The Right to Habeas Corpus: Only in the Other Americas

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THE RIGHT TO HABEAS CORPUS: ONLY IN THE OTHER AMERICAS*

"[N]o one can be perfectly free till all are free . . . ."

Herbert Spencer, *First Principles*

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INTRODUCTION

Personal liberty is the most important fundamental human right. It includes the right to be free from arbitrary arrest and detention. The writ of habeas corpus prevents legal authorities from wrongfully detaining individuals, thereby facilitating one of the basic guarantees of

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* Editor's note: In volume 10, *The American University Journal of International Law and Policy* will publish a complete index to cases heard by the Inter-American Commission on Human Rights. Ms. Faulkner's article, and the cases cited herein, should be read in light of this forthcoming publication.

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1. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (stating that the right to be free from torture has become an accepted part of customary international law); *see also Ingraham v. Wright*, 430 U.S. 651 (1977) (noting the surrender of liberty interests upon curtailment of physical freedom by commitment, imprisonment, or impairment of bodily integrity); *see also Rodolfo Piza, Coordination of the Mechanisms for the Protection of Human Rights in the American Convention with those Established by the United Nations*, 30 AM. U. L REV. 167, 168-70 (1981) (discussing the evolution of human rights in the international order).

2. Laurent Marcoux Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B.C. INT’L & COMP. L. REV. 345 (1982); *see Piza, supra note 1, at 168 (defining human rights as fundamental rights conferred upon an individual and derived from an individual's human value and dignity).

3. See *BLACK'S LAW DICTIONARY* 638 (5th ed. 1979) (defining a writ of habeas corpus as a judicial order directing government officials to bring a person to custody before a court for inquiry into the legality of the custody and to discharge the detainee if the custody is deemed invalid). Habeas corpus originally meant, in Latin, “you
personal freedom in English and American law. A civilized society cannot tolerate intrusions upon the right to remain free from detention without due process of law.

Abuses of basic human rights routinely occur in countries that do not recognize the right to habeas corpus. Arbitrary arrests, disappearances, and torture occur regularly in many American countries. Worse, some
governments consider violating the rights of dissidents both politically and morally acceptable.  

In emergency situations, states face conflicting obligations. Although a state must take steps to protect its very existence during national emergencies, the state must still protect individual rights. Whether securing the state's national interest or protecting the safety of its people, governments must reconcile individual and aggregate interests. Reconciling these interests proves especially difficult during public emergencies. 

The historical record concerning human rights violations during states of emergency is bleak. Disappearances, summary executions, detentions without due process, torture, and other forms of cruel and degrading treatment frequently accompany states of emergency.

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Salvador, Guatemala, Haiti and other countries. Id.

8. See id. at 105-75 (discussing and detailing human rights violations made by governments in the Americas during 1981).


10. Id. at 414-15.

11. Id. at 413-15.

12. Id. A state of emergency occurs during an extraordinary national crisis and generally entails broad restrictions on human rights. See generally Edward Lawson, Encyclopedia of Human Rights 1406-10 (1991) (outlining the various international conventions that define and govern when and what actions a state may take in time of crisis). In theory, the restrictions are limited in time; once the crisis is resolved, full recognition of human rights returns. See, e.g., id. at 1407 (citing the Human Rights Committee's general comments on article 4 in the International Convention on Human Rights, which state the committee's contention that measures taken under the article 4, public emergency provisions, should be considered "exceptional and temporary in nature" and that they should only continue for the period in which "the life of the nation concerned is threatened"). In a conflict between national survival and strict enforcement of human rights, international law supports national survival. Int'l Comm'n of Jurists, States of Emergency: Their Impact on Human Rights 438 (1983). The recent exception to this premise came in the Habeas Corpus Case, which promises a new respect for human rights. See infra notes 102-37 and accompanying text (explaining the Habeas Corpus Case and the Inter-American Court of Human Rights' analysis of the state of emergency provisions in the American Convention on Human Rights).


14. See Amnesty International, Torture in the Eighties 11 (1984) (discussing the prevalence of torture and human rights violations). Torture most often occurs during a detainee's first days in custody. Id. These vulnerable hours are usually spent incommunicado, when security forces maintain total control over the fate of the detainee, denying access to relatives, lawyers or independent doctors. Id. Some detainees
Worse, some governments invoke national security to justify restricting individual rights.\textsuperscript{15} Because national security is often emotive and politically charged, governments can easily manipulate public opinion by selectively releasing information and appealing to mass fears.\textsuperscript{16}

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are held in secret, their whereabouts known only to their captors. \textit{Id.} Authorities often deny that certain detainees are held, making it easier to torture or kill them or to make them "disappear." \textit{Id.} Incommunicado detention, secret detention and "disappearances" increase the latitude of security agents over the lives and well-being of the people in custody. \textit{Id.} Suspension of habeas corpus and other legal remedies, trial of political detainees in military courts and the lack of any independent means to examine or record a prisoner's medical condition allow security forces to conceal evidence of torture from lawyers, civilian magistrates, independent doctors and others who would be capable of taking action against their illegal activities. \textit{Id.}

15. \textit{See generally} McDougal, \textit{supra} note 9, at 413-15 (stating that claimed threats to national security vary). External attacks, subversion, internal unrest, violence, and economic crisis are commonly cited menaces. \textit{Id.} Sometimes governments claim multiple threats of a highly diffused nature or even claim wholesale suspension of the constitutional order to justify restricting the rights and freedoms of citizens. \textit{Id.}

16. \textit{See} Argentina National Commission of Disappeared People, Nunca Mas 51-52 (Writer's and Scholars International Ltd., trans., 1st ed. 1986) (noting that Argentina continually denies disappearances and tortures and restricts their dissemination to the world through secret detention centers). Approximately 340 secret detention centers have for years illegally deprived thousands of persons of their freedom. \textit{Id.} Some of the detainees have never returned. \textit{Id.} Military authorities respond to national and international public opinion by asserting that the missing persons were abroad or that they fell victim to feuding among themselves. \textit{Id.} at 52. The military government also uses its total control of the media to confuse and misinform the public. \textit{Id.}

States of emergency have profound negative effects on national political systems. Int'l Comm'n of Jurists, \textit{supra} note 12, at 413-17. During states of emergency, governments often eliminate educational and artistic pluralism, and restrict the ability to distribute and receive information. \textit{Id.} at 417-20. These restrictions limit political freedom and unionization and impede the accommodation and integration of diverse social groups in national polity. \textit{Id.} at 417-24. For example, during the summer of 1993, the Guatemalan government elected no less than 5 different presidents. During the political changes, the government-elect ordered all media to cease dissemination of any election news. In compliance, a Guatemalan newspaper published only solid black pages.

Further, the search for political solutions through negotiation and consensus may give way to reliance on the military for settling disputes with opposing groups. \textit{Id.} at 417-24. States of emergency often provide a means through which ruling minorities safeguard their own power by instituting permanent restrictions of human rights. \textit{Id.} at 415-16.

During states of emergency, persons in the government attracted to the exercise of total power often emerge; the population becomes frightened and resentful. \textit{Id.} at 417-24. Ironically, the very same emergency powers originally invoked to save the nation and continue its existence as an organized community become the vehicle for
Modern constitutions and international human rights instruments recognize governmental restrictions on personal freedoms as a necessary response to a genuine threat to national security.\textsuperscript{17} Although countries do face genuine threats to their security, national security concerns are most often invoked to legitimate restrictions on personal freedoms, frequently exaggerating or concocting the danger and taking excessive or unwarranted restrictive measures.\textsuperscript{18} Government power elites often invoke national security to further personal ends.\textsuperscript{19} Although the international community does not offer absolute safeguards to human rights, it must guard against spurious invocations of community interests to excuse human rights violations.\textsuperscript{20}

The international community must recognize the inherent limits of subordinating constitutional liberties in an otherwise one-sided focus on meeting threats to national security.\textsuperscript{21} Individual rights also rate as soci-

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\textsuperscript{18} See Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946) (Murphy J., concurring) (recognizing that throughout history oppressors have used real or imagined threats to the public well-being as an excuse for abrogating human rights in an unwarranted manner). Unfortunately, the practice that Justice Murphy decried has continued unabated since that time for a large portion of the human population.

\textsuperscript{19} \textsc{McDougal}, supra note 9, at 805.


\textsuperscript{21} See L.C. Green, \textit{Derogation of Human Rights in Emergency Situations}, 16 \textsc{Can. Y.B. Intern. Law} 92, 97-115 (1978) (stating that international documents recognize the need to accomplish both sets of goals by allowing partial or complete suspension of certain rights during states of emergencies).

One commentator asserts that the policy underlying these provisions focuses on an attempt to limit noncompliance in order to prevent the need for more far-reaching limitations of human rights. Schreuer, supra note 20, at 115. Professor Schreuer explains that without such a safety valve, states might hesitate to join the Convention or might append more significant reservations to their accession. \textit{Id.} Moreover, during an actual emergency, such as war, civil unrest, or revolution, national elites may consider...
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eral rights, and therefore, merge as an integral part of any democratic society. Thus, a democratic society that sacrifices individual rights to protect itself may find that it no longer safeguards the rights upon which it was founded. 22

The declaration of a state of emergency often serves as a harbinger of serious human rights violations. 23 Law can and must ensure individual rights for all, at all times. 24 Recognizing the right of freedom from arbitrary arrest and detention, a number of international treaties have established guidelines regulating emergency situations. 25 Recently, the

compliance a low priority and may resort to broader claims to derogate their obligations, or they may even denounce the Convention entirely. Id. Derogation clauses, therefore, may offer advantages if limited in scope, applied in accordance with the basic purpose of the Convention, and if they follow basic democratic policies. Id. at 115-16.

22. See Thomas Emerson, National Security and Civil Liberties, 9 YALE J. WORLD PUB. ORDER 78, 80 (1982). Despite its potentially adverse effects on the world public order, national security constitutes an unavoidable sub-category of both strategy and politics. Id. at 79. No government stands free to determine independently what its security needs are and, therefore, how much of its resources it should divert for security purposes. Id. at 81-82. The practical importance of national security compels the search for an approach that makes security goals compatible with democratic values and human rights. See id. at 111 (asserting that a firmly guarded national security system that seeks to deter all risks is "not compatible with a democratic society," calling for accommodation between the systems of national security and safeguarding constitutional liberty through the judicial system).

23. See, e.g., Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 119 (1866) (stating that "by the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers").

24. See EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 14 (1915) (explaining the obligations of states and their neighbors to ensure the protection of human rights on a continual basis).

Where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family nation are authorized by international law to intervene on grounds of humanity. When these 'human' rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in last resort, by the most appropriate organ of the international community.

Id. (footnote omitted).

25. See generally LAWSON, supra note 12, at 1406-10 (providing selected portions of international treaties governing human rights treatment during states of emergency).
Inter-American Court of Human Rights ruled that the right to habeas corpus is nonderogable, even during states of emergency.\textsuperscript{26}

This Comment discusses the role of the American Convention on Human Rights (American Convention)\textsuperscript{27} in protecting human rights within the American hemisphere and compares it to the European system for protecting human rights.\textsuperscript{28} Section I surveys the Inter-American system for protecting human rights and the American Convention. Section II analyzes the Inter-American Court's \textit{Habeas Corpus} advisory opinion.\textsuperscript{29} Section III examines the development and current status of the European system for protecting human rights. Section IV discusses the implications of the \textit{Habeas Corpus} Court's opinion for the protection against arbitrary arrest and detention in the Americas and in Europe. Section V offers recommendations for more effective protection of human rights. Finally, this Comment concludes that the United States and Western Europe must comply with the \textit{Habeas Corpus Case} and declare habeas corpus as a nonderogable right in all circumstances.

\section{I. THE INTER-AMERICAN SYSTEM FOR PROTECTING HUMAN RIGHTS}

\subsection{A. THE AMERICAN CONVENTION}

The Organization of American States (OAS) adopted the American Convention in 1969 to protect human rights through a judicial forum.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{26} Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion, OC-8/87 of Jan. 30, 1987, Inter-Am. Ct. H.R., Series A: Judgments and Opinions, No. 8 (1987) [hereinafter \textit{Habeas Corpus Case}].
\item \textsuperscript{27} American Convention, supra note 17. As the regional treaty for the western hemisphere, the American Convention provides a legal framework for states of emergency in the Americas and regulates the assertion of emergency powers by any state a party to it. See Jaime Oraá, \textit{Human Rights in States of Emergency in International Law} 51-55 (1992) (discussing the role of the American Convention in monitoring human rights practices during states of emergency).
\item \textsuperscript{28} See infra notes 138-204 and accompanying text (explaining the European mechanisms governing human rights).
\item \textsuperscript{29} \textit{Habeas Corpus Case}, supra note 26; see infra notes 102-37 and accompanying text (discussing the Inter-American Court's analysis in the \textit{Habeas Corpus Case}).
\item \textsuperscript{30} Comment, "Other Treaties": The Inter-American Court of Human Rights Defines Its Advisory Jurisdiction, 33 \textit{Am. U. L. Rev.} 211, 221-12 (1983). Organized for commercial purposes in 1890, the OAS originated as the International Union of American Republics. Frederick L. Kirgis, Jr., \textit{International Organizations in Their Legal Setting, Selected Documents} 9 (1993). The organization changed its name
\end{itemize}
Since its entry into force in 1978, twenty-three out of thirty-one OAS member states have ratified the American Convention. The United States, Brazil, Chile, and Paraguay are among the nations who have not yet ratified the American Convention. Containing two substantive parts, the American Convention is modelled on the European Convention on Human Rights and envisions a similar institutional structure. Part I of the American Convention establishes the duties of the signatory states, defines the protected rights, and provides the means for the


31. Thomas Buergenthal & Robert E. Norris, 5 Human Rights—The Inter-American System app. 5 at 3 (1993). The American Convention on Human Rights was opened for signature on November 22, 1969 at an Inter-American Specialized Conference, held in San José, Costa Rica, under the auspices of the OAS. It became effective on July 18, 1978, and has been ratified by 23 OAS Member States. See id. (indicating that Argentina, Barbados, Bolivia, Columbia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela all ratified the American Convention).


To date, the Senate has not taken any further action regarding these treaties and the United States has not ratified them. But see, State Department's Human Rights Report: Organizations and Human Rights Subcomm. of the House Foreign Affairs Comm., 103 Cong., 2d Sess. (1994) (discussing the Clinton Administration's support for ratification of these four treaties).


34. American Convention, supra note 17, arts. 1-2.

35. American Convention, supra note 17, arts. 3-26.
suspension of certain rights. Part II establishes two autonomous organizations: the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights (the Court). Together these organizations comprise the Convention’s enforcement mechanism. To protect human rights within the Inter-American system, the Commission investigates and attempts to settle alleged violations of the American Convention. The Court interprets the American Convention and tries complaints that the Commission is unable to settle.

Only the Commission and member states accepting the Court’s jurisdiction have standing to bring cases. Although individuals lack standing to bring cases before the Court, the Commission may refer individual complaints to the Court. The American Convention requires the Commission to appear in all cases it refers to the Court. Additionally, the Commission may request advisory opinions from the Court.

B. THE GUARANTEES OF THE AMERICAN CONVENTION

The American Convention guarantees more than two dozen broad categories of civil and political rights. The guarantees include the

36. American Convention, supra note 17, arts. 27-30.
37. American Convention, supra note 17, art. 33. The American Convention mandates that the Commission protect human rights. Id. art. 41. The Commission principally deals with charges of violations of the rights the Convention guarantees. Id. arts. 41(f), 44-51. The American Convention acknowledges the right of individual petition while it provides the right of inter-state communications in a limited manner. Id. arts. 44-45.
38. American Convention, supra note 17, art. 52.
39. See American Convention, supra note 17, art. 33-82 (delegating authority to the Commission and the Court); see id. art 41 (listing the Commission’s functions and powers); id. art. 57 (requiring the inclusion of the Commission in all cases before the Court); id. art. 61 (explaining the Court’s jurisdiction).
40. See American Convention, supra note 17, arts. 41-82 (listing the Commission’s functions).
41. American Convention, supra note 17, arts. 62-64.
42. American Convention, supra note 17, art. 61.
43. American Convention, supra note 17, art. 44.
44. American Convention, supra note 17, arts. 57, 61.
45. American Convention, supra note 17, art. 64.
46. American Convention, supra note 17, arts. 3-26.
right to judicial personality,\textsuperscript{47} the right to life,\textsuperscript{48} the right to humane treatment,\textsuperscript{49} the right to be free from slavery,\textsuperscript{50} the right to personal liberty,\textsuperscript{51} the right to a fair trial,\textsuperscript{52} the right to equal protection of the law,\textsuperscript{53} and the right to judicial protection.\textsuperscript{54} The American Convention obligates parties to respect and ensure the free and full exercise of the Convention's rights and guarantees.\textsuperscript{55} The parties agree to take progressive measures to fully realize the rights implicit in the economic, scientific, and cultural standards set forth in the American Convention.\textsuperscript{56} The American Convention also imposes a broad nondiscrimination clause.\textsuperscript{57}

\textsuperscript{47} American Convention, \textit{supra} note 17, art. 3 The American Convention guarantees the right to be recognized as a person before the law. \textit{Id.}

\textsuperscript{48} American Convention, \textit{supra} note 17, art. 4.

\textsuperscript{49} American Convention, \textit{supra} note 17, art. 5.

\textsuperscript{50} American Convention, \textit{supra} note 17, art. 6.

\textsuperscript{51} American Convention, \textit{supra} note 17, art. 7.

\textsuperscript{52} American Convention, \textit{supra} note 17, art. 8.

\textsuperscript{53} American Convention, \textit{supra} note 17, art. 24.

\textsuperscript{54} American Convention, \textit{supra} note 17, art. 25.

\textsuperscript{55} American Convention, \textit{supra} note 17, art. 1(1). Under the American Convention, rights do not extend to corporations. \textit{See id.} art. 1(2) (stipulating that "person" means human being).

\textsuperscript{56} American Convention, \textit{supra} note 17, art. 26.

\textsuperscript{57} American Convention, \textit{supra} note 17, art.1(1).
C. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Court, like other international tribunals, has two kinds of jurisdiction: adjudicatory and advisory. Adjudicatory jurisdiction authorizes the Court to decide cases in which the complaining party alleges that a state has violated rights guaranteed by the American Convention. A state does not accept contentious jurisdiction by merely ratifying the American Convention. Contentious jurisdiction is optional.

Parties must accept jurisdiction before they may file cases or have standing to appear in cases brought against them. As soon as a state ratifies the American Convention, the Commission has jurisdiction to hear an individual petition directed against that state. The Court's judgment in a contentious case is binding upon the parties.

The American Convention grants the Court the broadest possible advisory jurisdiction of any international tribunal. The Court's advisory

58. American Convention, supra note 17, arts. 52-69. See Thomas Buergenthal, The American and European Conventions on Human Rights: Similarities and Differences, 30 AM. U. L. REV. 155, 157 (1981) (explaining the composition of the Inter-American Court of Human Rights). The Convention established the Inter-American Court of Human Rights in 1978. LAWSON, supra note 12, at 906. The Court consists of seven judges, nominated and elected by the parties to the American Convention. American Convention, supra note 17, art. 52. Judges serve a six-year term and may be elected again for only one additional term. Id. art. 54. The Court has its seat in San José, Costa Rica. LAWSON, supra note 12, at 906.

59. See, e.g., H.W.A. Thirlway, Advisory Opinions of International Courts, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 38-43 (R. Bernhardt, ed. 1992) (explaining the function of an advisory opinion and the jurisdiction of the various international courts, including the Permanent Court of International Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights, to give advisory opinions); see also Pierre Pescatore, Court of Justice of the European Communities, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 852, 855-60 (R. Bernhardt, ed. 1992) (discussing the jurisdiction of the Court of Justice of the European Communities).

60. American Convention, supra note 17, arts. 62-64.
61. American Convention, supra note 17, art. 62(3).
62. American Convention, supra note 17, art. 62. The American Convention delineates the Court's contentious jurisdiction. Id.

63. American Convention, supra note 17, art. 61.
64. American Convention, supra note 17, arts. 44-45.
65. American Convention, supra note 17, art. 62(1).
jurisdiction authorizes it to issue legal opinions even though no controversy exists between parties. All OAS members or organs, regardless of whether they have ratified the Convention, may invoke the Court’s advisory jurisdiction.

Although nonbinding, international courts utilize advisory opinions as an important and useful tool. Advisory opinions enable courts to interpret applicable law before disputes occur and therefore may help to prevent conflicts. The Court’s pronouncements are respected as legal authority because of the Court’s character as a judicial institution empowered to interpret and apply the American Convention. Thus, whether such a pronouncement is made as an advisory opinion or in a contentious case does not affect its legitimacy or authoritative character.

The American Convention does not establish a formal procedure to enforce the Court’s rulings against recalcitrant states. The Convention, however, allows the OAS to convene a special session or to take other measures the OAS deems appropriate.

D. ARTICLE 27, THE DEROGATION CLAUSE

Article 27 of the American Convention permits the suspension of certain rights only during wartime or other emergency situations which threaten state independence or security. This clause is similar to Article 15 of the European Convention, which allows for derogations from

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67. American Convention, supra note 17, art. 64.
68. American Convention, supra note 17, art. 64.
70. Comment, supra note 30, at 217.
71. See H.W.A. Thirlway, supra note 59, at 38 (explaining that international tribunals do not inherently have the power to give advisory opinions unless that power is conferred upon the tribunal by its creating instrument or convention).
72. See H.W.A. Thirlway, supra note 59, at 42 (noting “the solemnity of the [c]ourt’s decision in advisory cases” and “its close formal resemblance to a judgement”).
73. See American Convention, supra note 17, art. 68(1) (mandating that parties to the Convention comply with the Court’s judgments).
74. American Convention, supra note 17, art. 65.
75. American Convention, supra note 17, art. 27.
human rights obligations "[i]n times of war or other public emergency threatening the life of the nation." Although the derogation clauses are similar, the legislative history of Article 27 and the catalog of nonderogable rights demonstrates that the American Convention provides more protection of human rights than does the European Convention.

1. Legislative History

Three drafts of the American Convention preceded the current version. Dissatisfied with these drafts, the Commission devised the working document for the Conference of San José. The International Covenant on Civil and Political Rights served as a model for the working draft. Initially, the working draft permitted the suspension of hu-

76. European Convention, supra note 17, art. 15.
77. See Comparative Study of the Draft Convention on Human Rights Prepared by the Inter-American Council of Jurists (Approved At Its Fourth Meeting, Santiago, Chile, 1959) And Those Presented by Uruguay and Chile At the Second Special Inter-American Conference (Rio de Janeiro, 1965), OEA/Ser L/VII. 14 Doc. 7 (English) Corr. (1966) (comparing the American Convention drafts submitted by Chile, Uruguay and the Inter-American Council of Jurists). The Inter-American Council of Jurists and the Uruguayan government composed two drafts. Id. These drafts permitted derogation during officially proclaimed public emergencies. Id. at 26-27. Additionally, the Uruguayan version required competent state authorities to declare a public emergency. Id. at 28. The Chilean government created the third draft. Id. at 27-28. The Chilean draft adopted the same language as the IACJ and Uruguayan versions providing for derogations in limited circumstances recognized by law. Id. According to these drafts, as long as the member states are recognized by law in their respective states, they could adopt dispositions that for a limited time and in necessary strict measures, allowed them to derogate human rights. Id; Acta Resumida de la Cuarta Sesión, reprinted in, Segunda Conferencia Interamericana Extraordinaria, Rio de Janeiro, Brazil, Nov. 17-30, 1965, I ACTAS Y DOCUMENTOS, OEA/Ser. E/XIII 3, Doc. 118, at 432, 440 (1965).
79. Norris & Reiton, supra note 78, at 192.
man rights during official public emergencies. The Commission later dropped this language and revised Article 27 in accordance with its earlier resolution on the protection of human rights. The final version allowed derogation from guarantees "[i]n time of war or other emergency which threatens the independence or the security of a State Party."

The study upon which the final resolution and article were founded emphasized that human rights should be suspended only in truly exceptional circumstances that threaten state security. A state may resort to emergency powers only when other means of maintaining peace have failed. The Commission's final draft included due process of law, as well as the right to protection from arbitrary arrest and detention in its list of nonderogable rights. Due to dissension among the delegations, the new version deleted both rights.

The United States delegation's motion to reincorporate these rights was defeated. The United States successfully proposed an amendment to the derogation article, creating the clause: "or of the judicial guarantees essential for the protection of such rights." This amendment became the springboard for the Habeas Corpus Case, which recognizes that a right is not fully protected unless governmental actions or laws restricting that right can be challenged for their constitutional or legal propriety.

82. Id. at 50.
83. Daniel Hugo Martins, The Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or "State of Siege", OEA/Ser. L/V/II.15, Doc. 12 (English) at 34-35 (1967). The study concluded that human rights should be suspended only to protect state security. Id. at 34.
84. See id. (explaining that human rights should be suspended only in emergency situations).
86. Id. at 264-66.
87. Id. at 267.
88. Id. at 448.
2. Limitations on the Scope of the Suspension

A party may derogate from its obligation to respect the rights guaranteed in the American Convention only "to the extent and for the period of time strictly required by the exigencies of the situation . . . " The extent of the derogation may be restricted by limiting the territory affected or the measures taken. Additionally, the American Convention contains an arbitrary arrest provision further limiting the measures that a state may employ and compelling a narrow interpretation of circumstances permitting derogation.

Moreover, under the American Convention each person's rights are limited by the rights of others, and by the security and general welfare of all, which form important components of a democratic society. Of the three comparable human rights instruments, only the American Convention contains such a general restrictive clause. This provision demonstrates that states should not resort to derogation in ordinary situations, but only in extraordinary situations in which ordinary measures prove insufficient.

89. American Convention, supra note 17, art. 27(1).
90. American Convention, supra note 17, art. 27(1).
91. American Convention, supra note 17, art. 7.

Article 7 reads in part:

1. Everyone has the right to personal liberty and security.
2. No one shall be deprived of his personal 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.

92. American Convention, supra note 17, art. 32(2). See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31, ¶ 1, 8 I.L.M. 679 [hereinafter Vienna Convention] (setting forth the basic rule of interpretation for treaties applicable to the American and European Conventions); see also id. art. 32 (providing that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose").


The Convention also limits measures that states may take in emergency situations by requiring that they not create measures inconsistent with other commitments under international law. Consequently, any derogation must not violate other treaties to which that state is also a party.

3. Nonderogable Guarantees

The derogation clause of the American Convention does not authorize the suspension of all rights. Nonsuspendable rights include rights to judicial personality, life, humane treatment, name, nationality, and participation in government. The rights of family and of child, freedom of conscience and religion, and freedom from slavery and ex post facto laws are also not suspendable.

The American Convention further prohibits suspension of the "judicial guarantees essential for the protection" of nonderogable rights. Although the Convention does not specify the "essential" guarantees, the Habeas Corpus Case indicates one right which is considered essential—the right to a judicial hearing before a judicial officer. Upholding the right to habeas corpus is essential because it offers the only method of enforcing the Convention's remaining rights.

II. THE HABEAS CORPUS CASE

A. THE COURT’S INTERPRETATION OF ARTICLES 7, 25, 27

Because of the atrocities that often accompany states of emergency, the Commission requested that the Court interpret the scope of the last phrase of Article 27 which prohibits the suspension of judicial guar-

95. See American Convention, supra note 17, art. 27(1) (limiting allowable derogations to those measures consistent with other international treaty obligations). Humanitarian law agreements are deemed incorporated by reference to the derogation clause of the American Convention for those parties that have also ratified the Geneva Conventions and the Two Protocols. Id. Any derogations inconsistent with the humanitarian law conventions are not permitted. Id.

96. American Convention, supra note 17, art. 27(2).
97. American Convention, supra note 17, art. 27(2).
98. American Convention, supra note 17, art. 27(2).
99. American Convention, supra note 17, art. 27(2).
100. American Convention, supra note 17, art. 27(2).
101. American Convention, supra note 17, art. 27(2).
102. See American Convention, supra note 17, art. 64(1) (granting the Commission the right to seek an advisory opinion through an “interpretation of [the American]
The Commission suggested that the value of the right to habeas corpus is greatest during states of emergency. The immediate goal of habeas corpus is to bring the detainee before a judge to verify that he is alive and to determine whether his captors subjected him to physical or psychological torture. The Commission reasoned that the right to habeas corpus constitutes an inextricable part of the right to humane treatment, which is never suspendable. In fact, without habeas corpus, the right to humane treatment cannot be enforced. The Court issued a unanimous opinion supporting the Commission’s view.

Convention or of other treaties concerning the protection of human rights in the American States”). The Commission is additionally empowered with an absolute right to request advisory opinions within the framework of Article 64(1). The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82 of Sept. 24, 1982, Series A. No. 2, ¶ 16.

103. See Habeas Corpus Case, supra note 26, at 515 (interpreting the scope of Article 27). In its request for an opinion, the Commission argued that some parties assume that the writ of habeas corpus is suspendable. *Id.* Some states promulgated special laws and instituted certain practices enabling them in some cases to hold a detainee incommunicado for up to 15 days. *Id.* The Commission stated that the detainee is often secluded from any outside contact and is prevented from resorting to the writ of habeas corpus at a time of its greatest importance. *Id.*

104. *Habeas Corpus Case, supra* note 26, at 515.

105. *Habeas Corpus Case, supra* note 26, at 515.

106. *American Convention, supra* note 17, art. 5. Article 5 provides:

1. Every person shall have the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. 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.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

*Id.*

107. *Habeas Corpus Case, supra* note 26, at 514.

In interpreting Articles 25(1) and 7(6) of the American Convention, the Court considered the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties and the provisions of Article 29 of the American Convention.\(^{109}\) The Vienna Convention eschews a detailed collection of treaty interpretation cannons. The Vienna Convention contains two basic principles: (1) treaties are binding and require a good faith performance,\(^{110}\) and (2) a party may not invoke domestic law to justify failure to perform a treaty.\(^{111}\)

The Court in the *Habeas Corpus Case* first noted that Article 27 does not address whether the right of habeas corpus is nonderogable.\(^{112}\) When read in conjunction with the specific category of "judicial guarantees essential for the protection of such rights," the Court concluded that suspension of guarantees does not imply a temporary suspension of the rule of law.\(^{113}\) Nor does the suspension of guarantees mean that those in power may disregard the principle of legality, which is always binding.\(^{114}\) An inseparable bond exists between the principle of legality, democratic institutions, and the rule of law.\(^{115}\)

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109. *See* Vienna Convention, *supra* note 92, art. 31(1) (stating that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

Article 29 of the American Convention provides:

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of another convention to which one of the said states is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

American Convention, *supra* note 17, art. 29

The Court interpreted Article 27(2) as preventing suppression of the rights and freedoms recognized in the American Convention. *Habeas Corpus Case, supra* note 26, at 516.

110. *See* Vienna Convention, *supra* note 92, art. 26 (describing the treaty principle known as the *pacta sunt servanda*).

111. Vienna Convention, *supra* note 92, art. 27.

112. *Habeas Corpus Case, supra* note 26, at 517.

113. *Habeas Corpus Case, supra* note 26, at 517.

114. *Habeas Corpus Case, supra* note 26, at 517.

115. *Habeas Corpus Case, supra* note 26, at 519; *see also* American Convention,
Moreover, the Court reasoned that because guarantees are designed to protect and ensure the exercise of a right, parties to the American Convention have an obligation to respect the rights of all persons, as well as an obligation to protect and ensure the exercise of such rights.\textsuperscript{116} The Court then pointed out that the Article 27 derogation provision itself is subject to certain limitations; it applies only in war time, public danger or states of emergency which threaten the continued existence or well-being of the state.\textsuperscript{117} The Court further noted that the provision permits suspension of certain rights and freedoms "only to the extent and for the period of time strictly required by the exigencies of the situation;" such measures must not violate the party's other international legal obligations. Further, the measures must not involve "discrimination on the ground of race, color, sex, language, religion, or social origin."\textsuperscript{118}

The Court observed that abuses often result from the application of emergency measures not objectively justified.\textsuperscript{119} Given the principles upon which the Inter-American system is founded, the suspension of guarantees not only undermines the foundation of democracy, but calls into question the continued protection of certain fundamental human rights.\textsuperscript{120}

\textbf{B. THE COURT'S INTERPRETATION OF "JUDICIAL GUARANTEES ESSENTIAL FOR THE PROTECTION OF SUCH RIGHTS"}

After the Court limited the boundaries of a party's power to curtail certain rights during emergency situations, it determined which rights fall within the scope of the derogation provision.\textsuperscript{121} When determining what judicial remedies are "essential" to protect nonsuspendable rights,

\textit{supra} note 17, art. 30 (limiting derogation of protected rights and freedoms to measures that are in accord with public law and the general interest of the community).

116. \textit{Habeas Corpus Case, supra} note 26, at 518. The Court stated that "[t]he concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad." \textit{Id}; see also American Convention, \textit{supra} note 17, art. 1(1) (creating an obligation for all member parties to respect the rights enumerated in the Convention).

117. American Convention, \textit{supra} note 17, art. 27.

118. \textit{Habeas Corpus Case, supra} note 26, at 518.

119. \textit{Habeas Corpus Case, supra} note 26, at 518.

120. \textit{Habeas Corpus Case, supra} note 26, at 518.

121. \textit{Habeas Corpus Case, supra} note 26, at 518.
the answer varies depending upon which rights are at stake. Some human rights cannot be outweighed by any exigent circumstances. For example, the Court recognized that the "essential" judicial guarantees necessary to protect a person's physical integrity differs from rights that seek to protect the right to a name.

In analyzing "essential" judicial guarantees, the Court defined "judicial" to refer only to those remedies capable of protecting rights. The Court found implicit in this definition "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." In determining that the right to habeas corpus is an essential judicial guarantee, the Court looked to Article 25(1) of the American Convention, which provides that all individuals have the right to immediate judicial review of all possible acts that violate fundamental rights afforded by the Convention.

The Court termed the general provision in Article 25(1) as "amparo," a simple and prompt remedy designed to protect all rights under the Convention. The Court reasoned that "amparo" applies to all rights, including those nonderogable rights expressly mentioned in Article 27(2). The Court determined that the writ of habeas corpus constitutes a judicial remedy designed to protect against arbitrary arrest and detention through a judicial decree ordering the appearance of the detained person before a judge to determine the lawfulness of the deten-

122. Habeas Corpus Case, supra note 26, at 518.
123. Habeas Corpus Case, supra note 26, at 518. This author believes that some human rights are fundamental rights—fundamental in the sense that they are conferred upon the individual as such and solely for his human condition, in such a way that they are derived from his own human nature, from his intrinsic dignity; and that they are, as such, antecedent to, superior to, and independent of any authority and, therefore, cannot be invented, but merely discovered.
125. Habeas Corpus Case, supra note 26, at 520.
126. Habeas Corpus Case, supra note 26, at 520.
127. American Convention, supra note 17, art. 25 (1). Article 25(1) reads in part: Everyone has the right to simple and prompt recourse . . . to a competent court or tribunal for protection against acts that violate his fundamental rights recognized . . . by this Convention, even though such persons acting in the course of their official duties.
128. Habeas Corpus Case, supra note 26, at 520.
129. Habeas Corpus Case, supra note 26, at 520.
tion and, if appropriate, to order the release of the detainee.\textsuperscript{130} “Amparo” comprises a whole series of remedies, and habeas corpus provides an essential component of “amparo” as well as an independent remedy.\textsuperscript{131} For habeas corpus to achieve its primary purpose, the detained person must appear before a competent judge or tribunal. Habeas corpus plays an important role in ensuring respect for a person’s life and physical integrity, in preventing his disappearance, and in protecting him against torture or other cruel, inhumane or degrading treatment.\textsuperscript{132} Applying this reasoning to the practices of certain nations in the western hemisphere, the Court concluded that the rights to life and humane treatment are threatened whenever habeas corpus is suspended.\textsuperscript{133}

Given the Inter-American system’s deep-rooted principles, the suspension of guarantees must remain associated with the “effective exercise of representative democracy” referred to in Article 3 of the OAS Charter.\textsuperscript{134} The Court held that, because habeas corpus forms a judicial guarantee essential to protect the rights and freedoms of a democratic society, Article 27(2) prohibits its suspension.\textsuperscript{135}

\textsuperscript{130} Habeas Corpus Case, supra note 26, at 520.
\textsuperscript{131} Habeas Corpus Case, supra note 26, at 521.
\textsuperscript{132} Habeas Corpus Case, supra note 26, at 521.
\textsuperscript{133} Habeas Corpus Case, supra note 26, at 521.
\textsuperscript{134} Habeas Corpus Case, supra note 26, at 518; OAS Charter, supra note 30, art. 3.
\textsuperscript{135} Habeas Corpus Case, supra note 26, at 518. The Court ruled that the writ of habeas corpus is non-suspendable. Id. Although many provisions of the American Convention do not recognize habeas corpus as a nonderogable right in emergency situations, the Court relied on Article 27(2) for its authority that such a right is non-suspendable. Id.

The Court found support for its conclusion that the right to habeas corpus was an essential judicial guarantee by referring to the record of the Commission’s address during the hearing on the request for this advisory opinion. Id. The President of the Commission stated in the hearing:

The Commission is convinced that thousands of forced disappearances could have been avoided in the recent past if the writ of habeas corpus had been effective and if the judges had investigated the detention by personally going to the places that had been denounced as those of detention. This writ is the best instrument available to correct promptly abuses of authority involving arbitrary deprivation of freedom. It is also an effective means of preventing torture and other physical and psychological abuses, such as exile, perhaps the worst punishment, which has been so abused in our hemisphere, where thousands of exiles make up a true exodus.

As the Commission has painfully recalled in its last Annual Report, these tortures and constraints tend to occur during long periods of incommunication,
The Court in the *Habeas Corpus Case* thus derived its interpretation of Article 27(2), as applied to Article 7(6) and in light of Article 25(1), by examining not only the ordinary meaning of the articles, but the realities of the subsequent practice of parties under the Convention. The Court found no reason to exclude the right of habeas corpus from the Convention's protection and thereby upheld habeas corpus as an "essential judicial guarantee" of the remaining rights and freedoms.

III. THE EUROPEAN SYSTEM FOR PROTECTING HUMAN RIGHTS

The European Court of Human Rights, established in 1959, is the most judicially active of the international human rights tribunals. The Council of Europe (the Council), a regional intergovernmental organization consisting of twenty-one western European nations, established the European System for protecting human rights. The Council's legal authority to protect and promote human rights emanates from two treaties: the European Convention of Human Rights (the European Convention) and the European Social Charter (the Charter). The European Court's jurisdiction extends to the interpretation and application of the European Convention and its various Additional Protocols. The European Convention, entered into force in 1953, guarantees basic civil and political rights, while the Charter guarantees economic and social rights. Article 3 of the European Convention serves to guarantee during which the prisoner lacks the legal means to assert his rights. It is precisely under these circumstances that the writ of habeas corpus is of greatest importance.

*Id.*

Article 27 limits the ability of the state to suspend rights and freedoms by delineating a category of specific rights and freedoms that are never derogable under any circumstances. American Convention, *supra* note 17, art. 17.

136. *Habeas Corpus Case,* *supra* note 26, at 518.

137. *Habeas Corpus Case,* *supra* note 26, at 518.

138. ARTHUR HENRY ROBERTSON, HUMAN RIGHTS IN EUROPE (2d ed. 1977).

139. *Id.* at 5-16.

140. European Convention, *supra* note 17, art. 45.

141. European Convention, *supra* note 17, arts 2-18. See generally LAWSON, *supra* note 12, at 564 (discussing the rights protected under the European Social Charter). All 22 member states of the Council of Europe have ratified the Convention. BASIC DOCUMENTS ON HUMAN RIGHTS 326 (Ian Brownlie ed., 3d ed. 1992). These states are as follows: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, The Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. *Id.*
these rights in "[e]very Member of the Council of Europe," thereby requiring them to accept the principles and ensure "the enjoyment of human rights and fundamental freedoms."\footnote{European Convention, supra note 17, art. 3.}

B. RIGHTS GUARANTEED

The European Convention establishes the most advanced international system for protecting human rights in existence today.\footnote{Jerry L. Mashaw, Federal Issues In and About the Jurisdiction of the Court of Justice of the European Communities, 40 Tul. L. Rev. 21 (1965).} The European Convention’s guarantees include the right to life, the right to be free from torture, inhumane or degrading treatment and punishment, the prohibition of slavery, and the rights to liberty, security of person, and due process of law.\footnote{European Convention, supra note 17, arts. 2-6.} The European Convention also contains a non-discrimination clause and a provision requiring that member states provide effective remedies for victims of human rights violations.\footnote{European Convention, supra note 17, arts. 13-14. See generally, FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 21 (1975) (discussing the guarantees made by the parties to the European Convention).}

Article 15 of the European Convention establishes two conditions for derogation: (1) the existence of a public emergency threatening the life of the nation, and (2) any measures undertaken by the state resulting from the dangers facing the state.\footnote{European Convention, supra note 17, art. 15.} In theory, these conditions appear to restrict a state’s right to derogate.\footnote{Id.} In practice, however, the bar-

\footnote{142. European Convention, supra note 17, art. 3.}
\footnote{143. Jerry L. Mashaw, Federal Issues In and About the Jurisdiction of the Court of Justice of the European Communities, 40 Tul. L. Rev. 21 (1965).}
\footnote{144. European Convention, supra note 17, arts. 2-6.}
\footnote{145. European Convention, supra note 17, arts. 13-14. See generally, FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 21 (1975) (discussing the guarantees made by the parties to the European Convention).}
\footnote{146. European Convention, supra note 17, art. 15.}
\footnote{147. European Convention, supra note 17, art. 15.}
riers to derogation in the European system are frighteningly low and human rights are often suspended.

B. THE EUROPEAN COURT OF HUMAN RIGHTS

1. Jurisdiction

Only the parties to the European Convention that accept the jurisdiction of the European Court of Human Rights and the European Commission on Human Rights (the Commission) may refer cases to the Court.148 The Commission's jurisdiction to deal with cases filed by one party against another party becomes compulsory as soon as both parties have ratified the Convention.149 The Commission's jurisdiction to decide individual petitions is, however, optional.150 Individual jurisdiction is invocable only if the party, in addition to ratifying the Convention, has submitted to individual jurisdiction.151

Only cases that the Commission and the parties refer to the European Court of Human Rights have contentious jurisdiction.152 Individuals have no standing to take a case before the Court.153 Individuals may only file complaints with the Commission.154 The Commission may refer the case to the Court. After the Court accepts a case and renders a decision, the decision is final.155

Although the European Convention initially conferred only contentious jurisdiction on the European Court,156 it now also has limited advisory jurisdiction.157 The European Convention empowers only the Commit-

148. European Convention, supra note 17, art. 15.
149. European Convention, supra note 17, art. 24.
150. European Convention, supra note 17, art. 24.
151. European Convention, supra note 17, art. 25. An individual must exhaust all available domestic remedies before filing a case with the Commission. Id. art. 26.
152. European Convention, supra note 17, art. 45.
153. See European Convention, supra note 17, art. 44 (stating that only parties and the Commission have the right to bring actions before the Court). A case is ripe for adjudication by the court only "[a]fter the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32." Id. art. 47.
154. European Convention, supra note 17, art. 25.
155. European Convention, supra note 17, art. 52.
156. See ROBERTSON, supra note 138, at 314-19 (discussing the jurisdiction of the European Court of Human Rights).
157. ROBERTSON, supra note 138, at 314-19. See generally European Convention, supra note 17, Protocol II.
tee of Ministers to request advisory opinions. This power is limited, however, to “legal questions concerning the interpretation of the Convention and the Protocols thereto.” In exercising its advisory jurisdiction, the Court may not interpret “the content or scope of the rights or freedoms guaranteed by the European Convention and its Protocols.”

2. Shortcomings in the European System: Past Derogations

The European Commission’s record is not encouraging. Nearly forty percent of the 5,000 registered applications lodged under Article 25 of the European Convention came from “persons detained in prison, or otherwise interned.” Despite large scale degrading and barbaric detentions by Britain in Northern Ireland, the Commission has refused to investigate the complaints or to take appropriate action.

The European Convention is subject to strict, impartial, and nonpoliticized international supervision by its Commission and by the European Court. These agencies have interpreted the derogation clause of the European Convention and found all three of the following derogations cases justifiable. Lawless v. Ireland originated from an

158. European Convention, supra note 17, Protocol II, art. 1(1).
159. European Convention, supra note 17, Protocol II, art. 1(1).
160. European Convention, supra note 17, Protocol II, art. 1(2).

This author contends that statesmen hypocritically proclaim the importance of the protection of human rights but refuse to act when the need arises. Such hypocrisy has led to a crisis in the world order. This crisis is apparent by the inability of European and other states to cope with international terrorism as characterized by a policy of craven surrender to terrorists’ threats, and by a failure to punish terrorists and to intervene against countries knowingly harboring terrorists or acting as accessories after the fact. Id.


individual complaint and was examined by the Commission and the Court. The Greek Case\textsuperscript{165} originated from a complaint by several other member states and did not reach the Court. Both the Commission and the Court examined Ireland v. United Kingdom.\textsuperscript{166}

a. Notification

The European Convention requires that derogating parties notify the Secretary General of the Council of Europe of all derogation measures taken and of the reasons for the derogation.\textsuperscript{167} The European Convention does not, however, contain time limits for such notification.\textsuperscript{168} In the Greek Case, the Commission found that the state's communication of the reasons for derogation was unduly late because more than four months had passed.\textsuperscript{169} By contrast, the International Covenant on Civil and Political Rights and the American Convention require immediate notification.\textsuperscript{170} This probably means that such notification should occur no later than at the time the government imposes derogation.

While governments in the European system must give information concerning the nature of the derogation measures, they need not specify the derogated articles.\textsuperscript{171} Moreover, a violation of the notification requirement does not appear to affect the validity of the derogation.\textsuperscript{172}

By contrast, both the International Covenant on Civil and Political Rights and the American Convention require precise information identifying the derogated provisions.\textsuperscript{173} Therefore, derogations from the European Convention are most likely to suffer from neglect or lack of accountability.

\begin{itemize}
\item \textsuperscript{165} The Greek Case, 1968 Y.B. EUR. CONV. ON HUM. RTS. 690 (Eur. Comm'n on Human Rights) [hereinafter Greek Case]. Greece suspended its constitution following a series of demonstrations, riots, terrorist attacks, and strikes. \textit{Id.} at 704.
\item \textsuperscript{166} Report of Ireland v. United Kingdom, \textit{supra} note 162, at 8; Ireland v. United Kingdom, 1978 Y.B. EUR. CONV. ON HUM. RTS. at 602.
\item \textsuperscript{167} European Convention, \textit{supra} note 17, art. 15(3).
\item \textsuperscript{168} \textit{See} European Convention, \textit{supra} note 17, art. 15(3) (failing to delineate any time constraints on notification of derogation).
\item \textsuperscript{169} Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. at 41-43.
\item \textsuperscript{170} American Convention, \textit{supra} note 17, art. 27(3); International Covenant, \textit{supra} note 93, art. 4(3).
\item \textsuperscript{171} Lawless Case, 1961 Y.B. EUR. CONV. ON HUM. RTS. at 482. Governments must give a specific and timely statement of the reasons for the derogation. \textit{Id.}
\item \textsuperscript{172} Lawless Case, 1961 Y.B. EUR. CONV. ON HUM. RTS. at 482-86.
\item \textsuperscript{173} American Convention, \textit{supra} note 17, art. 27(3); International Covenant, \textit{supra} note 17, art. 4(3).
\end{itemize}
b. **Criteria of an Emergency**

Because certain international conflicts do not clearly constitute public emergencies, the European Court has given substantial deference to the judgment of derogating governments.\(^\text{174}\)

To justify derogations, the Irish government in *Lawless* argued that

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\(^{174}\) Report of the Lawless Case, *supra* note 94, at 57. The "margin of appreciation" or scope of discretion of domestic courts is recognized by the Strasbourg authorities as immunizing states from the challenge of the European Convention. *Id.*; see also Sir Humphrey's Argument, 2 E.H.R.R., ser. B, at 391-97 (1960-61) (encouraging the Court to adopt the concept of "margin of appreciation").

The *Lawless Case* dealt with Article 15 of the European Convention. Report of the *Lawless Case, supra* note 94. The Commission, and later the European Court, accepted the argument that national authorities should benefit from a reasonable "margin of appreciation" in deciding whether a public emergency exists and in deciding what measures to take to cope with a public emergency. *Id.* at 57. The Court later recognized that the provisions allowing restrictions on some of the basic human rights, as provided for in paragraph 2 of Articles 8, 9, 10 and 11 of the Convention, would leave a margin of appreciation to the contracting states when exercising such restrictions. *Id.* This margin, according to the Court, is given to both the domestic legislature and other domestic bodies called upon to interpret and apply the laws in force. *Id.*; see, e.g., DeWilde, Ooms and Vevsyp Cases, 12 Eur. Ct. H.R. (ser. A) (1971); Case of Engel and Others, 22 Eur. Ct. H.R. (ser. A) (1976); Golder Case, 18 Eur. Ct. H.R. (ser. A) at 21-22 (1975). According to the Court in Ireland v. United Kingdom:

It falls in the first place to each Contracting State, with its responsibility for the "life of the nation," to determine whether that life is threatened by a "public emergency" and, if so, how far is it necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves those authorities a wide margin of appreciation.

Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements . . . , is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis . . . .

Report of Ireland v. United Kingdom, *supra* note 162.

Domestic margin of appreciation is thus accompanied by a European supervision. *Id.*; see also Feingold, *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, 53 NOTRE DAME L. REV. 90, 90-106 passim (1977) (discussing the Court's use of the margin of appreciation and its incompatibility with the European Convention).
the warlike operations of the Irish Republican Army against the authorities in Northern Ireland created a state of emergency by attempting to involve the Irish State in a war against a foreign state.\textsuperscript{175} The Court in \textit{Lawless} defined a "public emergency threatening the life of the nation" somewhat vaguely as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed."\textsuperscript{176} In \textit{Ireland v. United Kingdom},\textsuperscript{177} also involving Northern Ireland, the United Kingdom argued that shooting, bombing and rioting, the inability of regular criminal courts to restore peace and order, the widespread intimidation of the population, and the difficulties for control presented by the ease of escape across the border, justified the United Kingdom's derogation from its obligations.\textsuperscript{178}

The \textit{Ireland} Court's analysis is, however, problematic. Because internal disturbances do not involve dangers from \textit{outside} the state that threaten the life of the nation, any measure the government takes to cope with \textit{internal} emergencies are directed against the citizens of the state. This is inconsistent with the prescribed purposes of the derogation clause and the \textit{Ireland} Court's opinion. Even actual war may not constitute a sufficient threat to justify restrictions on personal freedom. A war, for example, may take place far from the territory of a country and may not affect the normal life of a nation. Similarly, mere declarations of war may not always accompany belligerent acts. As with all other public dangers, if a national government can confront a war with its ordinary powers, it cannot use the war to declare a state of emergency and to expand those powers.

In the \textit{Greek Case}, the Commission held that an emergency must affect the \textit{whole} nation before a derogation is permitted.\textsuperscript{179} In its report, the Commission attempted to give a general and comprehensive

\footnotesize{175. Robertson, \textit{supra} note 138, at 112-39; Report of the Lawless Case, \textit{supra} note 94, at 76.}

\footnotesize{176. Lawless Case, 1961 Y.B. EUR. CONV. ON HUM. RTS. at 472-74. The Court considered critical: (1) the existence of a secret army (the Irish Republican Army) engaged in unconstitutional activities and using violence to reach their ends; (2) the operation of this army outside state territory, which jeopardized Ireland's relations with its neighbors; and (3) the steady and alarming increase in terrorist activities. \textit{Id.} at 474.}

\footnotesize{177. Ireland v. United Kingdom, 1978 Y.B. EUR. CONV. ON HUM. RTS. at 602.}

\footnotesize{178. Report of Ireland v. United Kingdom, \textit{supra} note 162, at 75-86.}

\footnotesize{179. Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. at 72.}
list of requirements for a "public emergency." The Commission declared that the crisis: (1) must be actual and imminent; (2) must involve the whole nation; (3) must threaten the continuance of the organized life of the community; and (4) must be exceptional in that the normal measures permitted by the Convention for the maintenance of public safety, health, and order are plainly inadequate. Moreover, the Commission placed the burden of proof on the government to demonstrate the need to suspend human rights.

c. Limitations on the Scope of Suspension and the Extent of Measures

The scope of a derogation must directly relate to the exigency of the situation. A rational link must exist between the emergency and the specific measures employed. The emergency must appear grave and involve a threat to the routine procedures in the administration of law. Moreover, while the state may possess a certain "margin of appreciation" for determining whether such a situation exists, its determination is not a matter of unilateral discretion. The measures of derogation also must not extend more than are "strictly required by the exigencies of the situation" that have provoked their use. Thus, the derogation must relate proportionally to the claimed emergency, and the state must use the least stringent measures available to alleviate the emergency situation. The government also receives a "margin of appreciation" in assessing the need for implementation of the

180. Id.
181. Id. (emphasis added).
182. Id.
183. See Report of Ireland v. United Kingdom, supra note 162, at 118-19 (explaining how the United Kingdom justified its methods against Northern Ireland by referring to Article 15 of the European Convention and the security situation).
184. Report of Ireland v. United Kingdom, supra note 162, at 119.
185. Report of Ireland v. United Kingdom, supra note 162, at 119.
186. See generally Lawless Case, 1961 Y.B. EUR. CONV. ON HUM. RTS. 430 (discussing how the state is bound to the principles and jurisdiction of the Convention as a Contracting Party and, in return, the individual is bound to the jurisdiction of the state); Greek Case, 1968 Y.B. EUR. CONV. ON HUM. RTS. 690 (discussing how the Court rejected the claim of the Greek government to invoke a state of emergency justifying the suspension of certain rights because the emergency did not exist when first proclaimed, and was not thereafter beyond the normal control of the Greek authorities).
187. European Convention, supra note 17, art. 15.
188. Report of Ireland v. United Kingdom, supra note 162, at 118-19.
derogation. Nonetheless, the state’s decision to levy a derogation must undergo close international scrutiny.

Similar to Article 4 of the International Covenant on Civil and Political Rights and Article 27 of the American Convention, Article 15 of the European Convention permits derogations only where such measures are not inconsistent with other obligations under international law. The four Geneva Conventions of 1949 provide additional obligations under international law with which members of the European Convention must comply.

The fact that Article 5 guarantees the right to liberty but does not guard against arbitrary use of power represents a significant shortcoming of the European Convention. The European Convention provides a substantially lower standard of protection than the Universal Declaration, the International Covenant on Civil and Political Rights, or the American Convention because the word “lawful” qualifies all the limitations to the right to personal liberty found in Article 5. The government that is accused of violating its obligations also determines the lawfulness of its actions. The European Convention, however, does provide a set of criteria to guard against arbitrariness. To the extent that international treaties should protect against arbitrary laws, the United Nations’ broader definition of unlawful activities provides a higher standard of protection than does the European Convention.

191. International Covenant, supra note 93, art. 4.
192. American Convention, supra note 17, art. 27.
193. European Convention, supra note 17, art. 15.
194. See European Convention, supra note 17, art. 15 (defining the scope of a derogation).
196. European Convention, supra note 17, art. 5.
197. See European Convention, supra note 17, art. 5(4) (declaring that anyone deprived of liberty is entitled to proceedings that will decide the lawfulness of the detention).
198. See European Convention, supra note 17, arts. 5-7 (imposing standards of reasonable treatment for the detained individuals).
199. See Schreuer, supra note 20, at 130 (explaining that Article 2(4) of the Unit-
d. Enforcing Judgments Under Article 54

Article 54 of the European Convention empowers the Committee of Ministers to ensure the enforcement of judgments of the European Court. To discharge this obligation, the Committee adopted “Rules Concerning the Application of Article 54 of the European Convention on Human Rights.” The Rules provide that upon transmission of a judgment, the Committee shall include the judgment on its agenda. The state in question then must inform the Committee of steps taken to comply with the judgment. If the state has not taken any steps to comply with the judgment, the case is automatically placed on the Committee’s agenda for consideration within the next six months.

IV. THE UNITED STATES AND THE AMERICAN CONVENTION

Under the United States Constitution, the Executive Branch negotiates treaties. To bind the United States, two-thirds of the Senate must give its advice and consent to ratification. The United States Senate has not yet ratified the American Convention.

The president may, however, bind the United States without the Senate’s consent by executive agreements. The president may make international agreements directly with foreign nations. Like treaties, these agreements become the law of the land. The president could,
therefore, independently bind the United States to the American Convention provided that such an agreement was held not to need the advice and consent of the Senate.\footnote{211}

The constitutionality of a treaty is purely a domestic issue.\footnote{212} Even if the United States Supreme Court declared a treaty unconstitutional, United States' failure to give effect to the treaty would constitute a breach of its obligations under international law.\footnote{213}

Article VI of the United States Constitution provides, in part, that all treaties are the supreme law of the land.\footnote{214} Under this provision, federal statutes and treaties have the same judicial effect.\footnote{215} Thus, no treaty provision becomes effective if it conflicts with the United States Constitution.\footnote{216} A conflict arises with respect to Article I of the Constitution, which prohibits the suspension of the writ of habeas corpus unless it is necessary to maintain public safety.\footnote{217} Thus, the United States Constitution might sanction suspension of the right to habeas corpus relief under circumstances where the \textit{Habeas Corpus} decision would not.\footnote{218}

Arguably, the United States is not bound by the \textit{Habeas Corpus Case} because it has not ratified the American Convention. Further, as an advisory opinion, the \textit{Habeas Corpus Case} may not bind any party to the Convention. It does not follow, however, that the United States

\begin{itemize}
  \item \footnote{211}{Id.}
  \item \footnote{212}{Vienna Convention, \textit{supra} note 92, art. 27. The United States has signed, but not ratified, the Vienna Convention. \textit{Id.} art. 46.}
  \item \footnote{213}{Vienna Convention, \textit{supra} note 92, arts. 27, 46.}
  \item \footnote{214}{U.S. CONST. art. VI.}
  \item \footnote{215}{\textit{See} Missouri v. Holland, 252 U.S. 416, 421 (1920) (holding that a treaty is invalid if it infringes on the Constitution). \textit{See also} Banco National de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (confining international relations to the auspices of the federal government and disallowing state government interpretations); Edye v. Robertson, 112 U.S. 580, 581 (1884) (holding that courts have reviewing power over treaty provisions); Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972) (emphasizing that Congress can denounce treaty obligations at any time).

  \item \footnote{216}{\textit{See} Reid v. Covert, 354 U.S. 1, 2 (1957) (holding that neither Congress nor any other branch of government power is subject to provisions in international agreements that are outside the scope of the Constitution); \textit{see also} American Convention, \textit{supra} note 17, art. 29(b) (containing a clause stating that nothing shall be inapposite to the American Convention).

  \item \footnote{217}{U.S. CONST. art. I, § 9 (emphasis added); \textit{see} Act Relating to Habeas Corpus and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1963) (authorizing President Lincoln to suspend the writ of habeas corpus during the Civil War).

  \item \footnote{218}{\textit{See} supra notes 26 and 102-37 and accompanying text (discussing the \textit{Habeas Corpus} case).}
should disregard the *Habeas Corpus* decision. The United States has a moral obligation, as the model democratic state, to applaud and embrace the Court's holding that the right to habeas corpus is an essential and nonderogable right.\(^\text{219}\)

Moreover, because the structural integrity of the American Convention mandates that only organs and parties to the treaty may bring suit to demand observance of the Convention's guarantees, the United States is unable to bring suit to stop ongoing human rights deprivations.\(^\text{220}\) United States' nonratification of the American Convention reveals an alarming insensitivity toward the general purposes and underlying philosophy of the OAS system as well as the goals the United States Constitution establishes.\(^\text{221}\)

V. RECOMMENDATIONS

The European Court and the United States must confront the issue of whether prolonged incommunicado detention and the denial of the right to challenge the lawfulness of detention are ever justified. Detention and denial of the right to habeas corpus are often preconditions to torture and violations of the right to life, which are unconditionally prohibited.\(^\text{222}\) Thus, the suspension of the right to habeas corpus is never justifiable. No state of emergency, no matter how violent or wide-

\[^{219}\text{Ex Parte Milligan, 71 U.S. (4 Wall.) at 120-21. The Court stated:}\
\text{The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the writ of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence.}\
\text{Id. (emphasis added).}\]

\[^{220}\text{American Convention, supra note 17, art. 61.}\]

\[^{221}\text{If former President Carter had succeeded in gaining Senate consent to ratification, the United States would be in a stronger position, morally and politically, to pursue a vigorous policy vis-à-vis governments with questionable human rights records. Signing the American Convention would provide the United States with another method of gaining information concerning human rights conditions in other countries and attitudes of particular governments about conditions. Such information could influence the direction, substance, and interests of United States' human rights foreign policy.}\]

\[^{222}\text{American Convention, supra note 17, art. 27(2).}\]
spread, could ever require the barring of detained persons from contact with an officer of the judiciary, a lawyer, a doctor, or a family member. Denying detainees such contact is never "strictly required by the exigencies of the situation."223

The United States and the European Court should follow the Habeas Corpus Court's decision and declare that the right to freedom from arbitrary arrest and detention, guarded by the right to habeas corpus, is a judicially essential guarantee to protect the remaining rights. The International Covenant on Civil and Political Rights,224 the American Convention, and the recent decision of the Habeas Corpus Court all stand for the proposition that the right of habeas corpus is nonderogable even in a state of emergency. These international agreements and decisions present strong evidence of the nonderogability of the right to habeas corpus in a state of emergency under customary international law.225

At a minimum, the European Convention and United States Constitution should guarantee the following: (1) the right in criminal cases to appear before a judicial officer; (2) the right to challenge the lawfulness of the detention; and (3) the right to release if the detention is found unlawful. Anything less fails to adequately express the right to respect the inherent dignity of the human person.

CONCLUSION

The first steps toward dictatorship are with the gradual suppression and erosion of individual rights.226 Once this suppression begins, it be-

223. European Convention, supra note 17, art. 15.
224. International Covenant, supra note 93, art. 10(1).
225. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (characterizing a growing body of international human rights law as customary international law). United States courts have relied on customary international law to grant relief. Id. at § 703(c); see also Filartiga, 630 F.2d at 876 (holding that the right to freedom from torture has become part of customary international law, as defined by the Universal Declaration of Human Rights). To substantiate its conclusion, the court traced the evolution of this rule from the United Nations Charter, the Universal Declaration, and other major international human rights instruments. Id; see also Jeffrey M. Blum and Ralph G. Steinhardt, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53 (1981) (discussing the struggle of domestic courts to adequately implement redress for human rights violations abroad in the face of traditional notions of territoriality).
226. See generally ROBERTSON, supra note 138, at 84-138 (discussing the conflicts surrounding the protection of particular rights).
comes increasingly difficult to bring it to a halt. 227 A democratic society must determine in advance the standards of rights and freedoms that it must respect. Society must then institute legal mechanisms to ensure these standards are observed. 228 A worldwide system of supervision is necessary to guarantee these rights as the foundation upon which to guard against all forms of totalitarianism.

If emergency situations must be the point of departure for the international law of human rights, any derogation must be as restrictive as possible. 229 The purpose of the American Convention, the European Convention, and the United States Constitution is to protect human rights and fundamental freedoms. 230 Derogation from the right to habeas corpus only leads to the suspension of further rights and freedoms, and the gradual erosion and eventual destruction of democratic societies.

Civilization cannot survive without the fundamental rights necessary to maintain the dignity of man. The state is only a creature of man; it must serve its master and not itself. Where the international community allows the state to pursue its goals at the expense of its citizens, mankind takes a giant leap backwards.

227. ROBERTSON, supra note 138, at 5.
228. Accepted general mechanisms of human rights enforcement include diplomatic pressure, moral and political support for the pro-human rights opposition, economic sanctions and various proportionate unarmed countermeasures.
229. See Vienna Convention, supra note 92, art. 31(1) (providing that the treaty language should be interpreted in good faith based upon its ordinary meaning and in keeping with its ultimate goal).