rapporteur urges the United States to invite the United Nations High Commissioner for Refugees to conduct confidential individual interviews with the detainees, in order to determine their qualification as refugees and to recommend their resettlement to other countries. He also urges the United States not to require from receiving countries the detention or monitoring of those returned in cases where such measures would not have basis in international and domestic law, and equally urges receiving States not to accept such conditions." *Id.* para. 58. *See also id*. para 57.

remains mandatory in a due process of law,[128] the presentation of certain information in a redacted form in order to protect sensitive national security matters can be justified.

Trial by a *competent, independent and impartial tribunal established by law*[129] has been considered "an absolute right that may suffer no exception"[130] at any time. However, the states, particularly in the framework of the European Convention, are left with a wide margin of appreciation as to what constitutes a court,[131] and, in particular, military tribunals are recognized as such. Accordingly, the establishment of *ad hoc* tribunals which transfer jurisdiction to try civilians in military courts does not *per se* violate fair trial standards. In a recent report, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism only issued a call for "caution in allocating terrorism cases to military," adding that the "use of military tribunals should be limited to trials of military personnel for acts committed in the course of military actions."[132] However, such tribunals would potentially fall outside the judicial guarantees of independent courts, particularly because of the "exceptional procedures [they apply and] which do not comply with normal standards of justice."[133] Such lower-level procedures often include, *inter alia*, prolonged periods of pre-charge and pre-trial detention, inadequate access to counsel, and intrusion into attorney-client confidentiality; lower evidentiary and other procedural standards may also encourage resort to extralegal practices such

128 The Federal Supreme Court of Germany remanded a case due to the fact that the United States had refused to share with the German courts potentially exculpatory evidence. *See* Case of Motassadeq, Judgment of 3 March 2004, Strafverteidiger (BGH), StV 4/2004, cited in Scheinin Report 2008, at para. 36 n. 79.

129 Note that the first logical meaning of "established by law" is by legislative order rather than executive order. This issue was raised in the *Tadić* case regarding the ICTY. For a discussion of this issue, *see* Yusuf Aksar, Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court 38-40 (2004).

130 M. González del Río v. Peru, Communication No. 263/1987, HRC Views adopted on 28 October 1992, GAOR, A/48/40 (vol. II), at 20, para. 5.2.

131 Jeanine Bucherer, Die Vereinbarkeit von Militärgerichten mit dem Recht auf ein faires Verfahren gemäss Art. 6 Abs. 1 EMRK, Art. 8 Abs. 1 AMRK und Art. 14 Abs. 1 des UN-Paktes über bürgerliche und politische Rechte 29-30 (2005).

132 Scheinin Report 2008, *supra* note 38, para. 28. He added that "the trying of any civilians by military should take place only in limited exceptional situations where resort to such trials is necessary and justified by objective and serious reasons such as military occupation of foreign territory where regular civilian courts are unable to undertake the trials. The Special Rapporteur reiterates his concern that the possibility exists for civilians to be tried by a military commission at Guantánamo Bay, in the case of persons who might be categorized by the United States as unlawful enemy combatants but who in fact were not directly involved in the conduct of hostilities in an armed conflict." *Ibid.*

133 As noted in paragraph 4 of HRC General Comment No. 13 on Article 14, issued in 1984, and now replaced by General Comment No. 32 (2007).

as torture and inhuman treatment to elicit confessions.[134] Ultimate concern is raised in the context of the potential lack of a full review of conviction and sentencing in such courts, both on issues of law and fact. Human rights jurisprudence evinces the fact that even in cases dealing with the offense of terrorism, there is a preference for the jurisdiction of ordinary criminal courts rather than military tribunals over such crimes.[135]

The Inter-American Court places utmost importance upon the trial by *competent, independent and impartial tribunals,* and considers them *essentials of due process*, while condemning the jurisdiction of special or military courts to try civilians in times of emergency.[136] Freedom from any form of political, executive or military pressure on the judicial officers remains fundamental. This right was violated in the composition of the military commissions before the Military Commissions Act (MCA),[137] whereas tribunals established under the MCA appear to arguably pass the independence test.[138] The practice before the military commissions, so far, particularly in Hamdan's conviction and sentencing showed such independence. As to the trial of civilians by military tribunals, as discussed above, one cannot argue that there is international consensus against such action,[139] though, as a matter of policy, *de lege ferenda,* a re-

134 Scheinin Report 2008, *supra* note 38, para. 27.

135 In the case of Peru, the HRC "welcome[d] with satisfaction … the fact that the offence of terrorism has been transferred from the jurisdiction of the military courts to that of the ordinary criminal courts." U.N. Doc. GAOR, A/56/40 (vol. I) (2001), at 45, para. 4.

136 "When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process is violated. That right to due process, in turn, is intimately linked to the very right of access to the courts…. This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial." Castillo Petruzzi, *supra* note 110, at 196-197, paras. 128-131.

137 *Cf.* Findlay v. United Kingdom, ECtHR, Reports of Judgments and Decisions (RJD) No. 30 (1997-I), at 263-282, discussed *supra* in Chapter V, at notes 126-134. Similarly, in the case of some Turkish military courts, the assessment reports on the military judges were compiled by the army; thus no independence was ensured. Bucherer, *supra* note 131, at 63.

138 The European Commission of Human Rights treated the issue of the independence of those tribunals in a few cases of a mostly penal character, and concluded that judges appointed for a limited period of time and who remained active members of the military during their service on the court did not lose their independence as long as their service had a "certain stability," and they were not subject to instructions from their military superiors regarding the exercise of their judicial functions. For details, see Bucherer, *supra* note 131, at 46-53. Similarly, in the case of the assessment reports normally compiled on the military judges by the army, there was going to be no direct dependency of the judges on reviewers.

139 *See* General Comment 32 on Article 14 (July 27, 2007), para. 6. stating: "The Committee notes the existence, in many countries, of military or special courts which try civilians. While *the Covenant does not prohibit the trial of civilians in military or special courts,* it requires that such trials are in full conformity with the requirements of article 14 and that

cent UN study has argued that the "jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel."[140] The same had been suggested by the HRC in General Comment 32. Overall, however, there is a common understanding that when it comes to the independence and impartiality of a tribunal, even appearances are important,[141] and arguably, when it comes to appearances, military commissions as such do not, at least *prima facie*, look independent.[142] Nevertheless, as part of a longstanding tradition and practice, a military tribunal is an emergency body: extraordinary threats require extraordinary protections. No one is yet in a position to judge whether the terrorist threat has subsided, so the *jus in bello* is still relevant.[143] Accordingly, one cannot simply conclude that President Bush was wrong when he stated that an extraordinary emergency exists, and when he determined that such terrorist acts, if not vigorously prevented, will occur again. In this vein, some have noticed that though we "may not be interested in chaos …, chaos is interested in us."[144] Accepting this conclusion, one can also accept the potentiality of

its guarantees cannot be limited or modified because of the military or special character of the court concerned." *Id.* para. 22 (*emphasis added*). However, the HRC sounds this cautionary note: "The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned." *Ibid.*

140 Working paper by Mr. Decaux, containing an updated version of the draft principles governing the administration of justice through military tribunals, UN Doc. E/CN.4/Sub.2/2005/9 (2 June 2005), para.11, commenting on the jurisprudence and general comments of the HRC. *See also* Scheinin Report 2008, *supra* note 38, para. 45(b).

141 "Even appearances may be of some importance….[because] what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused." Case of Yalgin and Others v. Turkey, ECtHR, Judgment of 25 September 2001, *available at* http://www.hri.ca/fortherecord2001/euro2001/documentation/judgments/appln031892-96.htm, para.46. *See* also General Comment 32 on Article 14 (July 27, 2007): "the tribunal must also appear to a reasonable observer to be impartial." *Id.* para 21.

142 Criticizing the very idea of military courts, after the First World War, a French commentator noted: "Military men are men of action and vitality, they care little for formalities. In their hands, the tasks of investigating and adjudicating the facts proceed like an assault with bayonets. The key is to reach the objective—it doesn't matter how—the objective being so to speak, execution." Henri Guernut, *Preface*, in Réau, Les Crimes des conseils de guerree, ix, quoted in Peter Judson Richards, Extraordinary Justice: Military Tribunals in Historical and International Context 183 (2007).

143 For a challenge to the "contention that the military commission functions as a reflexive 'rubber stamp' of executive will," see Richards, *supra* note 142, at 183-185.

144 *See* Robert Cooper, The Breaking of Nations: Order and Chaos in the Twenty-First Century 77 (2004). He adds: "In fact chaos, or at least the crime that lives within it, needs the civilized world and preys upon it …. At its worst, in the form of terrorism, chaos can become a serious threat to the whole international order. Terrorism represents the privatization of war, the pre-modern with teeth." *Ibid.* Further he states that "in the jungle, one must use the laws of jungle. In this period of peace in Europe, there is a temptation to neglect defences, both physical and psychological." *Id.* at 62.

rendering justice through military commissions, challenging somehow the *military music*[145] analogy – as long as the law that establishes them makes sure that military justice operates within the time-honored standards of emergency-proof due process both domestic and international.[146] The ultimate judgment on the international legality of such commissions depends on the assessment of aggregate fairness, in context, of its procedures, both in the text of the law and its application.

145 "Military justice is to justice as military music is to music"—the saying has been attributed to Georges Clemenceau commenting on the Dreyfus affair. *See* Richards, *supra* note 142, at 183, and its note 2.

146 That does not mean that such military commissions have to comply fully with Article 14 guarantees enshrined in ICCPR, and, moreover, it is arguable to consider these guarantees as a whole as untouchable minimum, as Professor Paust would put it, "guaranteed at all persons in all circumstances." Paust, *supra* note 43, at 105. Rather, as this study has argued in previous chapters, many of such guarantees are necessary absolutes, *i.e.* fundamental guarantees of a fair trial, but a number of other guarantees have to be weighed in each particular case and balanced in a way that would make it possible to "solve a conflict between competing rights in a convincing manner," as Professor Klein would argue and also warn, though in a different context, of the danger of expanding certain concepts to a point that "would render the state unable to protect its citizens against … terrorists." *See* Eckart Klein, *Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy*, Israeli Law Review (forthcoming 2008).

CHAPTER VII Discussion of Alternatives and Recommendation of Solutions in the Global Common Interest

*Salus populi suprema lex**

> *Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.*
>
> Alexander Hamilton[1]

Terrorism seems to be the single worst intruder into 21st century mankind's enjoyment of human rights and fundamental freedoms. It could very well also be considered the most notorious saboteur of the foundations of modern human rights law. This study aimed at offering some insights into these issues. At the start of this study the reader was confronted with a number of questions. In this final section, the author wraps up some answers with the hope that you, the reader, will acknowledge as a humble achievement this small step, worked out with thought and hard labor, and will consider it good enough as it can fairly be expected of one effort, and will pardon what is left for you and others to accomplish.[2]

There is no doubt that terrorism is an old phenomenon, but one that, after September 11, has secured the spotlight of the international community's center stage. As discussed above, there are at least sixteen conventions related to the prevention and suppression of terrorism, most of them with different subject matters, but still headed in the same direction. This is telling the story that the world community has been dealing with this issue for quite some time. There is also the slow and sometimes

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* Cicero, De Legibus, Book III, Part III, Sub. VIII, liberally translated as: "The welfare of the people shall be the supreme law."

1 The Federalist (Jacob E. Cooke ed., 1961) No. 8, at 45.

2 Adopted from a statement of Aristotle: "Mine is the first step and therefore a small one, though worked out with much thought and hard labor. You, my readers, or hearers of my lectures, if you think I have done as much as can fairly be expected of an initial start…will acknowledge what I have achieved and will pardon what I have left for others to accomplish." *Cf.* Roza Pati, *The Miami Declaration of Principles on Human Trafficking: Its Genesis and Purpose*, 1 Intercultural Hum. Rts. L. Rev. 5, 9 (2006).

stalling process of the UN *Ad Hoc* Committee on a comprehensive convention on terrorism.[3] However, the modalities that are being worked out on issues like the definition of terrorism, extradition, the transfer of criminal proceedings and prisoners, the seizure and forfeiture of assets, the recognition of foreign penal judgments, mutual assistance etc., in a "piece-meal subject-matter approach," as Professor Bassiouni calls it,[4] would not solve the issue of proper prosecution of the crime of terrorism, if there were no clarity as to the process due the accused of such acts, in the new light of the unique circumstances of the 21st century phenomenon of international terrorism.

While working to combat global terrorism, the newly opened massive front of prosecution of acts committed in its pursuit is what needs to receive particular attention.[5] For starters, it might be appropriate to seek to define "international terrorism"[6] and not merely "terrorism,"[7] to define the "due process" owed terrorist suspects, and

3 The *Ad Hoc* Committee established by General Assembly Resolution 51/210, December 17, 1996, is still in its process of negotiating to try to achieve a compromise solution on the text of a draft comprehensive counter-terrorism convention. In its February 25-26 and March 6, 2008 session, the *Ad Hoc* Committee recommended to the Sixth Committee that a working group be established in order to finalize the draft convention on international terrorism, as well as planning on convening a high-level conference under the auspices of the United Nations. As it has come to be seen, states find it difficult to agree on a text that would produce binding and comprehensive counter-terrorist law; they find it much easier to adopt without a vote resolutions that address the same issue. Consequently, some scholars would argue that maybe it is more imperative to "enhance compliance with existing 'sectoral' treaties" than coming up with a new treaty. *See* Andrea Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism*, in International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism 3, 21 (Giuseppe Nesi ed., 2006).

4 M. Cherif Bassiouni, International Terrorism: Multilateral Conventions (1937-2001) 7 (2001). As to the definition of terrorism, Professor Kalliopi Koufa, former UN Special Rapporteur on Human Rights and Terrorism has, for many years, been analyzing the issue of the definition of terrorism and considered it to be "one of the most controversial issues in the contemporary international legal and political arena," treated in a piece-meal fashion, crime by crime and issue by issue, avoiding a comprehensive approach. For more on actors and issues involved, see Kalliopi Koufa, *Terrorism and Human Rights: Progress Report*, U.N. Doc. No. E/CN.4/Sub.2/2001/31 (27 June 2001); *see also* Kalliopi Koufa, *Specific Human Rights Issues: New Priorities, Particularly Terrorism, Additional Progress Report*, U.N. Doc. No. E/CN.4/Sub.2/2003/WP1 (8 August 2003).

5 Many a time, international fora offer more than one option for prosecuting a case under the same set of facts. *See* Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals (2003).

6 It is not enough to be guided by the simplistic understanding of such a conduct as merely "prohibited by an international convention," as Professor Bassiouni defines it. Bassiouni, *supra* note 5, at 8.

7 Some scholars take the stand that defining "terrorism" is not only be a "politically unfeasible undertaking," but also be a pointless effort. *See* Bassiouni, at 8, also quoting R.R. Baxter, *A Sceptical Look at the Concept of Terrorism*, 7 Akron L.J. 380 (1974); and M.

the justice that may result. Actually, it appears to be not only desirable but necessary that the world community of states join together in concerted efforts to combat this ubiquitous menace to world peace and security in a dispassionate way. Ratifying the existing conventions against terrorism is one good step forward, but it is not enough.[8] For one, the use of force by certain states in combating terrorist organizations beyond their borders is already causing tension amongst states, and has only increased the perplexity of the application of rules, declared policies and practices in international law.[9]

In waging this fight, as the discussion in previous sections as well as the numerous consulted references have suggested, there seems to have been at best a neglect and at worst a destruction of the various international standards regarding due process. However, maybe it is about time that the "creative destruction" theory is applied not only in economics, but to this phenomenon as well. Maybe the old paradigm of due process standards needs partial refreshment for the purposes of prosecuting the global war on terror, but not necessarily a total restructuring following bankruptcy, as the Executive Branch has been trying to achieve. An unprecedented security threat would warrant unprecedented security measures, but in fashioning those, the fundamental principles which a nation like the United States is built upon ought to remain lofty and untouched. The humane treatment of the captives and the absolute prohibition of torture constitute the core of such fundamentals. A world order of human dignity cannot be built on the reciprocity of treatment when your adversary is a gruesome and cold-blooded killing machine: a free democratic country like the U.S., which treasures the rule of law above all, cannot and should not lower its standards to its level. By living up to its ideals, the U.S. preserves its necessary global role as the chief proponent of the rule of law, human rights and democracy, showing the world that it stands firm for the concept of a just world order under law. The proponents of a "*Feindstrafrecht*" for terrorists would not only have some difficulties reconciling

Cherif Bassiouni, *Methodological Options of International Control of Terrorism*, 7 Akron L.J. 188 (1974).

8 Just recently, Switzerland ratified four international conventions and protocols of the United Nations combating nuclear and maritime terrorism, joining only two other States that have ratified all 16 universal UN conventions and protocols combating terrorism. *Combating Terrorism More Effectively by Legal Means*, Oct. 15, 2008, *available at* http://www.diplomacymonitor.com/stu/dm.nsf/dn/dn737F7AE4CDC146B6852574E3005F3308.

9 Consider for instance the reaction of the OAS as regards the March 1, 2008 attack of Colombia against the FARC (Revolutionary Armed Forces of Colombia) camp located in Ecuador. FARC violence against Colombia has been considered a terrorist attack by the UN Security Council in its Resolution 1465 of 2003; the OAS had followed suit with Resolution 837 (1354/03), condemning the terrorist attack. After Colombia's 2008 attack, the OAS, however, condemned Colombia as violating Ecuador's sovereignty, its territorial integrity, and other principles of international law. *Cf.* Tatiana Waisberg, *Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors*, ASIL Insight, Vol. 12, Issue 17, Aug. 22, 2008.

their prescriptions with the human rights principle of equality before the law;[10] they themselves acknowledge the danger of its abuse and refuse to demarcate the line where the ultimate boundaries of human decency and legality are crossed.[11] While it might very well be true that anti-terrorism measures will remain an abiding feature of world politics and international law, it would nevertheless be dangerous to resort to the idea of a criminal law or constitutional order that would place individuals outside the definition of the human community. The humanity is a whole, albeit an imperfect constellation with lots of self-destructive elements, such as terrorists. The laws that govern humankind generally, do govern every one of its members individually, although with tougher sanctions applied to more radically dangerous acts, and their perpetrators, who cannot nevertheless be considered "*Unpersonen*."

At the same time, the adjudication of terrorism suspects by the armed forces may, in certain circumstances and under essential fair trial guarantees, be appropriate. Military justice, properly conceived, can be an instrument of justice.[12] It may even be necessary to achieve a speedy adjudication while saving material and human resources at a time when they are needed most elsewhere; there may be arguments that it better protects sensitive data of national and public security as well as judges, witnesses and others involved in the process.[13] Understandably, in this scenario, terrorist suspects would not be afforded all the same guarantees that are afforded to a criminal suspect within the national legal systems of a country, but, then again, terrorists are not ordinary criminals, as they have become most unpredictable and dangerous co-

10 Dick Marty, Secret detentions and illegal transfers of detainees involving Council of Europe member states, Second Report (Explanatory Memorandum), Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 7 June 2007, Doc. AS/Jur (2007) 36, *available at* http://media.washingtonpost.com/wp-srv/politics/ssi/full_report_marty_060807.pdf, para. 351.

11 Günther Jakobs, *Terroristen als Personen im Recht?*, *supra* Chapter IV.C.2, at notes 287-298. *See also* Otto Depenheuer, Die Selbstbehauptung des Rechtsstaates (2007).

12 However, other scholars come to a different result. *See* Christoph Grabenwarter, *Right to a Fair Trial and Terrorism*, in Les Nouvelles Menaces Contre la Paix et la Securite Internationales, 211, 214-215 (A Pedone ed., 2004). Referring to the jurisprudence on Article 6 of the ECHR, as well as that on Article 14 of the ICCPR, Grabenwarter considers the conclusion "relatively clear" that "*pure* military tribunals established for the trial of terrorists are not in line" with such jurisprudence. *Ibid.*

13 *See generally* Peter Judson Richards, Extraordinary Justice: Military Tribunals in Historical and International Context (2007); Neal Richardson & Spencer Crona, *Detention of Terrorists as Unlawful Combatants and Their Trial by American Military Commissions*, in Law in the War on International terrorism 123 (Ved P. Nanda ed., 2005); and Robert Hardaway, Christopher Hardaway & James Siegesmund, *Military Tribunals and Civil Liberties in Times of National Peril: A Legal and Historical Perspective*, in Law in the War on International terrorism 169 (Ved P. Nanda ed., 2005). A comparative discussion of the right to an independent and impartial judge and jury can be found in Stefan Sottiaux, Terrorism and the Limitation of Rights: The ECHR and the US Constitution 332-344 (2008).

travelers of the 21st century era of globalization. For lack of a better judicial system in the world today, military tribunals *per se* are not *prima facie* the greatest injustice, if any, done in the fight against terrorism.

In the war on international terrorism, as it has shaped up now, the adversary is not fighting for liberty. On the contrary, terrorists of the Al Qaeda vintage are fighting against individual freedom and the rule of law; they are engaged in a "dirty war" [14] with no rules one can ascertain; they do not have a clear political agenda, such as the goal of independence, as, say, the rebels in Northern Ireland and Chechnya. All one can discern is that they desire that the entire world convert to their version of Islam, and thus they would like to be able to impose the most fanatic part of their culture and the most fundamentalist part of their religion upon the rest of humanity, particularly the West. Consequently, there is no doubt in any sound mind that, for purposes of self-preservation of our liberal and democratic culture, this goal has to be fought with all one's might. In addition, the real danger of a nuclear terrorist attack – aware as we are that the proliferation of nuclear material and capabilities is not a mere nightmare any more – does require that all conceivable measures be taken to prevent this doomsday scenario. The governments owe this to their people; the world community of states owes it to its overarching goal of maintaining international peace and security.

In the past, we have seen many cases of countries plagued by internal spasms of terrorism that have successfully fought off this scourge through various out-of-the-ordinary measures, while preserving the core of their fundamental rights and civil liberties. The Federal Republic of Germany in its dealings with the "Red Army Faction," Italy with respect to the "Red Brigades," the U.K. as regards the IRA, and Turkey with respect to the Kurds come to mind. In contrast, the U.S. is facing an outside enemy, which makes it an international (though it may not be an "inter-nations") war, and not an essentially internal conflict. In addition, this conflict appears to truly be a clash of civilizations. One would hope there are ways to mitigate this struggle short of war. Strategically, and procedurally, a serious global dialogue with moderate, non-fundamentalist Islam should thus constitute an essential part of international diplomacy. Ignoring the problématique that associates with about 21% of the population of the world would not appear to be a valid option.[15] But how realistic is it that this dialogue will actually work? Since 1945, the United Nations has been promoting a universal system of human rights protection. Today still, however, extreme cultural relativists have not moved one iota from their firm beliefs that human rights are contingent on group values. In various cultures, some of them based on religion, for example, women are still considered half a man, and sometimes even the property of

14 Still, some scholars have been discussing the legitimacy of terrorism, asking for "internationally sanctioned avenues for pursuing legitimate grievances and resolving them," in order to remove the unavailability of peaceful alternatives as a argument for turning to violence. *See* Michael Levine & Saul Newman, *Sacred Cows and the Changing Face of Discourse on Terrorism: Cranking it up a Notch*, 10 Int'l J. Hum. Rts. 359, 368 (2006).

15 According to a 2007 estimate, 21.01% of the world's population are Muslims. *See* CIA World Factbook, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html#People (last visited September 29, 2008).

men. While initiating and continuing this necessary global intercultural dialogue, we should not expect any prompt results.

On the other hand, it seems that the best way to move forward would be for the international community to concentrate on developing legal structures and instruments that would take into account the special configuration and dynamics of the 21st century war against terrorism. Observing the rules fashioned in response to our past wars and conflicts would be instructive but not altogether prescriptive.[16] It is time to devise an all-new strategy and tactics to face this monstrous threat to our civilization. The new comprehensive convention on international terrorism, which is still in the works, would need to have a clear section on the process due terrorist suspects, and on ways and standards of adjudicating such acts. The post-World War II world community has given proof that it can produce successful systems to defend human rights and liberties, while also addressing security interests of states. The powerful global and regional systems of human rights protection that limited once-untouchable state sovereignty in internal affairs is a perfect precedent. The new world paradigm of after September 11 demands taking this new challenge seriously.

In the meantime, no weakness, weariness or reluctance should be shown in this war; the adversary is showing none either.[17] If not properly guarded, the Western

16 For that matter, even the discourse on what label to use as we address this conflict, be it "war," "crime," or "emergency situation," shows exactly the legal quagmire we find ourselves in, and goes to prove that we are missing the laws that would specifically address the particular sort of conflict we face in the 21st century. *Cf.* Professor Paust arguing that "the United States cannot be at 'war' with Al Qaeda or Terrorism," since such groups are not part of any "entities understood in international law." Jordan Paust, Beyond the Law: the Bush Administration's Unlawful Responses in the "War" on Terror 48-50 (2007). Even if we agree with this argument, the immediate next question is: what then?

17 Terrorist groups are showing no fatigue in inflicting blast after blast (just recently, in the month of October 2008, several countries like Turkey (near the city of Semdini), Sri-Lanka (on its Northern area) , Pakistan (Panjab), Georgia (Tshkinvali), India, Peru (Tayacaja) experienced terrorist attacks; diplomatic reactions to such attacks are *available at*: http://www.diplomacymonitor.com/stu/dm.nsf/issued?openform&cat=Terrorism. Only in the period of January 1 through February 18, 2008, there have been recorded about 511 persons dead and about 1202 persons wounded in 34 terrorist attacks, as reported by several news agencies such as CNN, BBC, Voice of America, Associated Press, Reuters, New York Times, CBS, and the Los Angeles Times, http://en.wikipedia.org/wiki/List_of_terrorist_incidents%2 C_2008). They continue to employ abhorrent tools of destruction (*compare* Fred W. Baker III, American Forces Press Service, *Iraqi Hospital Chief Detained in Bombing Investigation*, Feb. 13, 2008, reporting that a psychiatric hospital administrator in Iraq was detained on suspicion of supplying mentally impaired women for al Qaeda terror missions, *available at* http://www. diplomacymonitor.com/stu/dm.nsf/dn/dn6F-B52C3F8106D2E7852573EE00646CF6, and accrue substantial financial resources (*see* Israeli Ministry of Foreign Affairs, *Terrorist Finance Network Discovered*, Feb. 12, 2008, *available at* www.diplomacymonitor.com/ stu/dm.nsf/dn/dn07D0C1F4697EAD84852573ED004589C7), in constant pursuit of Bin Laden's "apocalyptic prediction" in 1998, and reiterated after September 11 attacks, of a black future for America, promoted by his

system of values, proven to be so conducive to the self-realization of human beings, could be headed towards failure. Striking the proper balance between prevention and the prosecution of terrorist acts on one side and human rights and liberties on the other is the challenge of the day: our generation of leaders, called on to make decisions on pertinent law and policy, has tough choices to make,[18] and as the U.S. Supreme Court recently confirmed, liberty and security can only be reconciled within the framework of the law.[19] The U.S. has taken on the global war on terror most intently, and rightly so. From a rule of law approach, it is uncontested that restrictions should be placed on executive power, certain boundaries and balances preserved, and limitations on rights should in no way interfere with the essence of right so as to render it meaningless. That being said, rejecting all that the U.S. has done and is doing to combat terrorism would be an irresponsible, if not a harmful stand, as long as it is not combined with the suggestion of better workable ways to combat the greatest threat that Western civilization has ever faced: being attacked with the intent of indiscriminate physical extermination only for the fault of being a non-Islamic liberal democracy. Simple Anti-Americanism, and across the board denunciation of its actions, sometimes clearly displayed, is not an option either.

Obviously, criticism of the government is a protected activity under the U.S.' cherished freedom of expression. It must, however, also be said that such criticism regarding the conduct of the war on terror is a relatively comfortable position to take, since arguments highlighting the wrongdoings of a state are the easiest to make in a democratic society. Beyond such criticism, important as it is, what should also be undertaken, is a careful analysis of the government's aims and claims – a government on the front line with a most dangerous, vindictive, mischievous and ruthless enemy. It will not be sufficient or helpful to this nation nor to humanity in the long run to take the stand of a persistent and permanent opponent of any government action confronting terrorism without engaging in the dialogue on effective countermeasures. Justice Kennedy's advice to the political branches to "engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism,"[20] should also resonate in the community of scholars and academics, journalists and civil society at large.

After all, it might not be a bad idea to try to find solutions as to how to handle emergency situations in the long run before they happen again. History has shown

considering it a duty for any Muslim to "kill the Americans and their allies – civilians and military – … in any country." Efraim Karsh, Islamic Imperialism – A History 226-228 (2006).

18 An interesting analysis of weighing policies nationally and also within the community of nations can be found in Jost Delbrück, *Right v. Might – Great Power Leadership in the Organized International Community of States and the Rule of Law*, in Verhandeln für den Frieden – Negotiating for Peace: Liber Amicorum Tono Eitel 23 (Jochen Abr. Frowein et al. eds., 2003).

19 Boumediene v. Bush, 128 S.Ct. 2229, 2277 (2008), Justice Kennedy, speaking for the Court.

20 *Ibid*.

that they will, and that the society will be caught by surprise and will react in panic. Professor Bruce Ackerman has taken a step forward by proposing an "emergency constitution,"[21] a framework statute with extraordinary powers for the Executive Branch, including preventive detention, but excluding torture, that would kick into action in times of emergency through the authorization of Congress, combined with a supermajority "escalator" to decide on its renewal. This "escalator" is intended to forestall permanent emergencies. This proposal, not very clear on the details of such emergency powers,[22] puts enormous faith into the wisdom of the Legislative Branch, one tested by the rapid approval of the PATRIOT Act and the Military Commissions Act, unfavorably reviewed, in part, by the Supreme Court, and also by the UN Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while encountering terrorism.[23] Moreover, it is a solely domestic response, reaffirming U.S. sovereignty in handling an essentially global phenomenon. It may be lacking in responses to future threats that are substantially different in nature. Particularly in its "escalator" provisions, fashioned after the South African Constitution's model, it assumes that emergencies are relatively short-term – an assumption probably at odds with the realities of the global war on terror.[24] In any event, even if such a framework statute may not be the right answer,[25] we may not content ourselves with rules and laws that were set up in times that were much dissimilar to ours. Many a time, such rules do not apply or they contain *lacunae* that could not have been fore-

21 Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029 (2004). For scholarly reactions to this article, see, *inter alia*, Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 Yale L.J. 1801 (2004), and David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 Yale L.J. 1753 (2004). *See also* Bruce Ackerman's *Response: This Is Not a War*, 113 Yale L.J. 1871 (2004), and Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006). *See* also Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 Fordham L. Rev., 475 (2006).

22 Laurence H. Tribe & Patrick O. Gudridge, *supra* note 22, at 1818 ("by and large, Ackerman avoids the question of what the government's emergency powers would be").

23 UN Special Rapporteur, Professor Martin Scheinin in his fact-finding mission to the United States assessed U.S. law and practice in the fight against terrorism, and concluded that certain segments of both the PATRIOT Act as well as of the MCA constitute violations of several rights contained in the ICCPR, such as the prohibition of torture, arbitrary detention, several elements of the fair trial guarantee, the presumption of innocence, prosecution on *ex-post facto* laws, extrajudicial killings and enforced disappearances, the right to privacy and protection against arbitrary interference with one's privacy. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum, Mission to the United States of America, U.N. Doc. A/HRC/6/17/Add.3 (22 November 2007).

24 Escalating majority requirements to retain such emergency measures may not address longer-lasting emergencies effectively. Kim Lane Scheppele, *We Are All Post-9/11 Now*, 75 Fordham L. Rev. 607, 613 (2006).

25 The most extreme opponents would even consider it "self-defeating proposal," or a theory failing to calibrate "diagnosis with remedy." *See* Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 Fordham L. Rev. 631 (2006).

seen to be filled at the time and place of their formation. Reading the U.S. Supreme Court's decisions on terrorism cases one can easily discern its sometimes helpless struggle to find any settled precedents that can be, at best, instructive in interpreting constitutional provisions.

Additionally, all law that regulated war came after particular instances of armed conflict had happened and those regulations were informed by these events. History has shown that new wars tend to be ever more novel and advanced in technology and techniques to defeat the adversary, and almost at all times, the laws governing armed conflict lag behind and leave blank spots, unable to fully encompass the conflict at hand. It happened so with the 1929 Geneva Conventions, reacting to a different setting than the 1899 and 1907 Hague Conventions. Later, the 1949 Geneva Conventions contemplated a war with different characteristics, and, later again, the Additional Protocols to the Geneva Conventions used as one of their predicates the war in Vietnam. It seems that the progress of the international law governing war has stopped there. The war on terror, however, is proving to be hard to be governed by the rules and procedures enshrined in the above-mentioned documents. New rules, principles and procedures that more precisely fit the facts and the contexts of today's international terrorism are long overdue.

The Hague and Geneva Conventions, in particular, contemplated a "gentlemen's war," the paradigm of fighting face to face, and of easily traceable trails of battles. Today, when technology and cyberspace have shrunk the world to a global village, when international terrorism knows no borders, when the potentiality of the use of nuclear weapons by private actors of the terrorist kind is not an imaginary, but a quite realistic threat, the need to respond in new ways is not just desirable – it is a necessity.

For the time being, humanity has to make do with what it has at hand, and when pertinent legislation is missing, maybe the courts, without usurping the legislative role and respecting the legislative intent, can still find ways to apply the old laws to the new patterns of facts. After all, law is a process.[26] It is obvious from the analysis of the U.S. measures taken against international terrorism that there does not seem

26 "Law, seen empirically, is a distinct social process, a process of communication of a particular nature: the relevant messages sent are statements of policy content that are transmitted by persons with authority in the relevant community, and include the express or implied threat of severe deprivations of values in the case of non-compliance and the promises of high indulgences or benefits in the case of compliance (signifying control intent). In short, law is conceived of as an *ongoing process* of *authoritative and controlling decision.* It is a human artifact, established, maintained and changed by the decisions of the politically relevant actors." Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 German Y.B. Int'l L. 96, 101 (2001). The following statement captures the nature of the change of the law by judges interpreting statutes: "[L]aw is not something which is (completely) made at one point in time, and afterwards simply 'applied' by officials, citizens and by judges to concrete cases. Law is constantly made, adapted and developed in legal practice, and most prominently by judges. If a court adapts, and even changes, the content of a legislative rule, it is not in so doing, usurping its role, but in most cases rather fully assuming its tasks and duties. Legislators cannot foresee everything, nor can they constantly adapt every statute to changed circumstances. It is

to be too high of a regard for international law, not even for that part of it which the U.S. is obliged to observe because of its express commitments to the world community. This is not just a matter of politics or the whims of department bureaucrats. The courts, too, including a good number of the justices of the Supreme Court, often appear to be tightly wrapped in their own legal culture and their doctrine of precedent that keeps them whirling in their domestic legal reasoning pool, blissfully oblivious of the well-established principles and the resulting obligations of international law. This "inward"[27] interpretation of the U.S. Constitution does not seem to have much in common with the Constitution itself that makes treaties the law of the land.

In these circumstances, one issue comes back to the fore: the necessity of the ratification of international instruments governing international criminal and human rights law, as well as humanitarian law by the United States. This is necessary not only to end the continuing isolation of American constitutional law from international human rights law, but also to create the factual opportunity for cross-fertilization of rules and for evincing a higher regard for universally accepted standards, as well as to improve U.S. legal practice. The U.S. judge-made and heralded doctrine of "non-self-executing" treaties works to create a *lacuna* in the standard interpretation of provisions related to due process. It is about time to lift up such a roadblock. Finding the contemporary common normative denominators becomes crucial. International law is not an anathema; on the contrary, it is the required balance weighted against the uncontrolled force, no matter what side it comes from. As the world economy experiences the worst turmoil in markets during September and October 2008, one can be brought to remember the intricate interlinkage of our global destiny. Unlike the corporate world that has moved to common practices and standards all over the world, the world of law in other areas than business is becoming ever more reluctant and slower in unifying governance by the same global standards of the rule of law.

States continue to hold a firm grip on the precedence of domestic law in dealing with issues, even those of global nature, thus impairing the efficiency of their acts. Looking beyond the U.S., policies and laws promulgated as well as methods and means employed by countries that have been facing terrorism for a long time, such as the U.K., Spain or Israel, do not seem to give a clear roadmap in dealing with the issue either. Present-day international terrorism is capricious and powerful; it is politically backed up either openly or secretly, with a high potentiality of never running out of manpower, suicide bombers, financial resources or weaponry. Hence, at this historical juncture, subscribing to international law and regulation must take precedence. This is a cause worth fighting for, so that no one would have to ask the rhetorical question "for whom the bell tolls?" as humanity needs to unite to address and direct its common destiny.

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precisely the task and the duty of the judges to fill in the gaps which every legislator must inevitably leave." Mark van Hoecke, Law as Communication 176 (2002).

27 *Cf.* Noah Feldman, *When Judges Make Foreign Policy*, N.Y. Times Magazine, Sept. 25, 2008, with an interesting discussion of liberal and conservative views on law as reflected by the Supreme Court judges in their recent decisions in *Medellín v. Texas* and *Boumediene v. Bush.*

Within the U.S., waging the war, and adjudicating terrorism exclusively based on the Executive's war powers has also proved to be counterproductive, particularly in times "when the laws can act, [which would render] every other mode of punishing supposed crimes … itself an enormous crime."[28] For a well-established democracy that cherishes liberty above all, Justice Davis most dramatically opined that "a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."[29] To satisfy the sentiments of many who are concerned about government interference with, say, their privacy, Justice Davis' comment would be a response to a number of PATRIOT Act provisions. As to the prosecution of unlawful combatants, the Chief Justice's concurring opinion in *Milligan* could offer guidance: "The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized, though merited, justice."[30]

What was done in the past might be attempted in the future. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[31] The 21st century guiding light of a world order of human dignity cannot tolerate that rights be atrophied, even when waging a long war whose end and whose final result is still unable to be predicted, particularly in an age of arguably unwinnable wars.[32] However, the people do need to be safe and feel secure as they continue to lead their daily lives. This difficult balancing act shifts the weight on and off between the competing interests of liberty and security. While there are no ready-made formulas applicable in all circumstances, a flexible, rather than a categorical,[33] approach to limitations on rights tailored to the need for security would be a better stance. To that end, this study expresses the preference for a system of government that would best serve society's common interest in securing maximum access to all the human aspirations, within which security and liberty are equally important. Consequently, at times, the temporary legal regime that weighs on security overtakes the other, only to pave the track for the more permanent legal regime of liberty to reign back in full.

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28 Lord Brougham and Sir James Mackintosh, quoted in *Ex Parte Milligan*, 71 U.S. 2, 115, 128 (1866).

29 Milligan, at 126.

30 *Id.* at 132.

31 *Id.* at 120.

32 For arguments leading to a conclusion of "unwinnable wars," and for an insightful analysis of presidential war powers, see Geoffrey Perret, Commander in Chief: How Truman, Johnson, and Bush Turned a Presidential Power into a Threat to America's Future (2007).

33 A comparative analysis of European and U.S. limitations on rights in combating terrorism, and a discussion of "flexible balancing models of limitations" *vis-à-vis* a "more rigid categorical limitations" approach is found in Stefan Sottiaux, Terrorism and the Limitation of Rights: The ECHR and the US Constitution (2008), particularly, at 406-410.

Furthermore, terrorism of the Al Qaeda type is a global scourge; it needs a global response. The answer offering the best chance for achieving the twin goals of sustained success in the global war on terror and maintaining the values-based identity is the development of international minimum standards for the treatment and adjudication of terrorist acts, as a separate category of international crime. UN General Assembly Resolution 59/191[34] and its system of monitoring of the protection of human rights while countering terrorism, together with the Security Council's counter-terrorism measures, are good places to start. The long and unfinished journey of a legally binding comprehensive convention testifies to the difficulty in attaining consensus now. Alternatively, for a quick start, at least the development of best practices[35] or voluntary codes of conduct[36] in the field should be immediately considered. In the quest for global standards, the two hardest issues facing the traditions of due process in fighting global terrorism have to be addressed: the treatment of suspected terrorists and their adjudication.

As to the *treatment of suspected terrorists*, the human dignity interest of the detainees and the legitimate security interest of the community demand careful balancing. Then-Defense Secretary Donald Rumsfeld had stated that the Al Qaeda and Taliban fighters rank "among the most dangerous, best-trained vicious killers on the face of the earth."[37] Vice President Dick Cheney put it this way: "These are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort. And they need to be detained, treated very cautiously, so that our people are not at risk."[38] Given the fact that the U.S. has already released or repatriated roughly four hundred and twenty three Guantánamo detainees, these statements are at least partially hyperbolic.[39]

On the other hand, the horrific nature of their acts speaks for itself. In addition, reports note that at least thirty of the detainees released to their home countries, appear to have immediately rejoined the terrorist fold; a number of them were killed in anti-terrorist raids.[40] Caution also makes sense given the experience of the *Mamdouh*

34 U.N.G.A. Res. 59/191 (2004): Protection of human rights and fundamental freedoms while countering terrorism.

35 As suggested by UN Special Rapporteur Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/63/223, 6 August 2008, para. 45.

36 As recommended by Council of Europe Rapporteur Dick Marty, *supra* note 11.

37 Katharine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W's, Cheney and Rumsfeld Declare*, N.Y. Times, Jan. 28, 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E00EEDF123AF93BA157 52C0A9649C8B63.

38 *Ibid.*

39 Andrew O. Selsky, *Vicious killers' from Guantanamo Bay routinely freed by other countries*, Associated Press, Dec. 15, 2006, *available at* http://www.usatoday.com/news/world/2006-12-15-gitmo-freed_x.htm.

40 U.S. Department of Defense report, *available at* http://www.defenselink.mil/news/d20070712formergtmo.pdf.

Salim case, an Al-Qaeda operative awaiting trial in New York City in 2000 for his part in the 1998 embassy bombings; he used a comb to stab a prison guard through the eye.[41] For such reasons of continued dangerousness, certain special measures and limitations upon the enjoyment of the rights provided for in the human rights treaties and the Geneva Convention are warranted.[42] But these limitations need to be narrowly tailored to the precise threat posed by the detainees, and in view of the totality of circumstances. While a delicate juxtaposition of the human dignity interest of the detainees and the legitimate security interest of the community takes place, the prohibition of torture as well as cruel, inhuman and degrading treatment cannot ever be balanced away. These concepts require a clearer elemental definition that would materialize in their absolute prohibition: no immunities granted; no statute of limitations; and no "superior order" defense. Courts could play a major role in this respect. If basic obligations under minimum international standards as to the treatment of detainees are met, then the security-based limitations can be specifically tailored, and also tolerated. "The international human rights and humanitarian standards allow for flexibility in emergencies, but the standards still apply and must be upheld."[43] An important guarantee to be granted at all times is access to detainees by the International Committee of the Red Cross. This guarantee should remain untouched. The right to challenge the lawfulness of detention is also categorical, and no interest could possibly justify *incommunicado* detention. Additionally, the home countries of the alleged terrorists could also, if they chose to do so, legitimately claim the observance of the time-honored international minimum standard of diplomatic protection: foreigners cannot be denied an international minimum standard of justice[44] that would result in a *déni de justice*, particularly in a context where ordinary courts are not accessible to foreigners or where guarantees are missing that are indispensable to the proper administration of justice.

As to the *criminal prosecution and adjudication of suspected international terrorists*, international tribunals have a strong initial attraction, since the Al Qaeda terrorist threat is directed against world order itself, not just the United States. The International Criminal Court could have been such a forum, but to be truly effective,

41 Susan Saulny, *As Attacker Is Sentenced, Victim Vents Disgust and Is Ejected*, N.Y. Times, May 4, 2004.

42 And with this assertion comes the fact that there is already an environment "deeply inimical to due process." Tom Farer, *The Two Faces of Terror*, 101 Am. J. Int'l. L. 363, 366 (2007).

43 Mary Robinson, *Denying captives rights will return to haunt us*, Independent, Jan. 19, 2002, *available at* http://www.independent.co.uk/story.jsp?story=115264.

44 Actually, the Vienna Convention on Consular Relations sets out rights and duties related to all persons deprived of freedom related to a criminal offence as entailing the duty for the detaining State to inform the accused of his right to consular protection, and such a right "must be counted among the minimum guarantees in Article 14 ICCPR, and applicable to the American States." *See* Advisory Opinion by the Inter-American Court of Human Rights on "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law," in Louise Doswald-Beck & Robert Kolb, Judicial Process and Human Rights (2004).

it would need the U.S. to be part of it. Additionally, the U.S. and other countries have worked to exclude terrorism as a crime from the jurisdiction of the ICC, so an important part of the jurisdiction *ratione materiae* is missing.[45] Revisiting the ICC option, by amending its statute to include the crime of international terrorism, and by negotiating with the U.S. in order to calm its apprehensions to allow it to ratify the Rome Statute, should remain a priority item on the agenda of the community of nations.[46]

The more realistic options are then domestic tribunals. U.S. civilian courts conducted the Walker Lindh, Moussaoui, Padilla and other Al Qaeda-linked terrorist cases on U.S. territory using the same procedures as in every other criminal trial. The same happened in Germany and the United Kingdom.[47] The advantage of treating terrorism as a crime, albeit vicious and horrific, would be to safeguard the due process guarantees achieved through decades of litigation, as well as to potentially minimize the glamorization of terrorists as war heroes.[48] However, in light of the discussion above, this does not seem to be a matter of preference for the U.S. Its military commissions outside U.S. sovereign territory dealing with the criminal justice legacy of the September 11 attack could nevertheless be sustained if they comply with the minimum due process guarantees in situations of emergency as detailed above. The recently decided case of *Hamdan* before a military commission may be taken by some as proof that military justice can actually work, even fairly. More such practice is, however, needed to convince a skeptical international community of the minimum procedural adequacy and legality of these institutions. The commission's decision in *Hamdan* also raised some eyebrows as it resulted in a marked discrepancy in sen-

45 However, some scholars would argue in favor of prosecuting terrorism as a crime against humanity under Article 7 of the ICC Statute. *See* Roberta Arnold, *Terrorism as a Crime Against Humanity Under the ICC Statute*, in International Cooperation in Counter-Terorism: The United Nations and Regional Organizations in the Fight Against Terrorism 121 (Giuseppe Nesi ed., 2006).

46 Early on, an *ad hoc* international criminal tribunal, following the examples of the Nuremberg and Tokyo International Military Tribunals after World War II, or the more recent creations of the Security Council, *i.e.* the International Criminal Tribunal for Yugoslavia and the International Criminal Court for Rwanda, could have been an option, but, as discussed above, they too have their difficulties, and the general impression is not necessarily one of ultimate efficiency. In any event, in the Security Council, the U.S. might have vetoed any such tribunal because of, *inter alia*, its lack of the death penalty sanction. As of the time of this writing, 255 detainees remain detained in Guantanamo, waiting to be tried, transferred or released. William Glaberson, *Despite Ruling, Detainee Cases Facing Delays*, N.Y. Times, Oct. 4, 2008, *available at* http://www.nytimes.com/2008/10/05/us/05gitmo.html?hp.

47 Grabenwarter, *supra* note 13, at 224.

48 On the other hand, there are arguments that terrorists could exploit civilian trials for purposes of propaganda. The manuals used for training terrorists paid good attention to providing strategies and guidance for disinforming and manipulating the media and the public. *See* Neal Richardson & Spencer Crona, *Detention of Terrorists as Unlawful Enemy Combatants and Their Trial by American Military Commissions*, in Law in the War on International Terrorism 123, 155 (Ved P. Nanda ed. 2005).

tencing as compared to that of Lindh or Padilla, who were tried in civilian courts and had received a much more severe punishment than Hamdan. This research study proves once more that there are no easy solutions to the challenge of international terrorism, and that ultimately a concerted effort of the international community is needed to deal effectively with this serious threat. Terrorists can be considered *hostes humani generis*, just like the pirates or the slavers of the past, but they are still to be judged as part of *humanitas* under humankind's civilized laws of today.

The United States can continue to go it alone in the war on terrorism. It seems to still have the power to do so, and some realists would stress exactly that: the U.S.' legitimacy stems from its superior military power rather than its commitment to international law.[49] But a measure of wisdom would help in the choice of means to fight for a world order of human dignity:[50] loyalty to the paradigm of the rule of law, including international law which the U.S. so undeniably fostered, throughout its history – all converging in a "synthesis of state sovereignty and individual human sovereignty."[51] Global cooperation on the basis of globally shared values resting on the principle of human dignity would seem to be a better recipe for success. Otherwise, Rudyard Kipling's words to the British *hegemon* of old could seem appropriate again:

If, drunk with sight of power, we loose
Wild tongues that have not Thee in awe,
Such boastings as the Gentiles use,
Or lesser breeds without the Law –
Lord God of Hosts, be with us yet,
Lest we forget – lest we forget!

For heathen heart that puts her trust
In reeking tube and iron shard,
All valiant dust that builds on dust,
And, guarding, calls not Thee to guard,
For frantic boast and foolish word –
Thy mercy on Thy People, Lord![52]

49 Robert Kagan, *America's Crisis of Legitimacy*, Foreign Affairs, March/April 2004, at 65.

50 For abiding guidance, see Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, Human Rights and World Public Order (1980).

51 Shiv RS Bedi, the Development of Human Rights Law by the Judges of the International Court of Justice 355 (2007). "[T]here is an indissoluble link between human rights and international law which may be described as follows: human rights as an ideology of law, with the concept of human dignity at its core, is the legislative spirit of the body of international law." *Ibid.*

52 Rudyard Kipling, "*Recessional*" (1897), cited in Detlev F. Vagts, *Hegemonic International Law*, 95 Am. J. Int'l L. 843, 848 (2001).

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