

**SHEDDING LIGHT ON A LEGAL  
BLACK HOLE: THE RIGHTS OF  
DETAINEES HELD IN U.S.  
CUSTODY AT GUANTANAMO**

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**I. Introduction**

Following the attacks of September 11, 2001, the United States initiated military operations against Taliban and Al Qaeda forces in Afghanistan. According to President Bush, a state of armed conflict existed between the United States and Al Qaeda, and U.S. military operations in Afghanistan were part of the overall campaign in the war on terrorism.<sup>1</sup> On November 13, 2001, the United States announced that certain individuals who were members of Al Qaeda or who had engaged in, aided or abetted, or conspired to commit, acts of international terrorism, were subject to detention at an appropriate location.<sup>2</sup> Soon thereafter, the United States began transferring individuals captured in Afghanistan to the Guantanamo Bay Naval Base in Cuba.

For over three years, the United States has detained hundreds of individuals at Guantanamo.<sup>3</sup> Most of these individuals have been detained without charge. They have been denied access to counsel or the courts. They are detained in isolation and have little interaction with other individuals. While some individuals have been released, the remaining detainees have been given no indication of when, or if, they will ever be released. As noted by several commentators, Guantanamo has been treated as a legal black hole.<sup>4</sup>

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In *Rasul v. Bush*, the U.S. Supreme Court held that the Guantanamo detainees were not without some rights. *Rasul v. Bush*, 124 S. Ct. 2686 (2004). Thus, the Court held that U.S. courts had jurisdiction to consider the legality of the detention of foreign nationals captured abroad in connection with military hostilities.

While the Supreme Court addressed the issue of judicial review from the perspective of U.S. domestic law, it paid scant attention to applicable international norms concerning judicial review. Accordingly, this Essay provides a brief overview of the right to judicial review under international law.<sup>5</sup> It also examines the geographic and temporal scope of this obligation.

**II. The Right to Judicial Review Under International Law**

The right to judicial review is a fundamental norm of international law.<sup>6</sup> Indeed, the right to judicial review is particularly significant because it provides a mechanism for protecting other fundamental norms.

The Universal Declaration of Human Rights (“UDHR”) is the most well-recognized and respected elaboration of international human rights norms. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). It is acknowledged to embody the rules of customary international law in the realm of human rights.<sup>7</sup> Article 8 of the UDHR provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The *travaux préparatoires* suggest that Article 8 was designed, in part, to serve the function of a habeas corpus provision. But for this right to have any meaning, there must be some access to a competent tribunal. Thus, Article 8 requires the establishment of a tribunal if it does not otherwise exist. Article 9 adds that “[n]o one shall be subjected to arbitrary arrest, detention or exile.” In addition, Article 10

provides that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

The International Covenant on Civil and Political Rights (“ICCPR”) formally codifies the right to judicial review.<sup>8</sup> See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. Article 9(1) provides that “[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” To protect against arbitrary deprivations of liberty, Article 9 of the ICCPR provides several safeguards. Article 9(2) provides that anyone who is arrested shall be informed “of the reasons for his arrest and shall be promptly informed of any charges against him.” Article 9(3) indicates that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” Article 9(4) adds that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The *travaux préparatoires* indicate that the purpose of this provision was to codify the right of habeas corpus. This right exists regardless of whether the underlying detention is lawful. Thus, Article 9(4) may be violated even if a person is lawfully detained.

The U.N. Human Rights Committee, which was established to monitor compliance with the ICCPR, has stated that the rights set forth in Article 9 are applicable to all deprivations of liberty. See Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights

Committee, U.N. GAOR, 37th sess., Supp. No. 40, Annex V, at 95 (1982). Indeed, the right to initiate judicial proceedings to challenge the lawfulness of detention is so important that it must be respected even during a state of emergency. See Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

In several cases, the Human Rights Committee has found a violation of the right to judicial review. In *Vuolanne v. Finland*, for example, a Finnish soldier challenged his detention by Finnish military authorities as a violation of Article 9(4) of the ICCPR. *Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. CCPR/C/35/D/254/1987 (1999). As a preliminary matter, the Committee acknowledged the application of the ICCPR to military personnel. *Id.* at para. 9.3. On the merits of the claim, the Committee noted that “there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law.” *Id.* at para. 9.6. Administrative review is an insufficient remedy; only judicial review is sufficient. In this case, “[t]he procedure followed . . . did not have a judicial character, the supervisory military officer who upheld the decision . . . cannot be deemed to be a ‘court’ within the meaning of Article 9(4) therefore, the obligations laid down therein have not been complied with by the authorities of the State party.” *Id.*

The U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Special Rapporteur”) has recognized the essential nature of judicial review and its status under international law. See Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002). According to the Special Rapporteur, “[j]udicial control of interference by the executive power with the individual’s right to liberty is an

essential feature of the rule of law.” *Id.* at para. 15. Canvassing various sources of international law, including U.N. instruments and the work of regional bodies, the Special Rapporteur concluded that the right to judicial review applies to all forms of deprivation of liberty, including administrative detention and immigration control measures. *Id.* at para. 17.

The U.N. Working Group on Arbitrary Detention has made similar findings. In *Öcalan v. Turkey*, the Working Group considered a petition brought on behalf of Abdullah Öcalan, the leader of Turkey’s Kurdish Workers’ Party (PKK). *Öcalan v. Turkey*, U.N. ESCOR, Comm’n on Human Rights, Opinions Adopted by the Working Group on Arbitrary Detention, 57th Sess., Item 11(a), U.N. Doc. E/CN.4/2001/14/Add.1 (2000), at 46. The petition alleged that Öcalan was detained incommunicado without access to counsel for ten days in a “state security” case. During his detention, Öcalan was never brought before a judge who could rule on the legality of his detention. In its decision, the Working Group indicated that incommunicado detention and denial of counsel for ten days is of “particular gravity” because access to counsel is of a determinatory character for the defendant during the detention period. *Id.* at 51. Accordingly, the Working Group found Öcalan’s detention was contrary to the safeguards set forth in Article 10 of the Universal Declaration of Human Rights and, therefore, arbitrary.

In addition to U.N. practice, each of the regional human rights systems recognize the right to judicial review as a fundamental right.

For example, the American Convention on Human Rights (“American Convention”) provides that “[n]o one shall be subject to arbitrary arrest or imprisonment.”<sup>9</sup> American Convention on Human Rights, Nov. 22, 1969, art. 7(3), 1144 U.N.T.S. 123. Article 7(5) adds that “[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time

or to be released with prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.” Article 7(6) provides that “[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.”

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

Both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have recognized the essential role of judicial review in the protection of fundamental rights.<sup>10</sup>

In *Castillo Petruzzi v. Peru*, the Inter-American Court of Human Rights examined the right of states to use incommunicado detention

without judicial review in cases of terrorism. *Castillo Petruzzi v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52 (1999). The Court found that a 36-day period “between the time of detention and the date on which the [petitioners] were brought before a judicial authority [was] excessive and contrary to the provisions of the Convention.” *Id.* at para. 111. The Court also found that the suspension of habeas corpus relief in cases involving suspected terrorists was a violation of the American Convention.

[T]he absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.

*Id.* at para. 185.

In *Coard v. United States*, the Inter-American Commission on Human Rights considered the detention of several persons by the U.S. military during the U.S. invasion of Grenada in October 1983. *Coard v. United States*, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR (1999). The petitioners were held incommunicado by the United States military for several days and with no access to counsel or judicial review. Despite their purported status as military personnel and their capture during military operations, the United States refused to classify the detainees as prisoners of war; they were accordingly treated as civilians. While the Inter-American Commission noted that detention of civilians for reasons of security is permissible, such detention must comply with international law. For example, decisions on detention must

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

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

*Id.* at para. 55. In addition, the Commission noted that judicial review through the mechanism of habeas corpus can also protect a detainee’s other fundamental rights.

The application of *habeas corpus* and similar remedies plays a fundamental role in, *inter alia*, protecting against arbitrary arrest and unlawful detention, and clarifying the situation of missing persons. Such remedies, moreover, may ‘forestall opportunities for persons exercising power over detainees to engage in torture or other cruel, inhuman or degrading treatment or punishment.’

*Id.* (citations omitted).

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) provides that “[e]veryone has the right to liberty and security of the person.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(1), 213 U.N.T.S. 221. Article 5(3) indicates that “[e]veryone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.” Article 5(4) adds

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

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

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

*Id.* at 588. While detention schemes may be permissible under certain scenarios, the Court

indicated that ample safeguards must be present. In the *Aksoy* case, however, such safeguards were lacking. According to the Court, the denial of access to a lawyer, doctor, relative, or friend, and the absence of any realistic possibility of being brought before a court to test the legality of the detention, meant that the applicant “was left completely at the mercy of those holding him,” which was incompatible with the prohibition against arbitrary detention. *Id.* at 590. Thus, the Court found Turkey in violation of the European Convention and its obligation to provide judicial review.<sup>11</sup>

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

Finally, the African Charter on Human and Peoples’ Rights prohibits arbitrary detention and affirms the importance of judicial review. African Charter on Human and Peoples’ Rights,

June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5. Article 6 provides that “[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.” Art. 7(1) adds that “[e]very individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; . . .”

### III. The Geographic Scope of International Obligations

Under international law, a state is obligated to respect and ensure the human rights of persons who are within its sovereign territory and also to those who are subject to its jurisdiction and control. “Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state’s obligation to respect the pertinent human rights continues.” Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 81 (1995).

The Universal Declaration of Human Rights provides that “[e]veryone is entitled to all the rights and freedoms set forth in the declaration, without discrimination of any kind, . . .” UDHR, *supra*, at art. 2. It adds that “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” *Id.*

Article 2(1) of the International Covenant on Civil and Political Rights requires a member state “to ensure to all individuals within its territory and subject to its

jurisdiction” the rights recognized in the present Covenant.<sup>12</sup> The Human Rights Committee has interpreted this provision as imposing an obligation on member states to extend the protections of the ICCPR to all individuals subject to their jurisdiction.<sup>13</sup> *See* Human Rights Committee, General Comment No. 3, U.N. Doc. HRI/GEN/1/Rev. 5 (2001), at 112. In *Sergio Euben Lopez Burgos v. Uruguay*, for example, members of the Uruguayan security forces kidnaped a Uruguayan national living in Argentina and forcibly returned him to Uruguay. *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981). Although the arrest and mistreatment of Lopez Burgos allegedly took place in Argentina, the Committee found Uruguay responsible for these actions. Indeed, the Committee found “it would be unconscionable to so interpret the responsibility under the . . . Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”<sup>14</sup> *Id.* at para. 12.3.

The European Convention provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” European Convention, *supra*, at art. 1. The European Court of Human Rights has determined that the protections afforded by the European Convention apply to all territories and people over which member states have effective control. In *Loizidou v. Turkey*, for example, a Greek Cypriot alleged that Turkish forces in northern Cyprus had denied her access to her land. *Loizidou v. Turkey*, 23 E.H.R.R. 513 (1997). As a result, she alleged Turkey was in violation of the European Convention. As a preliminary matter, the European Court determined that Turkey exercised “effective overall control” of the policies and actions of the authorities in northern Cyprus. It then determined that Turkey could be held liable for breaching European Convention obligations

even though such acts were committed outside Turkish territory.

The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

*Id.* at 530. Thus, the European Court found Turkey in violation of its obligations under the European Convention.<sup>15</sup>

The American Convention on Human Rights indicates that its substantive provisions apply wherever a state exercises jurisdiction or control. Thus, member states “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination . . . .” American Convention, *supra*, at art. 1(1). Significantly, the American Convention defines the word “person” to mean every human being. *Id.* at art. 1(2). Similarly, the American Declaration on the Rights and Duties of Man provides that “[e]very person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.” American Declaration, *supra*, at art. XVII.

The Inter-American Commission on Human Rights has recognized the extraterritorial application of human rights obligations.<sup>16</sup> In *Coard v. United States*, the Commission acknowledged that international norms are not limited to a state’s territory but apply to any location where a state wields control over individuals.

Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While

this most commonly refers to persons within a state’s territory, it may under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad.

*Coard et al. v. United States*, *supra*, at para. 37. Thus, the Commission found that the provisions of the American Declaration of the Rights and Duties of Man applied to U.S. actions in Grenada.

The Inter-American Commission reaffirmed this fundamental principle in relation to persons detained at Guantanamo. In February 2002, several nongovernmental organizations filed a petition with the Commission challenging U.S. actions at Guantanamo. In response, the Commission adopted precautionary measures, urging the United States to comply with international human rights and humanitarian standards at Guantanamo. In its decision, the Commission acknowledged the applicability of these international standards to U.S. conduct at Guantanamo and that such standards applied in respect to all persons subject to U.S. authority and control.

The determination of a state’s responsibility for violations of the international human rights of a particular individual turns not on the individual’s nationality or presence within a particular geographic area, but rather whether under specific circumstances, that person fell within the state’s authority and control.<sup>17</sup>

Decision of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba, March 13, 2002, at 2. The Commission went on to note that “no

person under the authority and control of a state regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.” *Id.* at 3. In March 2003, the Commission reiterated its position on the legal status of Guantanamo and U.S. obligations under international law.<sup>18</sup>

#### **IV. The Temporal Scope of International Obligations**

The right to judicial review of the lawfulness of detention applies at all times, including in times of war or public emergency. While international law recognizes the right of derogation from certain obligations in time of public emergency, this right of derogation is subject to numerous safeguards.

The International Covenant on Civil and Political Rights provides that a state may derogate from certain obligations in times of public emergency that threaten the life of the nation and the existence of which is officially proclaimed.<sup>19</sup> ICCPR, *supra*, at art. 4(1). A state may derogate from these obligations “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.” *Id.* The European Convention on Human Rights and the American Convention on Human Rights contain similar provisions on derogation.<sup>20</sup>

While derogation is authorized under international law, it is subject to numerous safeguards. *See generally* Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). First, the right of derogation is limited to times of “public emergency” that threaten “the life of the nation.” Significantly though, “not every disturbance or catastrophe qualifies as a public emergency.” *Id.* at para. 3. Even times of armed conflict are not sufficient to justify derogation in the absence of conditions that

threaten the life of the nation. Second, such derogation must be strictly required by the exigencies of the situation.<sup>21</sup> *Id.* at para. 4. The legitimacy of any purported derogation is measured by the temporal and territorial scope of the derogation as well as its material scope. Third, any measures taken in derogation must not be inconsistent with other obligations under international law. Fourth, there is an explicit notice requirement. A state seeking to derogate from any of its treaty obligations must notify the appropriate actors, both at the commencement and conclusion of such derogation. These provisions have been strictly construed to ensure that states do not engage in the “cynical and calculated destruction” of fundamental rights.<sup>22</sup>

There are, however, some obligations from which no derogation is possible. Thus, these obligations must be complied with at all times, even in time of war or public emergency. These include the prohibition against arbitrary deprivation of life and the prohibition against torture or cruel, inhuman or degrading treatment or punishment. *See* ICCPR, *supra*, at art. 4(2); European Convention, *supra*, at art. 15(2); American Convention, *supra*, at art. 27(2).

While international agreements such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights identify non-derogable obligations, these lists are not exhaustive. International practice has extended the principle of non-derogation to other fundamental norms. Specifically, the right of judicial review is now recognized to be a non-derogable obligation.

For example, the U.N. Human Rights Committee has imposed significant restrictions on a state’s ability to limit judicial review. In General Comment No. 29, the Committee considered whether restrictions on judicial review were derogable. Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). While the right to judicial review does not appear on the list of non-derogable obligations in Article 4 of the ICCPR, the Committee noted that “the

category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2.” *Id.* at para. 11. Indeed, “[s]tates parties 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 by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.” *Id.* The Committee then noted the important role played by judicial review in ensuring compliance with other fundamental norms. *Id.* at para. 16.

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. . . . 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.

*Id.* at para. 15. For these reasons, the Committee made clear the non-derogable nature of the fair trial provisions of the ICCPR, including the right to judicial review.<sup>23</sup>

Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international

humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion 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 offense. 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.<sup>24</sup>

Human Rights Committee, General Comment No. 29, *supra*, at para. 11.

The Inter-American Court on Human Rights has also stressed the importance of judicial review and the applicability of this fundamental right even in time of public emergency. In Advisory Opinion OC-9/87, the Inter-American Court addressed the importance of judicial guarantees in states of emergency. Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) (October 6, 1987). The Court noted that the American Convention allows states to derogate from certain obligations. It concluded, however, that states cannot derogate from judicial guarantees, including the right to *habeas corpus* or any other effective judicial remedy. *Id.* at para. 41. In Advisory Opinion OC-8/87, the Court was even more emphatic about the importance of *habeas corpus* protection and its relevance in times of public emergency. Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights) (January 30, 1987).

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

*Id.* at para. 35. Accordingly, the Court concluded that the right of judicial review, including *habeas corpus*, cannot be suspended, even in time of war, public danger, or other emergency that threatens the independence or security of the state.<sup>25</sup>

Pursuant to the derogation provisions of the International Covenant on Civil and Political Rights, the United States is obligated to inform the other States Parties of the provisions "from which it has derogated and of the reasons by which it was actuated." ICCPR, *supra*, at art. 4(3). To date, the United States has not submitted any announcement of its intent to derogate from its obligations under the ICCPR.

## V. Conclusion

International law firmly establishes the right of detainees to seek judicial review of their detention. Significantly, this right applies to all detainees, in peacetime or war. While different rules may regulate detention in time of war, the underlying right to judicial review remains constant.

This Essay has addressed the right of prisoners at Guantanamo to seek judicial review of their detention. The principles and protections of international law, however, apply to all U.S. detainees, regardless of where they

are held. Recent disclosures of "ghost detainees" held by the U.S. military abroad and the abuses suffered at Abu Ghraib only serve to reaffirm the importance of providing judicial review to all detainees.<sup>26</sup>

## Endnotes:

<sup>1</sup> See The White House, Presidential Address to the Nation (Oct. 8, 2001).

<sup>2</sup> See The White House, Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism (Nov. 13, 2001).

<sup>3</sup> The detainees are believed to be nationals of more than 40 countries, and include children and senior citizens.

<sup>4</sup> See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004) ("The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals."); *R. on the Application of Abbasi & Anor. v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA Civ 1598, para. 64 (U.K. Sup. Ct. Judicature, (C.A.), Nov. 6, 2002) ("[I]n apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole.'").

<sup>5</sup> This Essay does not address U.S. domestic law and its application to the Guantanamo detainees.

<sup>6</sup> This Essay does not address the status of judicial review under international humanitarian law.

<sup>7</sup> See generally LOUIS HENKIN ET AL., HUMAN RIGHTS 286 (1999).

<sup>8</sup> The United States has signed and ratified the ICCPR.

<sup>9</sup> The United States has signed the American Convention.

<sup>10</sup> In its 2002 Report on Terrorism and Human Rights, the Inter-American Commission noted the relevance of international human rights norms, including the right to due process and judicial review, in the struggle against terrorism. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (2002). The OAS General Assembly echoed these views in Resolution 1906, which indicated that “the fight against terrorism must be waged with full respect for the law, human rights, and democratic institutions, so as to preserve the rule of law, freedoms, and democratic values in the Hemisphere.” OAS General Assembly, Resolution 1906 (XXXII-O/02) (June 4, 2002).

<sup>11</sup> In *Brannigan and McBride v. United Kingdom*, the European Court upheld a law permitting detention for up to seven days without judicial review. *Brannigan and McBride v. United Kingdom*, 17 E.H.R.R. 539 (1994). It did so, however, only because: (1) the remedy of habeas corpus was available to test the lawfulness of the original arrest and detention; (2) there was an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest; and (3) detainees were entitled to inform a relative or friend about their detention and to have access to a doctor. *See also Ireland v. United Kingdom*, 2 E.H.R.R. 25 (1979-80); *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., at para. 69 (*quoting Winterwerp v. The Netherlands*, App. No. 0006301/73, Eur. Ct. H.R., at para. 60) (“[T]he remedy required by Article 5 § 4 must be of a judicial nature, which implies that ‘the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty.’”).

<sup>12</sup> Commentators have interpreted this provision “as a disjunctive conjugation indicating that a state party must be deemed to have assumed the obligation to respect and ensure the rights recognized in the Covenant ‘to all individuals within its territory’ and ‘to all individuals subject to its jurisdiction.’” THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 40 (1987).

<sup>13</sup> *See also* Human Rights Committee, Draft General Comment on Article 2, U.N. Doc. CCPR/C/74/CRP.4/Rev.3 (2003), at para. 9 (“This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”).

<sup>14</sup> *See also* Lilian Celiberti de Casariego v. Uruguay, Communication No. 56/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 92 (1984).

<sup>15</sup> *See also* *Cyprus v. Turkey*, 4 E.H.R.R. 482, 586 (1982) (“The High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual responsibility, whether that authority is exercised within their own territory or abroad.”); *Drozd and Janousek v. France and Spain*, 14 E.H.R.R. 745, 788 (1992) (“The term jurisdiction is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.”); *Bankovic v. Belgium*, App. No. 52207/99 (Dec. 19, 2001) (a state may be held responsible for violations of the European Convention if “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, [it] exercises all or some of the public powers normally to be exercised by that government . . .”); *Ocalan v. Turkey*, App. No. 46221/99 (March 12, 2003).

<sup>16</sup> *See also* *Ferrer-Mazorra v. United States*, Case No. 9903, Report No. 51/01, Annual Report of the IACHR, at para. 180 (“OAS Member States are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control, . . .”).

<sup>17</sup> *See also* *Saldaño v. Argentina*, Report N. 38/99, Annual Report of the IACHR 1998.

<sup>18</sup> *See* Decision of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba, March 18, 2003, at 2.

<sup>19</sup> In the *Nuclear Weapons* case, the International Court of Justice acknowledged that the protections of the International Covenant on Civil and Political Rights do not “cease in times of war, except by operation of Article 4 of the Convention, whereby certain provisions may be derogated from in a time of national emergency.” International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, at para. 25.

<sup>20</sup> See European Convention on Human Rights, *supra*, at art. 15; American Convention on Human Rights, *supra*, at art. 27.

<sup>21</sup> See also *Lanza v. Uruguay*, Communication No. R.2/8, U.N. Doc. A/35/40 at 111 (1980).

<sup>22</sup> See generally JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994); P.R. Gandhi, *The Human Rights Committee and Derogation in Public Emergencies*, 32 GERMAN Y.B. INT’L L. 323 (1989).

<sup>23</sup> See also Human Rights Committee, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (“[W]hile reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.”).

<sup>24</sup> See also U.N. Doc. CCPR/C/79/Add.93 (1998), at para. 21 (“[A] State party may not depart from the requirement of effective judicial review of detention.”).

<sup>25</sup> See also *Castillo Petruzzi v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52 (1999).

<sup>26</sup> See George Edmonson and Andrew Mollison, *CIA Hid Iraq ‘Ghost Detainees,’* ATLANTA JOURNAL-CONSTITUTION, Sept. 10, 2004, at 2C.