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Comment, Counter-terrorist Operations and the Rule of Law

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Abstract

Measures to prevent and punish terrorism must be conducted with respect for human rights. Nonetheless, when counter-terrorism methods shift from law enforcement to transnational armed conflict, the applicability and effect of particular positive human rights norms may change. If European states find it necessary to pursue the military model of counter-terrorism, then European human rights jurisprudence may need to modify its rigid opposition to military trials. The right to take proceedings before a court for determination of the lawfulness of detention provides an important procedural safeguard against torture and disappearance, but in some narrow circumstances derogation from that right may be strictly required by the exigencies of combating terrorism.

As Professor Warbrick notes in his instructive paper,[1] European states have responded to the new terrorism threats since 2001 primarily by means of traditional law enforcement methods. It is to be hoped that conditions will remain favourable enough that they can continue to do so. The purpose of this Comment is to add an additional perspective, addressing some of the problems that US experience suggests the European human rights analysis may encounter if a shift to the military model of counter-terrorism later becomes necessary. It will focus particularly on problems raised by military custody and military jurisdiction.

1 The Military Model

Since 2001, the United States Government has felt impelled to supplement the criminal justice model of counter-terrorist action with military action. There is no war on terrorism as such, but there does exist an armed conflict between the United States and Al Qaeda. Neither of the received categories of modern international humanitarian law, international armed conflict between states or internal armed

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1 Warbrick, 'The European Response to Terrorism in an Age of Human Rights,' this issue, at 989.

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conflict within a state, fits this conflict. But Al Qaeda has shown itself capable of carrying on military operations on a scale that justifies characterization as armed conflict. Moreover, given the informal structure of Al Qaeda, these hostilities may shade into conflict with a less distinct class of terrorist organizations pursuing Islamist political goals.

This conflict differs from the kinds of struggles involved in most decisions of the European Court of Human Rights about terrorism. Most such decisions have concerned either separatist violence or revolutionary violence within a state. Local insurgents seeking to gain control of all or part of a state's territory face different incentives that limit the degree of their destructiveness against people and places. Separatists who appeal to world opinion to validate their claims confront different constraints than groups that reject the legitimacy of international law.

When the military model frames counter-terrorist operations, rule of law aspirations have lesser relevance than in the criminal justice model. They continue to play an important role, but in a more limited manner. Armed conflict should not be wholly unrestrained, and rule of law conceptions inform both the restrictions that international humanitarian law imposes and the means of enforcing them. However, rule of law values of transparency, predictability, and egalitarianism are incompatible with military needs of flexibility and surprise. The ideal of the rule of law concerns legitimate governance, not defence against those outside a state's authority.

The distinction between interstate use of force and governance also underlay the decision of the Court in *Banković v Belgium*.[2] That decision held that Yugoslav civilians subjected to NATO aerial bombardment during the Kosovo intervention were not within the jurisdiction of NATO member states in a manner that would make the European Convention on the Protection of Human Rights and Fundamental Freedoms applicable. While *Banković* has been criticized, its approach appears fundamentally correct. In particular, *Banković* illustrates the importance of understanding human rights treaties as positive institutional embodiments of moral principles.

Human rights standards commonly exhibit three interrelated aspects: they originate in consensual positive enactments; their content reflects suprapositive normative claims; and as legal rules they must operate within an institutional context. Both the drafting and the interpretation of human rights treaties are influenced by their consensual, suprapositive, and institutional aspects.[3] The transformation of moral insights into written legal norms regulating a range of distinct societies involves political compromises and predictions about how rules can be successfully implemented. Later interpretations of those texts take into account evidence of political will and accumulated experience with how rules operate in practice.

[2] *Banković v. Belgium*, 2001-XII ECHR 333 (Grand Chamber) (admissibility decision). For a similar argument regarding the scope of U.S. constitutional rights, see G. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996), at 97–100, 109–111.

[3] For fuller discussion, see Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance,' 55 *Stanford Law Review* (2003) 1863.

Thus, the drafting of human rights norms is likely to reflect assumptions about the conditions to which they will be applied. The text of the European Convention suggests that it was not designed to regulate the conduct of war. For example, the guarantee in Article 2 of the right to life identifies permissible occasions for the deprivation of life, including the use of absolutely necessary force 'for the purpose of quelling a riot or insurrection'.[4] It makes no reference to international armed conflict, which appears only in Article 15 on derogation.[5] Article 5(1) sets forth an exclusive enumeration of the permissible categories of lawful detention, but does not include the detention of prisoners of war.[6] Normal military operations would then seem to require extensive derogations.

The Court noted in *Banković* that participating states had made no notifications of derogation with respect to the 1991 Gulf War, the NATO operations in Bosnia and Herzegovina, or the Kosovo intervention, implying their belief that these activities were outside the scope of the Convention.[7] The Convention required states to ensure rights to persons 'within their jurisdiction'.[8] The exercise of jurisdiction over an individual differed from taking actions affecting an individual's interests, and aerial bombardment did not suffice to bring civilians in foreign territory within a state's jurisdiction. Exercise of jurisdiction would make the Convention as a whole applicable; the Court declined to accommodate the claims by dissecting the Convention into different rights with different thresholds of 'jurisdiction'.[9] Thus, regardless of whether the bombardment deprived victims of life in violation of international humanitarian law,[10] it did not deprive them of life in violation of the European Convention.

The Court also clouded the significance of its analysis by emphasizing the 'regional vocation' of the European Convention, suggesting that different reasoning might have been required if the foreign territory had been within the Council of Europe.[11] The Court has been concerned to avoid a 'gap' in human rights protection in the rare case of armed conflict between states in the Council of Europe (viz., Turkey and Cyprus). The opinion leaves unclear the extent to which the Convention applies if a European state occupies territory in an external region, such as Iraq.[12]

4 ECHR, Art. 2(2)(c).

5 Art. 15(1) lists 'war' as an occasion for permissible derogation from Convention obligations, and Art. 15(2) makes the right to life derogable only 'in respect of deaths resulting from lawful acts of war'.

6 The case law of the European Court of Human Rights confirms that, absent derogation, the enumeration in Art. 5(1) is exclusive, and does not authorize merely preventive detention. See, e.g. *Ječius v. Lithuania*, 2000-IX ECHR, 235, at 251, paras. 50–52.

7 *Banković*, *supra* note 2, at 352–353 (para. 62).

8 ECHR, Art. 1.

9 *Banković*, *supra* note 2, at 356–357 (para. 75).

10 The reference in Art. 15(2) to lawful acts of war did not apply conversely to make all deprivations of life in violation of international humanitarian law violations of the Convention, but rather addressed only actions taken by states within their jurisdiction: *ibid.* at 353 (para. 62).

11 *Ibid.*, at 358 (para. 80).

12 A case raising the applicability of the European Convention, as incorporated into UK law, to British troops in Iraq is currently pending in UK courts. See 'Families win hearing on deaths', *The Guardian*, 12 May 2004, at 13.

2 Military Trials

Once enemy prisoners are securely in custody, the opportunities to respect the rule of law increase. Among the debated issues in that context is the choice between military and civilian tribunals for prosecution of unprivileged combatants and war crimes.[13] European human rights case law has broadly disapproved of the participation of even a single military judge in security trials of civilians. The Court has argued that the presence of military judges creates an appearance of partiality in violation of the objective requirements for an impartial tribunal under Article 6(1) of the European Convention.[14] That jurisprudence is potentially under review as of this writing, in the Grand Chamber consideration of the *Öcalan* case.[15]

The disapproval of military tribunals seems understandable in the context of alleged internal subversion, where judicial independence provides an important protection for domestic political opponents. The Court appears to strike a balance, creating a prophylactic, institutionally justified rule that avoids the need for case-by-case inquiry and reduces the risk of unfair trial. As dissenting judges have sometimes warned, however, the limits of its reasoning are unclear, and it would potentially call into question all forms of military justice.[16] However, the Court has long upheld the compatibility in principle of military prosecutions of a state's own armed service personnel with Article 6.[17]

The Court's prophylactic rule is not necessarily appropriate for international armed conflict, or conflict with a foreign terrorist organization.[18] In international armed conflicts, military jurisdiction over regular forces of the enemy is not only traditional, but is specifically sanctioned by the Third Geneva Convention.[19] Arguably, in war,

[13] See, e.g., 'Agora: Military Commissions', 96 *AJIL* (2002) 320.

[14] *Incal v. Turkey*, 1998-IV ECHR 1547, 1572–1573 (para. 71) (Grand Chamber) (national security court); *Karataş v. Turkey*, 1999-IV ECHR 81 (Grand Chamber) (national security court); *Arap Yalgin v. Turkey*, ECHR (2001), Application 33370/96 (unpublished) (martial law court). Art. 6(1) provides that criminal charges must be determined in a fair hearing 'by an independent and impartial tribunal established by law'.

The Inter-American Court of Human Rights has suggested in more categorical terms that military jurisdiction over civilians is inappropriate, and violates due process rights under Art. 8 of the American Convention on Human Rights: *Castillo Peruzzi Case*, 52 Inter-Am. Ct. H.R. (ser. C) (1999), para. 128.

[15] See *Öcalan v. Turkey*, ECHR (2003), Application 46221/99 (unpublished) (initial Chamber judgment). The case was reargued before a Grand Chamber on 9 June 2004.

[16] *Arap Yalgin*, *supra* note 14 (dissent of Judge Gölcüklü); *Incal*, *supra* note 14, at 1578–1579 (joint partly dissenting opinion).

[17] See *Engel v. Netherlands*, ECHR (1976), Series A, No. 22, at 36–37 (paras. 85, 89); compare *Cooper v. United Kingdom*, 2003-XII ECHR __, para. 110 (Grand Chamber), finding that the revised structure of court martial proceedings in the RAF satisfied Art. 6(1)) ('[T]here is nothing in the provisions of Article 6 which would, in principle, exclude the determination by service tribunals of criminal charges against service personnel'.), with *Grieves v. United Kingdom*, 2003-XII ECHR __ (16 December 2003) (Grand Chamber) (finding insufficient guarantees of independence in naval court martial proceedings).

[18] It should be emphasized that this is not an argument concerning the necessity of derogation from Art. 6, although derogation may sometimes be required. It is an argument concerning the interpretation of Art. 6 in situations of armed conflict.

[19] See Convention [No. III] Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 84, 75 UNTS 135 ('A prisoner of war shall be tried only by a military court, unless. . . .'); cf. *ibid.*, Art. 102 ('the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power').

civilians may be as biased, or more biased, against the enemy than military professionals. Moreover, military judges may interpret the laws of war with the knowledge that their own forces will be bound by their interpretations, and may be less inclined to use adjudication as a vehicle for the progressive development of international humanitarian law than civilian judges. These considerations may have lesser force in the asymmetrical context of conflict between a state and a non-state actor. But military trials, with compensating procedural guarantees that both international humanitarian law and human rights law require, can be a legitimate consequence of the shift to the military model.

3 Judicial Oversight

If military jurisdiction over adversaries in a conflict with a foreign terrorist organization is sometimes appropriate, then the boundary between civilian and military jurisdiction becomes extremely important and the role of civilian courts in policing that boundary may be crucial.[20] That consideration suggests attention to Article 5(4) of the European Convention, which guarantees the right to a speedy determination by a court of the lawfulness of detention,[21] and secondarily to Article 5(3), which requires that detained offenders be brought promptly before a judicial officer.[22] These procedural guarantees are not themselves primary human rights, but rather important institutional safeguards for liberty and security. The relation of Article 5(4) to the military model raises a number of complex issues.

Over the years, the European Court of Human Rights has compiled a substantial body of case law construing Article 5(4). The Court has emphasized that the precise

[20] The decisions of the United States Supreme Court in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rasul v. Bush*, 124 S. Ct. 2686 (2004), reaffirmed the responsibility of civilian courts to determine the legality of the military detention of alleged 'enemy combatants'. However, they leave many issues open to future resolution. The plurality in *Hamdi* articulated minimum procedural guarantees for US citizens held as enemy combatants. The majority in *Rasul* affirmed habeas corpus jurisdiction over the detention of foreign nationals at the Guantanamo Bay Naval Base, but did not address the legal standards that a habeas court should apply to non-citizens, there or elsewhere. Moreover, the analysis in *Rasul* emphasized the plenary jurisdiction of the United States at Guantanamo, leaving uncertain the implications of the decision for detention at other locations outside US sovereign territory. Cf. Neuman, 'Closing the Guantanamo Loophole', 50 *Loyola Law Review* (2004) 1. In view of this uncertainty, the United States might shift its interrogation practices to other overseas bases. It might therefore be useful to inquire what effects European human rights law would have on US bases within the territory of European states. Would the European Convention permit the United Kingdom to permit the United States to reconstitute Guantanamo at the US base on Diego Garcia in the Indian Ocean? *Cf. Fogarty v. United Kingdom*, 2001-XI ECHR 157 (Grand Chamber); *Al-Adsani v. United Kingdom*, 2001-XI ECHR 79 (Grand Chamber).

[21] ECHR, Art. 5(4) ('Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.').

[22] ECHR, Art. 5(3) ('Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. . . . '). By its terms, Art. 5(3) applies only to arrests based on reasonable suspicion of having committed an offence, or reasonable necessity to prevent an offence, but these are the most relevant types of detention in the counterterrorism context, at least absent a derogation from Art. 5(1) authorizing an additional category of detention.

demands of Article 5(4) will vary depending on the type of detention at issue.[23] Review of the lawfulness of detention must be provided by a 'court', but it need not always be a 'court of law' integrated within the ordinary judiciary.[24] Rather, the reviewing tribunal must be judicial in character, a label that is earned in part by the structure of the tribunal and in part by the form of its proceedings.[25] Most fundamentally, the court must be independent of the executive and of the parties to the case, and authorized to compel the release of the individual if the detention is unlawful. It must also be impartial, in both the subjective and objective senses.[26] The Court has considered that parole boards and psychiatric review boards can count as courts if they satisfy those characteristics.[27] The Court has also stated that military courts can suffice, if appropriately configured, at least in cases involving active service members.[28]

The standard of review required by Article 5(4) varies with the type of detention at issue, but must address those elements that make the detention lawful under Article 5(1) as well as under national law.[29] The procedures that Article 5(4) has required in particular contexts have included the active right of the individual to initiate review,[30] opportunity for oral hearing,[31] and adversarial participation with access to the case file.[32] On the other hand, the Court has suggested that the procedures can be modified in terrorism cases to prevent disclosure of national security information to unauthorized recipients, while still affording 'a substantial measure of procedural justice'.[33]

Revelations in the spring of 2004 concerning inhumane treatment of prisoners by US personnel in Iraq have not only shed a spotlight on egregious and bizarre forms of abuse.[34] They have also corroborated earlier indications that degradation of prisoners was being systematically employed as an interrogation technique in the war on

[23] *X v. United Kingdom*, ECHR (1981), Series A, No. 46, at 22 (para.52).

[24] *Hutchison Reid v. United Kingdom*, 2003-IV ECHR __(20 February 2003), at para. 63.

[25] *X v. United Kingdom*, *supra* note 23, at 23 (para. 53).

[26] *D.N. v. Switzerland*, 2001-III ECHR 1, at 13–14 (paras. 42, 44) (Grand Chamber) ('it would be inconceivable that Article 5 § 4 . . . should not equally envisage, as a fundamental requisite, the impartiality of that court').

[27] *Ibid.*, at 13 (para. 39); *Waite v. United Kingdom*, ECHR (2002), Application 53236/99 (parole board).

[28] *De Jong v. Netherlands*, ECHR (1984), Series A, No. 77, at 26 (para. 58) (speedy recourse to the concededly independent military court would have satisfied Art. 5(4)); see also *Engel v. Netherlands*, *supra* note 17, at 27, 32 (paras. 68, 77) (no further judicial remedy is required under Art. 5(4) after conviction by an independent Supreme Military Court). The Human Rights Committee similarly suggested that review by a military court of disciplinary proceedings against a member of its own forces could satisfy CCPR, Art. 9(4), in *Vuolanne v. Finland*, No. 265/1987, UN Doc. CCPR/C/35/D/265/1987 (1989), para. 9.6.

[29] *Hutchison Reid*, *supra* note 24, at para. 64.

[30] *Rakevich v. Russia*, ECHR (2004), Application 58973/00, at para. 44.

[31] *Stafford v. United Kingdom*, 2002-IV ECHR 115, at 145 (para. 89) (Grand Chamber).

[32] *G.K. v. Poland*, ECHR (2004), Application 38816/97, at para. 91 ('the judicial procedure followed must be adversarial and must always ensure "equality of arms" between the parties').

[33] *Al-Nashif v. Bulgaria*, ECHR (2002), Application 50963/99 (unpublished), at paras. 95–97; *Chahal v. United Kingdom*, 1996-V ECHR 1831, 1866–1867 [para. 131] (Grand Chamber).

[34] See, e.g., Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: The Present Situation in Iraq, UN Doc. E/CN.4/2005/4 (2004), at paras. 40–69.

terrorism.[35] These events underscore the importance of Articles 5(3) and 5(4) (and their equivalents in other human rights treaties) in assuring the humane treatment, or even the survival, of prisoners.

Jurisprudence of both the European Court and the Inter-American Court of Human Rights has emphasized the connection between lack of judicial oversight and torture and disappearance of arrested persons. In *Aksoy v Turkey*, the European Court emphasized that 'prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which . . . is prohibited by the Convention in absolute and non-derogable terms', and that 'the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that [the applicant] was left completely at the mercy of those holding him'.[36] In *Taş v. Turkey*, the Court emphasized that Article 5 required states to take effective measures, including provision of independent judicial scrutiny, to 'safeguard against the risk of disappearance'.[37] Both of these cases involved investigation of terrorism.

The Inter-American Court, based on the grim record in Latin America, has explained at greater length why the remedy of habeas corpus was necessary to protect non-derogable rights to life and against torture:

> [H]abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. 36. This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended. . . .[38]

This insight has largely been lacking from the US law of habeas corpus. Traditionally, the writ served to challenge unlawful custody, not unlawful treatment in lawful custody.[39] In the mid-twentieth century, when US courts began to examine more closely conditions of confinement, they normally used other remedies.[40] The lessons

[35] See, e.g., Human Rights Watch, *Timeline of Detainee Abuse Allegations and Responses* (6 May 2004), available at http://hrw.org/english/docs/2004/05/07/usint8556_txt.htm.

[36] *Aksoy v. Turkey*, 1996-VI ECHR 2260, at 2282–2283 (paras. 76, 83). The Court invalidated Turkey's derogation from Art. 5(3) as not strictly required by the exigencies of the fight against terrorism in South-East Turkey: *ibid.*, at 2282 (para. 78). See also *Dikme v. Turkey*, 2000-VIII ECHR 223, at 249 (para. 66) (linking 'prompt judicial intervention' to the 'prevention of serious forms of ill-treatment . . . to which detainees are in danger of being subjected, particularly as a means of extracting confessions from them.'); *Al-Nashif*, *supra* note 33, para. 92 ('What is at stake [in Article 5(4)] is both the protection of the physical liberty of individuals as well as their personal security.').

[37] *Taş v. Turkey*, ECHR (2000), Application 24396/94 (unpublished), at para. 84.

[38] *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, 30 January 1987, 8 Inter-Am. Ct. H.R. (Ser. A) (1987), at paras. 35–36.

[39] See R.J. Sharpe, *The Law of Habeas Corpus* (1976), at 145–146; D. Clark and G. McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (2000), at 221–226.

[40] See *Preiser v. Rodriguez*, 411 U.S. 475, 498–499 (1973); *Muhammad v. Close*, 124 S. Ct. 1303 (2004) (per curiam).

of Abu Ghraib appear to have informed Justice O'Connor's recognition in *Hamdi v Rumsfeld* that 'history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse. . . .'[41]

4 Derogation from Judicial Oversight

Despite the undeniable importance of judicial oversight, circumstances may lead states to doubt the feasibility of affording detainees in connection with armed conflict access to the courts. The alleged obstacles may arise from the general conditions of a 'war on terrorism', from temporary disruption in the wake of a devastating attack, or from the logistical difficulties of extraterritorial counter-terrorism operations. The possibility of derogating from the Article 5(4) right may then become relevant.

The Inter-American Court and the UN Human Rights Committee have drawn very strong conclusions from the link between judicial oversight and prevention of torture and disappearance, and have maintained that the right to court supervision of the lawfulness of detention is non-derogable. The Inter-American Court had a good textual basis for this conclusion in Article 27 of the American Convention on Human Rights, which contains a list of non-derogable provisions including the rights to life and to humane treatment, along with 'the judicial guarantees essential for the protection of such rights'.[42] The Inter-American Court explained in two advisory decisions in 1987 that ACHR Article 27 should be understood as making the right to habeas corpus, as elaborated in ACHR Article 7(6), non-derogable.[43]

The Human Rights Committee employed similar reasoning in its General Comment No. 29 on States of Emergency, as governed by the Covenant on Civil and Political Rights. The Committee concluded that '[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant'.[44] The propriety of the Human Rights Committee's reasoning within the framework of the Covenant is more questionable. Unlike the American Convention, the International Covenant on Civil and Political Rights contains a closed list of non-derogable provisions, which does not include ICCPR Article 9(4).[45]

[41] 124 S. Ct. 2633, 2647 (2004) (plurality opinion). See *supra* note 20 (discussing *Hamdi*).

[42] American Convention on Human Rights, Art. 27(2).

[43] *Habeas Corpus in Emergency Situations*, *supra* note 38; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, 9 Inter-Am. Ct. H.R. (Ser. A), para. 38. The first sentence of Art. 7(6) reads, 'Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful'.

[44] Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 16. Art. 9(4) of the Covenant provides, 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

[45] CCPR Art. 4(2). The *travaux préparatoires* of Art. 4 suggest that the omission was deliberate. See Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision', 7 *Human Rights Quarterly* (1985) 89, at 116–118.

The fact that judicial review is, in practice, an insufficient condition for guaranteeing humane treatment of prisoners also weakens this conclusion, and suggests attention to competing considerations.

The European Court, in contrast, has held that ECHR Article 5(4) is subject to derogation (as the text of the European Convention indicates), and that derogation may sometimes be strictly required. In *Ireland v United Kingdom*, the Court upheld the United Kingdom's derogation from Article 5(4) as necessitated by the difficulty of combatting an underground military force that had engaged in a massive wave of violence and intimidation.[46] The Court emphasized the limits on the period for which suspects or witnesses could be detained, and the employment of alternative review procedures that lacked judicial character as partial compensation for the exclusion of judicial oversight.[47] In *Aksoy v Turkey*, the Court found Turkey's derogation from Article 5(3) excessive, because the need for unsupervised detention for 14 days without adequate alternative safeguards had not been established.[48]

The notion that emergencies may exist justifying some derogation from judicial inquiry into the lawfulness of detention coheres with the Anglo-American tradition, which does contemplate the suspension of the writ of habeas corpus. The United States Constitution of 1787 limited but endorsed the power of suspension, directing that '[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.'[49] The possibility of suspension reflects concern that there will be disorders so extreme that courts cannot be kept open, that temporary arrests without demonstrable proof may be required, that prisoners cannot be securely transported.

The permissibility of derogation from Article 5(4) may be affected by the Human Rights Committee's conclusion that the Covenant does not permit derogation from ICCPR Article 9(4), because the European Convention requires that derogation measures be consistent with a state's 'other obligations under international law'.[50] The European Court recognized this restriction in *Ireland v United Kingdom*, but no contrary international obligation had been identified (and the Human Rights Committee had not yet adopted its current interpretation).[51] Whether the Court

[46] *Ireland v. United Kingdom*, ECHR (1978), Series A, No. 25, at 80–81, 84 (paras. 212, 220). The decision was based in part on respect for the state's margin of appreciation. For purposes of the present discussion, the point is not whether this conclusion was empirically accurate, but rather whether circumstances in which derogation from Art. 5(4) is strictly required can arise.

[47] *Ibid.*, at 83 (paras. 217–218). See also *Brannigan v. United Kingdom*, ECHR (1993), Series A, No. 258-B (upholding a derogation from Art. 5(3) in the light of a limited period of unsupervised detention and alternative safeguards).

[48] *Aksoy*, *supra* note 36, at 2283 (paras. 82–84).

[49] US Constitution, Art. I, sec. 9, cl. 2; see Neuman, 'Habeas Corpus, Executive Detention, and Alien Removal', 98 *Columbia Law Review* (1998) 961, at 970–981; Sharpe, *supra* note 39, at 91–93. This tradition no doubt explains why the United States and the United Kingdom approved the derogability of CCPR Art. 9(4). *Cf.* Hartman, *supra* note 45, at 116–117.

[50] ECHR, Art. 15(1). To be more precise, although Art. 5(4) and CCPR Art. 9(4) are similarly worded, their proper interpretations may differ, and so Art. 5(4) would be non-derogable to the extent that a violation of Art. 5(4) is also a violation of CCPR Art. 9(4).

[51] *Ireland v. United Kingdom*, *supra* note 46, at 84 (para. 222).

should follow the Human Rights Committee's General Comment is a complicated question, both procedurally and on the merits. The Court observed in *Brannigan v United Kingdom* that it was 'not its role to seek to define authoritatively the meaning of . . . Article 4 of the Covenant'.[52] The Human Rights Committee's interpretation of the Covenant, while influential, is not legally binding, either.

The breadth of the Human Rights Committee's interpretation becomes even clearer when juxtaposed with the Committee's views on the extraterritorial applicability of the Covenant. The proper interpretation of ICCPR Article 2(1), requiring states 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction' the enumerated rights, has long been a subject of controversy.[53] The Committee's recent General Comment No. 31 construes this language expansively, as including all 'those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.[54] Thus, apparently every extraterritorial arrest, including those in the initial stages of an armed conflict, requires immediate access to a competent court that can decide without delay on the lawfulness of the detention, and this obligation is non-derogable. The practical consequences of simultaneous expansion on both these fronts are daunting. The Human Rights Committee's position on non-derogability of ICCPR Article 9(4) appears to be institutionally motivated by the difficulty of securing compliance with other rights, but one may wonder whether these interpretations sufficiently take into account the range of contexts in which the Covenant rights must be implemented.

The seeming tension between an effectively non-derogable right to court review of the lawfulness of detention and the historical suspendability of habeas corpus might be partly resolved by emphasizing that Article 5(4) does not necessarily require access to a genuine *court of law*, as a classic habeas corpus guarantee would. The Article 5(4) conception of 'court' includes other independent bodies with judicial character. Nonetheless, some of the emergency situations impairing the functioning of courts of law would also threaten the performance of other procedures of 'judicial character'. Moreover, there may be serious disadvantages in regarding quasi-judicial courts as a solution to this dilemma.

The salient rule of law issue is control of military detention of civilians, or of persons whose status is contested, in connection with counter-terrorist operations. If review of such detention can be shifted away from the ordinary courts without derogation, then neither the existence of a public emergency nor strict necessity for the shift must be shown. The Court's interpretation of Article 5(4) allows states 'a certain freedom to choose the most appropriate system for judicial review, and it is not within the province of the Court to inquire what would be the best or most

[52] *Brannigan v. United Kingdom*, *supra* note 47, at 57 (para. 72). The Court concluded in *Brannigan* that the derogation from Art. 5(3) appeared to be procedurally consistent with CCPR Art. 4. *Ibid.* para. 73.

[53] See C. Tomuschat, *Human Rights: Between Idealism and Realism* (2004), at 109–111.

[54] Human Rights Committee, General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26/05/2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

appropriate system in such matters'.[55] Facing the likelihood that there are some emergencies in which reliance on military courts may be truly necessary – particularly if Article 5(4) applies extraterritorially – the failure to limit use of military courts through doctrines of derogability may itself pose a danger to civilians. This conclusion may illustrate the institutional reality that derogation provisions of human rights treaties are not necessarily evasions of human rights, but rather may facilitate the adoption of stricter human rights norms for normal times.

5 Conclusion

The military model is likely to govern some aspects of counter-terrorism, in some regions of the world, for years to come. The resulting dilemmas for human rights law require careful analysis, and vigilant attention. Both terrorism and counter-terrorist operations can pose threats to fundamental human rights to life and physical integrity.

[55] *D.N. v. Switzerland*, *supra* note 26, at 13 (para. 39).