



**Guaranties of Lawful Detention Under Time of Public
Emergency
In International Human Rights Law**

ضمانات التوقيف القانوني المرعية في القانون الدولي
لحقوق الإنسان عند إعلان حالة الطوارئ في الدولة

BY

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During times of *public emergency*, certain types of detention that in ordinary circumstances would be considered arbitrary might be lawful according to international human rights law. Without criminal accusations, states can arrest and detain individuals for reasons related to security. The purpose of this article is to answer the question, what are the conditions that guarantee freedom from arbitrary detention during times of public emergency?

The meaning of the expression *public emergency* is given in article 4.1 of the International Covenant on Civil and Political Rights (ICCPR). The article implies that a *public emergency* is a disturbance in a state “. . . which threatens the life of the nation and [its] existence”¹ War, revolution, insurgency, terrorist attack, and even natural disasters are all examples of disturbances that could lead a state to announce that it is under a condition of public emergency. During ordinary times states are required to uphold human rights, but in times of public emergency, states may tweak the balance, somewhat, in favor of security over liberty.² Examples of such measures include, martial law and temporary suspension of *habeas corpus* or certain constitutional provisions, which could give the government power that might result in “arrests, searches, internment, summary trials, curfews, censorship and control of organizations like political parties or trade unions, postponement of elections and other curbs on political activity”³

Such unusual measures can only be justified temporarily during the time of public emergency. The ICCPR granted states

¹International Covenant on Civil and Political Rights, art. 4.1, Mar. 23, 1976, 999 U.N.T.S. 171.

²See Torkel Opsahl, *Emergency Derogation from Human Rights*, 5 MENNESKER OG RETTIGHETER 4, 4 (1987); see also Roger D. Golden, *What Price Security? The USA PATRIOT Act and America's Balance Between Freedom and Security*, in *HOMELAND SECURITY AND TERRORISM: READINGS AND INTERPRETATIONS* (James J. F. Forest, Russell D. Howard, & Joanne C. Moore eds., 2nd ed. 2014) to read more about the topic of the balance between security and freedom.

³Opsahl, *supra* note 2 at 4.

the right to derogate from their obligation to protect certain human rights. Article 4.1 states “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations”⁴ Article 4 does not specify those obligations that the state may derogate from. However, the article does pinpoint those rights the states are obligated to protect and may not derogate from such obligation under any circumstances, including public emergency. These rights are known as non-derogable rights.⁵ The individual’s right to liberty is not among those rights that are non-derogable. States, under public emergency, may lawfully derogate from their obligation to protect the individual’s right to liberty and, therefore, can arrest and detain individuals for security purposes, the purpose of public safety, or national emergency.⁶

What are the conditions that must be met for security detention to be lawful in time of public emergency? In time of public emergency there are two conditions that must be met for security detention to be lawful. First, the derogation from protecting the right to liberty must be lawful, and second, the detention must not be arbitrary.⁷

First condition, a genuine public emergency is the first ICCPR requirement for a valid derogation. A state can only derogate from some of its human rights obligations under the ICCPR if the state of emergency “. . . threatens the life of the nation and [its] existence”⁸ the second requirement is that the

⁴International Covenant on Civil and Political Rights, *supra* note 1 at art. 4.1.

⁵These non-derogable, rights are the right to life, the right to be protected from torture and other ill-treatment, the right to not be held under slavery and servitude, the right to not be imprisoned for debt, the right to not be retroactively criminally charged, the right to be recognized as a person before the law, and the right to freedom of thought, conscience, and religion.

⁶See CCPR/C/GC/35, General comment No. 35, *supra* note 518 at §VII. ¶65.

⁷International Covenant on Civil and Political Rights, *supra* note 1 at art. 4.1.

⁸*Id.* at art. 4.1.

public emergency be “officially proclaimed.”⁹ The proclamation must be made locally, for the public, as well as internationally for other states that are party to the ICCPR.¹⁰ Furthermore, the extent of the derogation must be strictly commensurate with the exigencies of the public emergency. This means the state must not exaggerate or go beyond what the reality requires.

The second condition that must be satisfied, in order that the detention of individuals during the time of public emergency be considered lawful is that the detention must not be arbitrary. Article 9 of the ICCPR defines the fundamental guarantees against arbitrary detention.¹¹ To avoid arbitrary detention during a time of public emergency the detention must not be unnecessary or for unreasonable purposes.¹² The detention must not be based on or involve discrimination on the ground of race, color, gender, language, faith or social origin.¹³ The detention must fulfill the fundamental guarantees against arbitrary detention that must be applied at all times, regardless of whether or not there is a state of emergency.¹⁴ These minimum standards or fundamental guarantee against arbitrary detention are non-derogable under any circumstances including time of public emergency.¹⁵

⁹*Id.* at art. 4.1.

¹⁰*Id.* at art. 4.1, 4.3.

¹¹*Id.* at art. 9, the article indicates that detention (1) must not be arbitrary; (2) must be on grounds established by law; (3) the detained party must be immediately informed of the reasons for his/her arrest and detention; (4) anyone criminally charged must be brought promptly before a judicial authority for speedy trial; (5) right to take proceeding before a court to challenge the lawfulness of any arrest or detention must be granted; and (6) compensation in case of unjust detention must be granted.

¹²Human Rights Committee, General Comment No. 35, *supra* note 6 at §VII. ¶66.

¹³International Covenant on Civil and Political Rights, *supra* note 1 at art. 4.1.

¹⁴*See id.* at art. 9. These fundamental guarantees against arbitrary require that detention must be on grounds established by law; the detainee must be immediately informed of the reasons for his/her arrest and detention; anyone criminally charged must be brought promptly before a judicial authority for speedy trial; right to take proceeding before a court to challenge the lawfulness of any arrest or detention must be granted; and compensation in case of unjust detention must be granted.

¹⁵*See generally* Arthur Chaskalson, *What's Happening to The Right to a Fair Hearing*, 41 ISR. L. REV 522, 526, 527 (2008).

The Human Rights Committee states that “[t]he fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.”¹⁶ In addition, the Human Rights Committee holds “[w]hile reservations to certain clauses of article 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to engage in arbitrary arrest and detention of persons.”¹⁷

The Human Rights Committee provides additional insight into the conditions under which derogation from the strict obligation to protect the right of liberty is permissible during times of public emergency. The Committee requires that emergency security detention must be conducted “rationally” and that such emergency power must not be misused. The Human Rights Committee explained that even though the rights enumerated in article 9 are not considered non-derogable rights, “. . . [s]tates parties derogating from normal procedures required under article 9 in circumstances of . . . public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.”¹⁸ Therefore, any detention under the state of emergency that is not necessary would constitute arbitrary detention.

Finally, the right to *habeas corpus* under public emergency must not be diminished.¹⁹ Individuals who are arrested and detained under the measures of public emergency must have their right to take the proceeding before a court in order for that court to decide on the lawfulness

¹⁶Human Rights Committee, General Comment No. 35, *supra* note 6 at §VII. ¶66.

¹⁷*Id.* at §VVI. 68.

¹⁸*Id.* at §VII. 65.

¹⁹*Id.* at §VVI. 67, the Human Rights Committee states that “. . . 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 measures of derogation.”

FREEDOM FROM ARBITRARY DETENTION
INTERNATIONAL HUMAN RIGHTS LAW PROVIDES GUARANTEES
AGAINST ARBITRARY DETENTION

حق السلامة من الاحتجاز التعسفي
ضمانات الحماية من الاحتجاز التعسفي في قانون حقوق الإنسان الدولي

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A Human right to liberty means the individual's right to freedom from being detained. The individual's right to liberty is one of the human rights that are protected by international human rights law. The International Covenant on Civil and Political Rights is an international hard law treaty. It will be used in this article as a standard reference to international human rights law. Article 9 of the covenant established that every individual has the right to liberty. The right to liberty is not only protected on the international level but also in many regional human rights instruments. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) state that "[e]veryone has the right to liberty. . . ." The American Convention on Human Rights (ACHR) states "[e]very person has the right to personal liberty. . . ." The Arab Charter on Human Rights states that "[e]very individual has the right to life, liberty, and security of person. These rights shall be protected by law." The recognition of the human right of liberty is also found in a number of non-binding international and regional *soft-law* instruments. The Universal Declaration of Human Rights states that "[e]veryone has the right to life, liberty, and security of person" The Asian Human Rights Declaration states that "[e]very person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty . . ." The Cairo Declaration on Human Rights in Islam states that "[i]t is not permitted without a legitimate reason to arrest an individual or restrict his freedom. . . ." Riyadh Declaration on Human Rights in Peace and War asserts that *unlawful restriction of human liberty and unlawful injury of an individual, physically or emotionally, is forbidden by Islamic Law.*

By listing all of the previous international laws, one would conclude that the right to liberty is widely recognized, protected, and guaranteed for everyone under international and regional human rights law, and no state government has a right to deprive an individual of his right to liberty without evidence or probable

cause of committing a crime. Although that conclusion sound to be accurate, the individual's right to liberty is neither unconditional nor ultimate. It is equally correct that the deprivation of individual liberty for intelligence or homeland security reasons is legally valid under international law.

The Human Rights Committee states that “[t]he right to liberty is not absolute.” Criminal charges are not the only legal grounds for deprivation of liberty. States may detain individuals under so-called *administrative detention*. Administrative detention encompasses preventative detention, security detention, and immigration detention. States also can arrest and detain individuals during a public emergency.

The common element to all these cases in which the state is legally justified, under international human rights law, in depriving an individual of their liberty is that the detention must not be *arbitrary*. The Human Rights Committee holds that states can legally deprive an individual of their liberty if that deprivation is not arbitrary. The question, at this point, is, what does it mean to say detention is arbitrary? Equivalently, it could be asked, what is required in order that detention is free of arbitrariness?

The Human Rights Committee explained the meaning of arbitrariness. The committee illustrates that imprisonment may be lawful by domestic law and nevertheless be arbitrary. The meaning of *arbitrariness* is not to be associated with an absence of legal ground. However, it must be understood more widely to encompass “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality.”

Both international human rights law and regional human rights laws, in an effort to protect against arbitrary detention, establish a set of conditions that must be met in order that deprivation of liberty is lawfully and not arbitrary. The decision to detain must be made on grounds established by law; reason for

arrest must be given to arrestee at the time of arrest; anyone criminally charged must be brought promptly before a judicial authority for speedy trial; right of *Habeas Corpus* must be granted by giving the detainee the ability to take proceeding before a court to challenge the lawfulness of an arrest or detention, and compensation in case of unjust detention must be granted.

These requirements can be called the “guarantees against arbitrary detention.” Violation of any or all of these requirements renders detention as arbitrary. These requirements are not only recognized by the ICCPR but are also established by many international and regional human rights instruments as well as having been established as precedents in many judicial verdicts and international human rights organizations.

Article 9 of the ICCPR states that “[n]o 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.” In addition, “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” According to this article, if the deprivation of an individual’s liberty occurs, the deprivation must be in accordance with procedures established by law, and the detained individual must be promptly informed of the grounds for their detention. These requirements are general and apply to all forms of detention, criminal or otherwise.

In addition to these requirements, article 9 contains other requirements that are specific to particular types of detention. With respect to individuals detained on criminal charges, article 9 states “[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.” With respect to anyone that is detained but not on the grounds of criminal charges, article 9

states 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.” Finally, and overall “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

The requirements are confirmed by the American Convention on Human Rights. The convention states that “[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.” It also states that “[a]nyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.” If an individual is criminally charged that individual “. . . 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 . . .” With respect to the right of every detained person to challenge the lawfulness of the confinement the convention states 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 . . .” Finally, the convention grants that “[e]very person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.”

The requirements are also confirmed by the Human Rights Committee. The committee confirmed that a lawful deprivation of an individual’s right to liberty must not be arbitrary and must be made on grounds established by law. The reason for arrest must be given to arrestee at the time of the arrest. Anyone criminally charged must be brought promptly before a judicial authority for speedy trial. The right to take proceeding before a court to

challenge the lawfulness of an arrest or detention must be granted. Finally, compensation in case of unjust detention must be granted.

Additionally, the requirements are confirmed by the Inter-American Commission on Human Rights. The Commission has said that any deprivation of an individual's right to liberty ". . . must in all circumstances comply with the requirements of preexisting domestic and international law." The deprivation of liberty must ". . . be based on the grounds and procedures clearly set forth in the constitution or other law and that it be demonstrably necessary, fair, and non-arbitrary." The detention ". . . must also be subject to supervisory judicial control without delay and, in instances when the state has justified continuing detention, at reasonable intervals."

The United Nations Office of the High Commissioner on Human Rights has demonstrated their acceptance of these requirements by passing the Human Rights, Terrorism, and Counterterrorism Fact Sheet.

In addition, the Working Group on Protecting Human Rights while Countering Terrorism, which is led by the Office of the United Nations High Commissioner for Human Rights, established a Basic Human Rights Reference Guide. The purpose of this guide is to assist legislators and decision-makers in ensuring that their laws and decisions which are made for the purpose of counter-terrorism comply completely with the international human rights laws. The Guide held that "[n]o one shall be subject to unlawful or arbitrary deprivation of liberty in the implementation of counterterrorism measures." If an individual has been arrested or detained on terrorism charges he/she ". . . must be informed of the reasons for arrest or detention . . ." The detained individual must also ". . . be brought promptly before a judge or other officer authorised by law to exercise judicial power." Finally, compensation must be granted if the detention determined to be unjust.

Furthermore, the nations that form the General Assembly of the United Nations have demonstrated their acceptance of these requirements by passing the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. This resolution states that “[a]rrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent official or persons authorized for that purpose.” The resolution also states, “[a]nyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.” With respect to the right of every person deprived of his liberty to have their case heard in court, the resolution states “[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed bylaw.” Furthermore, to ensure the right of all prisoners to challenge the lawfulness of their detention, the resolution states “[a] detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.” With respect to the right of prisoners to be compensated for cases where they are victims of miscarriage of justice, the resolution states “[d]amage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.” In the case of criminal charges, the resolution states that “[a] person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest.” The resolution also states “A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.”

**IN INTERNATIONAL HUMAN RIGHTS LAW, THE RIGHT OF PEOPLE
TO LIBERTY IS GUARANTEED TO EVERYONE**

**في القانون الدولي لحقوق الإنسان
حق الناس في الحرية مكفول للجميع**

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Terrorists in the security detentions are deprived of their right to liberty, as they are characterized as dangerous to society and to public safety. Some might say that terrorists have no right to liberty, they must be detained definitely, and the government should not risk the security of the society by releasing them. This statement is wrong under international human rights law. Individuals, whether they were terrorists or extremists who pose a threat to public security, regardless of what they might have done they still have human rights in virtue of the fact that they are human beings. At the same time, this does not mean that detained individuals who are categorized as terrorists or suspected terrorists must be released. Nevertheless, the statement consistent with international law is that all people have the right to liberty, including those who are classified as terrorists; besides that, the international law requires that holding terrorists in security detention is only permissible if the imprisonment is not arbitrary.

The right to liberty means freedom from being arbitrarily detained. Liberty is a right belonging to all human beings. This right is recognized on the international level and in regional and local human rights instruments. Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR) states that “[e]veryone has the right to liberty” The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states that “[e]veryone has the right to liberty. . . .” The American Convention on Human Rights (ACHR) states, “[e]very person has the right to personal liberty. . . .” The Arab Charter on Human Rights states that “[e]very individual has the right to life, liberty, and security of person. These rights shall be protected by law.”

The recognition of the human right to liberty also found in a number of non-binding international and regional *soft-law* instruments. The Universal Declaration of Human Rights states that “[e]veryone has the right to life, liberty, and security of person” The Asian Human Rights Declaration states that “[e]very

person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty . . .”The Cairo Declaration on Human Rights in Islam states that “[i]t is not permitted without a legitimate reason to arrest an individual or restrict his freedom. . . .” Riyadh Declaration on Human Rights in Peace and War asserts that *unlawful restriction of human liberty and unlawful injury of an individual, physically or emotionally, is forbidden by Islamic Law.*

Article 9 of the ICCPR specifies that the protection of the right to liberty is for “EVERYONE.” This means that the protection also includes those individuals who are in security detention centers either were charged with a terrorism-related crime or labeled as a suspected terrorist. The article is quite explicit that the right to liberty applies to all persons regardless of their status or situation. The Human Rights Committee holds that “[a]rticle 9 guarantees those rights to everyone.” The committee explained that *everyone* encompasses, “. . . among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.” Individuals who have been detained because they are categorized as terrorists enjoy the protection of article 9 and must be granted their right to *habeas corpus*.

The General Assembly of the United Nations adopted the Global Counterterrorism Strategy. The strategy itself stresses that each State has an obligation to ensure that all counterterrorism measures must comply with international human rights law. The United Nations Security Council affirms that an effective strategy of counterterrorism must not clash with the duty to protect human rights; both should be harmonized and equally support each other. Therefore, any counterterrorism strategy must take into account the protection of Human Rights. This protection must also be

enjoyable-rights for all human beings,even for those who might be labeled as terrorists.

**Under International Human Rights Law, What Is The
Legality of Preventative Detention after Completion of
Criminal Sentence?**

في القانون الدولي لحقوق الإنسان

ما مدى مشروعية الاستمرار في إعتقال المساجين الذين انهو مدة عقوبتهم الجنائية؟

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Individuals who have been convicted of a crime and who have finished the duration of their sentence must be immediately released. Once the criminal sentence has been served, the ground that legalized the deprivation of the sentenced prisoner's liberty has also expired. The Human Rights Committee holds that ". . . [i]f a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence, and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention." In *Fardon v. Australia*, an international covenant on civil and political rights (ICCPR) case, the plaintiff, a prisoner who had been sentenced to 14 years in prison for a sexual crime, claimed that his right to liberty under article 9 of the ICCPR had been violated by the government of Australia. The basis of his claim was that his sentence had expired on June 30, 2003 yet the state kept him under detention until December 4, 2006. The Human Rights Committee ruled that the continued detention, after the duration of the sentence, was arbitrary and consequently, in violation of paragraph 1 of article 9 of the ICCPR. In *Ann Maria Garcia Lanza de Netto v. Uruguay*, two relatives of the plaintiff, their detention had extended after their sentences had been fully served on the grounds that they continued to pose a security risk." The Human Rights Committee held that the detention was arbitrary and in violation of article 9.1 of the ICCPR.

This article has mainly been written to explain that although extending detention beyond the duration of the initial sentence is, in general, considered arbitrary and unlawful, there are exceptions to this principle. Continuing to detain a prisoner beyond the duration of a prisoner's sentence could be justified on the grounds of national security in certain circumstances.

These particular circumstances can be found in *Fardon v. Australia*, where the Human Rights Committee observes

[a]rticle 9 paragraph 1 of the Covenant recognises for everyone the right to liberty and the security of his person and that no-one may be subjected to arbitrary arrest or detention. The Article, however, provides for certain permissible limitations on this right, by way of detention, where the grounds and the procedures for doing so are established by law. Such limitations are indeed permissible and exist in most countries in laws which have for object, for example, immigration control or the institutionalised care of persons suffering from mental illness or other conditions harmful to themselves or society.

Therefore, it can be lawful under international human rights law to keep individuals detained after they have completed their criminal sentences if there are sufficient grounds for supposing that the release of the prisoner would pose a threat to public safety or national security. keep individuals detained after they have completed their criminal sentences on the ground of national security precautions does not mean to extend the prisoner's sentence, but instead constitutes another type of imprisonment which is known as preventive detention.

The purpose of preventive detention is to prevent a person from causing grave harm to themselves or others. If a state can prove that an individual poses a grave threat to the community, then that evidence can be used to legally justify further detention. However, there are many requirements the state must satisfy in order to avoid having the preventative detention become arbitrary detention.

The first requirement derives from article 9 of the ICCPR which states, “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” This part of the article touches on the distinction between substantive law and procedural law. Substantive law is concerned with what sort of actions are, in general, lawful, and unlawful. Procedural law is concerned with how, in general, laws are to be enforced. Article 9 asserts that in

order for any type of detention to be considered non-arbitrary both substantive and procedural laws must be on the books before the fact and that any deprivation of liberty must take place in accordance with these laws and procedures. For example, the nation of Australia enacted Dangerous Prisoners (Sexual Offenders) Act 2003. The act is designed to empower the state to extend the period of detention for prisoners who are identified as dangerous sexual predators. The act also establishes a procedure to enforce the law beginning with the evidence that confirms the dangerousness of the prisoners, to the filing of an order before the court, and provisions for periodic review as well as avenues of appeal.

Another requirement that must be satisfied in order that extended detention not be deemed arbitrary is that there must be compelling evidence showing that the release of the prisoner poses a grave risk to public safety. The Human Rights Committee states that “[t]he additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee’s committing similar crimes in the future.”

Another requirement is that preventive detention must be the option of last resort; all other possible options for ensuring public safety must first be exhausted.

Yet another requirement is that the purpose and condition of such detention must not be punitive and must not be located in penal institutions. Persons held in extended preventive detention must not be housed with prisoners who are serving time as punishment for crimes. Furthermore, the purpose of the detention must be rehabilitative, aiming at the benefit of the detainee as well as the safety of society.

Another requirement is that the evidence showing the necessity for implementing preventative detention must be submitted to an independent judicial authority for evaluation. In

addition, the detention must be reviewed periodically before the independent judicial authority to determine the necessity of further extended detention. The state has an obligation to present its case for extending detention before the independent judicial authority. If the state fails to conduct the periodical review, it must at least allow the detainee to take the case to the judicial authority himself. The right of any detainee to challenge the lawfulness of their detention is simply the right of *habeas corpus* which is protected by article 9¶4 of the ICCPR. The right of *habeas corpus* belongs to all persons and applies to all forms of detention. The Human Rights Committee states in this regard:

[t]he right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests. It also applies to detention for vagrancy or drug addiction, detention for educational purposes of children in conflict with the law and other forms of administrative detention. Detention within the meaning of paragraph 4 also includes house arrest and solitary confinement. When a prisoner is serving the minimum duration of a prison sentence as decided by a court of law after a conviction, either as a sentence for a fixed period of time or as the fixed portion of a potentially longer sentence, paragraph 4 does not require subsequent review of the detention.

In general, the authority that evaluates the evidence for the lawfulness of any detention should be a judicial court. There is, however, an exception to this principle. The Human Rights Committee states that “for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy fully judicial independence in deciding legal matters in proceedings that are judicial in nature.”

Finally, the last requirement must be satisfied, in order to avoid arbitrary detention, is that the court should make decisions regarding a detainee's appeal without delay and should make the decision known to the detainee immediately.

**IS RIGHT OF HABEAS CORPUS A CUSTOMARY
NORM OF INTERNATIONAL LAW?**

هل حق المثول أمام القضاء من سنن القانون العرفي الدولي؟

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Criminal charges are not the only legal grounds for deprivation of liberty. States may detain individuals under so-called *administrative detention*. Administrative detention encompasses preventative detention, security detention, and immigration detention. States also can arrest and detain individuals during times of public emergency.

The use of administrative detention is not prohibited under international human rights law. However, to comply with the International Covenant on Civil and Political Rights (ICCPR), any deprivation of individual liberty must not be arbitrary. There are certain conditions that must be satisfied in order for security detention to be considered lawful and not arbitrary. In brief, these conditions are: (1) the detention must be on grounds established by law; (2) reason for arrest must be given to arrestee at the time of arrest; (3) anyone criminally charged must be brought promptly before a judicial authority for speedy trial; (4) right to *Habeas Corpus* must be granted by giving the detainee the ability to take proceeding before a court to challenge the lawfulness of detention, and (5) compensation in case of unjust detention must be granted. During times of public emergency, there is one more additional requirement that the derogation from protecting the right to liberty must be based on the grounds that have been previously established by law.

This article is concerned about the right of *habeas corpus* of individuals who are categorized as terrorists and held in security detentions. The right to *habeas corpus* means that detainees must have their detention reviewed periodically by a judicial authority. The legal term *habeas corpus* means “[a] writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal.”

The author of this article asserts that the right to *habeas corpus* became a customary norm of international law. All states are legally obligated to conform their conduct to the norms of

customary international law. Therefore, all states must grant their security detainee the right of *habeas corpus*.

Customary international law is not a written body of law. The norms of customary international law emerge from the continuous practices of states themselves as they interact with one another. The continuous practice of states constitutes unwritten acknowledgment of recognition of legal obligation. It often happens that states decide to codify customary norms by means of formal treaties. The norms are already part of the law, but codifying them into treaties moves them from the realm of unwritten law into that of written law.

The codification of a customary norm does not increase the legal status of the norm, but it can make enforcing it easier and result in fewer violations of that norm. If a norm of customary international law is codified in a treaty, that does not mean that states that are not signatories to that treaty are no longer bound by that customary norm. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, the International Court of Justice (ICJ) ruled that the principles of customary international law are binding even if these principles have been codified into a treaty. “[i]t will, therefore, be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have identical content.” In addition, in the case of *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)*, the ICJ held that the principles of customary law are binding regardless of whether or not the parties are a signatory to a treaty that codified those principles.

There is one circumstance in which a state is not obligated by a norm of customary international law. A state is not bound to comply with a customary norm if that state has persistently objected to the norm from the time the norm developed. These objections can take the form of refraining from signing treaties

that codify the norm in question, or they can sign the treaty with an expressed reservation with respect to the norm in question. The state can also be a persistent objector to a norm by issuing diplomatic statements, official correspondence, executive practice, or local legislation that obviously do not respect the norm. However, states cannot be objectors to *jus cogens* norms. A *jus cogens* norm is one that is non-derogable such as the prohibition against genocide.

But how can a customary norm of international law be identified? In other words, how can it be proved that *habeas corpus* is a customary norm of international law? The norms of Customary law emerge from the consistent practices of states as they interact with other states. It often happens that states decide to codify such norms into treaties. Therefore, when a body of treaty law is analyzed, and it is found that there is a consensus among many treaties about a rule, it can be concluded that the rule in question is a customary norm. The following examination shows that *habeas corpus* has been codified into many instruments.

Article 9 of the ICCPR states 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 right to *habeas corpus* is also protected by regional human rights instruments. Article 5 of the ECHR states, “[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.” International human rights courts have ruled, in cases where detainees been deprived of their right to *habeas corpus*, that their detention was arbitrary. In *Bakhtiyari v. Australia*, the applicants claimed that his right to liberty had been violated. Among many issues related to the case, the applicant had been

imprisoned under immigration detention for two years and ten months without having the detention reviewed periodically by a judicial authority. The Human Rights Committee held that “. . . there was no discretion for a domestic court to review the justification of [the applicant] detention in substantive terms. The Committee considers that the inability judicially to challenge detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.” The committee also held that “. . . [the detention for that] length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.” In *Shafiq v. Australia*, the applicant, who had been confined under immigration detention for 6 years, claimed that he had been arbitrarily detained for an indefinite time because he was given no option to challenge the lawfulness of the detention in a court of law. After examining the merits, the Human Rights Committee ruled that the detention was in violation of article 9, and constituted arbitrary detention. The committee asserted that “. . . every decision to keep a person in detention should be open to periodical review, in order to reassess the necessity of detention and detention should not continue beyond the period for which a State party can provide appropriate justification.”

Habeas corpus has also been affirmed as a human right by a variety of human rights bodies. The Human Rights Committee clarified that “. . . any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.” The Inter-American Commission on Human Rights stated that individuals who have been detained for security reasons “. . . must also be subject to supervisory judicial control without delay and, in instances when the state has justified continuing detention, at reasonable intervals.” Additionally, the International Commission of Jurists has issued this statement. “All detainees have a right to *habeas corpus* or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must

remain an exceptional measure, be strictly time-limited, and be subject to frequent and regular judicial supervision.”

WHAT ‘RIGHT TO LIBERTY’ MEANS?

ما معنى حق الناس في الحرية؟

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The *Human's Right to liberty* is a right recognized in many human rights instruments. Article 9.1 of the ICCPR states that “[e]veryone has the right to liberty” The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) state that “[e]veryone has the right to liberty. . . .” The American Convention on Human Rights (ACHR) states, “[e]very person has the right to personal liberty. . . .” The Arab Charter on Human Rights states that “[e]very individual has the right to life, liberty, and security of person. These rights shall be protected by law.” The Universal Declaration of Human Rights, *a soft-law*, states that “[e]veryone has the right to life, liberty, and security of person” The Asian Human Rights Declaration states that “[e]very person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty” The Cairo Declaration on Human Rights in Islam states that “[i]t is not permitted without a legitimate reason to arrest an individual or restrict his freedom. . . .” Riyadh Declaration on Human Rights in Peace and War asserts that *unlawful restriction of human liberty and unlawful injury of an individual, physically or emotionally, is forbidden by Islamic Law.*

Sometimes, the right to liberty is construed in a relatively broad sense to include the right to act in various ways as one pleases. It might be thought that individuals' right to liberty granting the individuals their freedom to dress, eat, or say what they want, or to escort those who desire. This illustration is not quite right. The right to liberty in the legal sense is limited to the right not to be arbitrarily detained. The Human Rights Committee holds that the liberty of person mentioned in article 9 of the International Covenant on Civil and Political Rights (ICCPR) “. . . concerns freedom confinement of the body, not general freedom of action.” In addition, the Committee held in a previous comment that:

[a]rticle 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.

Furthermore, In *Wackenheim v. France*, the ruling of the Human Rights Committee holds that the meaning of individuals' right to liberty in article 9 is freedom from imprisonment, and should not be confused with the right to freedom of movement or to act in various ways as one pleases.

