The International Covenants on Human Rights: An Approach to Interpretation

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The basic values presently demanded in the ... International Covenants on Human Rights ... are formulated at ... high levels of abstraction. ... McDougal, Laswell & Chen, Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, 63 Am. J. Int'l L. 237, 265 (1969).
international level, the Human Rights Committee, envisaged by the Covenants and the Optional Protocol to the Covenants, would have to ascertain the meaning of these words if the acts of a signatory state were challenged as inconsistent with the articles of the Covenants.

This paper suggests a methodology by which the provisions of the Covenants can be defined more precisely. This will be done by attempting to determine the meaning of the term “arbitrary” arrest in article 9 of the CP Covenant. “Arbitrary” has been chosen from the vague words mentioned earlier, because it is considered to be the most important word in the Covenants. As already indicated, “arbitrary” is used in four articles of the CP Covenant and in as many articles of the Universal Declaration. In effect, the interpretation of these articles dealing with such basic human rights as the rights to life, to be free from arbitrary arrest and detention, to privacy, to property, to nationality, and to enter one’s own country largely hinge on the meaning of “arbitrary.”

II. “ARBITRARY ARREST” AND THE PRINCIPLES OF TREATY INTERPRETATION

Article 9 of the CP Covenant provides

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be

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5. The CP Covenant

Article 6 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 9 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 12 4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 17 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The Universal Declaration

Article 9 No one shall be subjected to arbitrary arrest, detention or exile.

Article 12 No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 15 1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 17 1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

(Emphasis in all articles added.)
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deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (Emphasis added.)

Does “arbitrary” mean “illegal” or “unjust” or both? The importance of the distinction is highlighted by the fact that if “arbitrary” merely means “illegal,” all despotic acts and oppressive laws of a government would be unassailable so long as these legislative enactments were in accordance with municipal laws. If “arbitrary” is synonymous with “unjust” then governments would have to respond to a higher standard. How then should a decision-maker go about choosing between these conflicting meanings of the word “arbitrary”? What are the tools he needs or the guidelines, if any, that he ought to follow?

Determining the meaning of the word “arbitrary” in article 9 relates, essentially, to the procedures for interpreting international agreements. While the interpretation of treaties is not an exact science, there have evolved, through the decisions of international courts and tribunals and the practice of foreign offices, certain guidelines which aid the task of clarification. This is not the place to examine the various canons of treaty interpretations, because there is a considerable difference of opinion regarding their relative importance and hierarchical order. But basic to all goals of treaty interpretation is the desire to give effect to the intention of the parties. Factors generally conceded as relevant to determine the meaning of terms employed in treaties include

1. the context of the treaty;
2. its objects and purposes;
3. its preparatory work;


9. “The primary or initial goal of interpretation . . . stipulates that decision-makers undertake a disciplined, responsible effort to ascertain the genuine shared expectations of the particular parties to an agreement. The link with fundamental policy is clear: to defend the dignity of man is to respect his choices and not, save for overriding common interest, to impose the choices of others upon him.” M. McDougal et al., supra note 7, at 40-41. “It is the intention of the authors . . . which is the starting-point and the goal of all interpretation. It is the duty of the judge to resort to all available means . . . to discover the intention of the parties . . .” Lauterpacht, supra note 7, at 83. “The primary end of treaty interpretation is to give effect to the intentions of the parties, and not frustrate them.” I D. O’Connell, International Law 271 (1963). The only possible exception is the extreme teleological school of thought which professes to ignore intentions as such, and looks only to the apparent objects and purposes of the treaty. See, e.g., Fitzmaurice, 1957 Article, supra note 7, at 204, 207-09.
4. the circumstances of its conclusion;
5. the special meaning to be given to a term if the parties intended such a term to have a special meaning;
6. any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
7. any subsequent practice which establishes the common understanding of the meaning of the terms as between the parties generally;
8. any relevant rules of international law applicable in the relations between the parties. Of these eight guidelines, seven are discussed in this section. The eighth, concerning rules of international law, is dealt with in section C, Conclusions and Recommendations.

A. The Context

"Interpretation starts, as it must, with a careful consideration of the text to be interpreted. This is so because the text is the expression of the will and intention of the parties. To elucidate its meaning, therefore, is ex hypothesi, to give effect to that will and intention." Considering the text of article 9 as a whole, it is possible to construe "arbitrary" as both "unlawful" and as imposing extra-legal obligations. Notice, for example, the interchangeable use of the words "arbitrary" and "unlawful" in the article:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. . . . .
3. 4. 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.

10. See arts. 27 and 28 adopted by the 1968 Vienna Conference on the Law of Treaties, in United Nations Law of Treaties Conference: Articles Adopted by Committee of the Whole [First Sess., Mar. 26-May 24, 1968], 7 INT'L LEGAL MATERIALS 770, 784-85 (1968). These articles, recommended earlier by the International Law Commission, Draft Articles, supra note 6, at 14, 49-54, reflect recent international attempts to codify the principles of interpretation. The United States has persuasively argued that the hierarchical distinction between "primary" and "supplementary" means of interpretation created by arts. 27 and 28 is overly rigid and unnecessarily restrictive. See Draft Articles, supra note 6, at 182-83, and 62 Am. J. Int'l L. 1021-27 (1967). The guidelines in the text are based on the U.S. proposed amendment, A/CONF.39/C.1/L.156, reprinted in 62 Am. J. Int'l L. 1021 (1968). The order in which they are stated has no significance respecting the relative weight to be given to each of them.

11. Fitzmaurice, 1957 Article, supra note 7, at 207. See also, Draft Articles, supra note 6, at 51-52, ¶ 11.
5. Anyone who has been the victim of *unlawful* arrest or detention shall have an enforceable right to compensation.\(^\text{12}\)

The restrictive—that is the "unlawful"—interpretation of "arbitrary" is aided by the third sentence in the first paragraph which refers to "except on such grounds and in accordance with such procedure as are established by law." It is further helped by the language of paragraph 4 under which a person who has been deprived of his liberty can have the "lawfulness" of his detention judged in a court. Similarly paragraph 5 asserts the enforceable right to compensation for victims of "unlawful" arrest.

But the reasons for interpreting "arbitrary" broadly are more persuasive. First, the "plain, natural or ordinary" meaning of "arbitrary" is not "unlawful."\(^{13}\) Thus, if the intention was merely to provide for arrest and detention "only in cases provided by law," the draftsmen would have either used the word "unlawful" instead of "arbitrary" (indeed, when confronted with the choice, they used the latter word), or deleted the second sentence on "arbitrary arrest," which, if "arbitrary" is interpreted to mean "unlawful," is redundant in view of the third sentence.

Second, the distinction between "arbitrary" and "unlawful" is supported by the other provisions of the Covenant. Most significantly, article 17 refers to "arbitrary or unlawful interference." Furthermore, the interchangeable use of "arbitrary" and "unlawful" in various articles reveals a deliberate pattern of distinction in their meaning. The Covenant adopts different methods to indicate the scope of the rights dealt with in its articles. "Law" is the final arbiter in articles 13 and 20. "Reasonableness" is the test of the restrictions under article 25. Articles 12(3), 19(3), 21 and 22(2) attempt to define the permissible restrictions (e.g., national security, public order, public health or morals) "provided by law." Articles 6, 9, 12(4) and 17 invoke the standard of "non-arbitrariness." While the vicissitudes of the drafting process (discussed below) may partly explain this difference in approach, the intended variance in emphasis is unmistakable.

Third, the cumulative effect of the provisions of articles 9 and 10 is the prescription of certain standards with which all "laws" on arrest and detention must comply. Thus the declaration of the "right to liberty and security of person" is followed by the requirements

\[\begin{align*}
(a) & \text{ arrest and detention should be on grounds and in accordance with procedures established by law,} \\
(b) & \text{ communication of reasons of arrest at the time of arrest,}
\end{align*}\]

\(^{12}\) Emphasis added in all sections. Paragraphs 2 and 3 cover certain important procedural rights but do not involve the words "arbitrary" or "unlawful."

\(^{13}\) A typical definition of "arbitrary" includes: (1) subject to individual will or judgment without restriction; contingent solely upon one's discretion; (2) decided by a judge or arbiter rather than by a law or statute; (3) using or abusing unlimited power; uncontrolled or unrestricted by law; despotic, tyrannical; (4) capricious; unreasonable; unsupported. *The Random House Dictionary of the English Language* 76 (1967).
prompt production before judicial authorities,
(d) trial within a reasonable time,
(e) prompt communication of charges,
(f) period of detention should be reasonable,
(g) bail,
(h) habeas corpus,
(i) enforceable right to compensation for unlawful arrest, and
(j) humane and proper treatment of those under detention.

All these combine to form a criminal jurisprudence based on the rule of law and principles of justice.

Finally, it can be argued that the opening sentence "everyone has the right to liberty and security of person" in paragraph 1 of article 9 controls the other provisions of that paragraph. Thus the laws referred to in the third sentence must not be inconsistent with everyone’s right to liberty and security of person. This argument is complemented by the general provisions of articles 2 and 5 of the Covenant. Article 2 contains the undertaking of all States parties to the Covenant to adopt such legislation as may be necessary to give effect to the rights recognized in the Covenant. Thus the laws in the third sentence of paragraph 1 would be the same as those which States undertake to provide under article 2, which according to the first sentence of paragraph 1 of article 9 must give effect to the right to liberty and security of person. Moreover, article 5 forbids State parties to take any action aimed at the destruction of the rights recognized in the Covenant. This would proscribe any action by States which would violate the right to liberty and security of person provided in the opening sentence of article 9.14

B. Objects and Purposes

The idea of an international bill of human rights was conceived mostly as a reaction against the totalitarianism in pre-1945 Europe. From the very beginning15 of the drafting of the Covenant to the very end16 the draftsmen dedicated their efforts to the protection of the rights of individuals against unwarranted encroachments by governments. The choice of their terms in the Covenant must be interpreted in light of this over-all dedication.

The preamble of the Covenant reflects the underlying philosophy behind the Covenant. It proclaims that the Covenant furthers the objectives of the United Nations Charter and the Universal Declaration of Human Rights. Moreover it recognizes the “inherent dignity and ... the equal and inalienable rights of all members of the human family ... [as] the foundation of freedom, justice and peace ....”17

17. Emphasis added.
C. The Preparatory Work

"It would hardly be an exaggeration" declares Lord McNair "to say that in almost every case involving the interpretation of a treaty one or both of the parties seeks to invoke the preparatory work." The word "arbitrary" figured prominently in the drafting of the Covenant. From the study of its incorporation in various articles—articles 6, 9, 12, 17 and the proposed article on property—several conclusions can be asserted with different degrees of emphasis.

Perhaps the firmest conclusion is that the draftsmen did not equate "arbitrary" with "unlawful." Another firm conclusion is that the word "arbitrary" was intended to invoke a standard of "justness" and "reasonableness"—that it was expected to protect individuals against governmental tyranny and despotism. The majority sentiment may well be summed up:

[Arbitrary] was a safeguard against the injustices of States, because it applied not only to laws but also to statutory regulation and to all acts performed by the executive. An arbitrary act was any act which violated justice, reason or legislation, or was done according to someone's will or discretion, or which was capricious, despotic, imperious, tyrannical or uncontrolled.

Beyond this, the preparatory work of the Covenant is less helpful. It is not possible to develop from it a more precise definition of "arbitrary" nor is it possible to deduce any defined standards of "justness" or "reasonableness."

Certain indicators of how some draftsmen visualized the interpretation of "arbitrary" can, however, be suggested as, at best, mere "soft" conclusions. Quite often, the phrase "due process of law" was injected in the discussion but it would soon be discovered that its meaning was not well understood among the majority of the draftsmen. Its peculiarity to the United States and the American-influenced legal systems hindered its general acceptability. Another differently expressed expectation was that "arbitrary" could be interpreted by reference to national Constitutions and generally accepted principles of law. Still another variant was the hope that world public opinion and the future growth of jurisprudence on the subject could determine what was, and what was not, arbitrary.

18. LORD McNAIR, supra note 6, at 412. He also points out that "the ... review of the practice indicates that no litigant before an international tribunal can afford to ignore the preparatory work of a treaty, but that he would probably err in making it a main plank in his argument." Id. at 422.

19. An examination of the travaux préparatoires of these articles has been undertaken at some length in Chapters II and IV of P. Hassan, Freedom From Arbitrary Arrest and Detention as a Human Right, 1969 (S.J.D. Thesis at Harvard Law School).

20. The following distinction between "firm" and "soft" conclusions is based on a dichotomy that Professor Richard Baxter makes between "hard" and "soft" law in his course on "Public International Law" given at Harvard Law School. Our distinction reflects the degree of consensus among the draftsmen.


22. See, e.g., statements of Mrs. Roosevelt, E/CN.4/SR.139, at 4; SR.140, at 14 (Apr. 6-7, 1950); Chang (China), E/CN.4/SR.139, at 12, 13; El-Farra (Syria), 12 GAOR, Third Comm. 271 (1957).
D. The Circumstances of Drafting

If further specificity cannot be derived from the preparatory work, it is largely due to the numerous difficulties which inhere in most multilateral drafting processes. The magnitude of the challenge involved in synthesizing standards of human rights acceptable to the general community of nations scarcely needs elaboration. Different ideologies, cultures and legal systems were represented in the drafting; conflicting viewpoints had to be reconciled and compromises made.

To this initial diversity must be added continual changes in the forum of drafting and, on many occasions, in the identity of the draftsmen. Thus within the United Nations alone, the Covenant was discussed in numerous organs and their committees and sub-committees: the “nuclear” Commission on Human Rights, the Commission on Human Rights (plenary, Drafting Committee, Working Party on the Convention, special drafting sub-committees), the Economic & Social Council (plenary, Social Committee), and the General Assembly (plenary, Third Committee). The composition of some of these bodies was ever expanding. Thus the doubling of the United Nations membership during the two-decades of the drafting period emphasized the need for continual reassessment by the “new” members of the work so far accomplished. Sometimes the same country would change its emphasis and position on some issues. Part of this can be explained in the context of the unusually protracted period of drafting; changes of governments and contemporary national legal experiences inevitably continued to affect national attitudes during this period. Another reason for some apparent contradictions in a country’s position could perhaps be found in the “changes of guards” among its representatives in the drafting bodies. No two representatives, even though receiving instructions from the same government, could be expected to take identical positions on many issues.

Considering the complexity of the task and the conditioning factors of the drafting process, one can better appreciate some of the questions left unanswered by the travaux. The lack of the desired specificity notwithstanding, the draftsmen acquitted themselves remarkably well. They unequivocally and abundantly emphasized their concern for the rights of individuals. Their choice of the word “arbitrary” over “unlawful” adequately reflects their intended emphasis. The Covenant, on the whole, has been hailed as a “good” document.

23. Outside the United Nations bodies, the Covenant was subjected to the scrutiny of governments, specialized agencies, non-governmental organizations and scholars.

24. It is a well known fact that many national representatives to the United Nations bodies shape rather than implement a previously decided policy. This is especially so in “non-political” controversies. The chances of shaping rather than merely following a policy, of course, vary from case to case. Generally speaking it could be said that the determining factor here would be the individual stature of the particular representative. Some countries, particularly the developing ones, do not have adequately trained regular staffs in their foreign offices. Without any effective guidelines in such cases, it would be easy for an eminently qualified representative to assert his “personal” viewpoints. An equally qualified successor would also have no guidelines, and he might feel free to stress a different position.

25. Sohn, A Short History of United Nations Documents on Human Rights, in Eon-
Undoubtedly, the draftsmen must have hoped that in interpreting it, future decision-makers would take into account the many handicaps of a drafting effort in which so many States and persons took part.

E. Special Meaning

Professor McDougal has persuasively demonstrated the relevance of the travaux préparatoires to determine whether or not the draftsmen intended to give certain words "special meanings." An examination of the travaux of the Covenant reveals that through their extended discussion of the word "arbitrary," the draftsmen intended to give this term a special meaning. What this meaning is has been noted in the preceding section on "The Preparatory Work."

F. Related Instrument

Elsewhere, we have established that the draftsmen of the Covenant treated the Universal Declaration of Human Rights as a "related instrument." Therein, we have also shown that the interpretation of the word "arbitrary" in the Covenant involves its interpretation in articles 9, 12, 15, and 17 of the Universal Declaration. A study of the inclusion of "arbitrary" in these articles of the Declaration reinforces our conclusions about the intended meaning of that term in the Covenant.

G. Subsequent Interpretation and Practice

Although the Covenant was adopted in 1966, article 9 was finally drafted by the Third Committee in 1958. The most important "subsequent interpretation" of the word "arbitrary" in article 9 is the understanding on which this word was included in article 12, adopted by the Third Committee in 1959, and in article 17, adopted in 1960. That understanding, discussed elsewhere, supports the distinction between "illegal" and "arbitrary."

Furthermore, a United Nations Committee on the Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile appointed by the Commission on Human Rights concludes that

while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary.

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28. See Chapter IV of Hassan, supra note 19.
Accordingly, the Committee adopted the following definition of "arbitrary":

an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.  

While the conclusions of the Committee presently await the consideration of the Commission, the comments received from over forty-five governments suggest that this definition of "arbitrary" will be substantially accepted. 

The definition of "arbitrary arrest" was also undertaken at two United Nations Seminars on the Protection of Human Rights in Criminal Law and Procedure. Both seminars recognized the possibility of a "legal" but "arbitrary" arrest. For example, the Baguio Seminar adopted the following definitions:

"Illegal arrest"—curtailment, not authorized by law, either statutory or customary, of an individual's freedom of movement.

"Arbitrary arrest"—an arrest authorized by a law which fails adequately to protect human rights because either (a) the legal right to arrest has been too widely defined, or (b) the means, circumstances or physical force attendant on the arrest exceed the reasonable requirements of effecting arrest.

Finally, inasmuch as the Declaration and the Covenant are part of one International Bill of Rights, the "subsequent interpretation and practice" concerning the words "arbitrary" and "arbitrarily" in the Declaration anticipate the future practice under article 9 of the Covenant. The practice relating to the articles of the Declaration points to a broad interpretation of "arbitrary." 

30. Id. This definition of "arbitrary" is also included in art. 1 of the Committee's proposed Draft Principles on Freedom from Arbitrary Arrest and Detention, id. at 205.


33. Most of the replies of governments cited in supra note 32 accepted explicitly or implicitly the Committee's definition of "arbitrary" in art. 1 of the Draft Principles. A handful of them objected to it on the ground that it left unanswered the question as to how and by which authority laws will be determined as "incompatible with respect for the right to liberty and security of person." See, e.g., the replies of France, E/CN.4/835, at 27; Spain, id. at 51. See also the replies of the Ukrainian Soviet Socialist Republic, id. at 66, and Malaysia, id. Add. 9, at 11. Yugoslavia suggested that the definition might become more concise and clear if it invoked the standards of the Universal Declaration, id. Add. 4, at 1.

34. These were held in Baguio City (Philippines), ST/TAA/HR/2 (Feb. 1958) and in Santiago (Chile), ST/TAA/HR/3 (May, 1958). Although both seminars preceded by a few months the adoption of article 9 by the Third Committee, they were held subsequent to the adoption of that article by the United Nations Commission on Human Rights which, in fact, is the original author of article 9.

35. See ST/TAA/HR/2, at 9. See also the Santiago Seminar, ST/TAA/HR/3, at 16.

36. For a full discussion, see Hassan, supra note 27 at 259-62.
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III. CONCLUSIONS AND RECOMMENDATIONS

About twelve years ago, when the word "arbitrary" was first discussed extensively by the Third Committee in connection with its drafting of the Covenant, El-Farra (Syria) pointed out,

[Even if the term "arbitrarily" had not yet been defined accurately, it would without a doubt quickly acquire a specific meaning, for as society progressed the law developed to meet new needs.]

Today, El-Farra's prophecy appears well on its way to realization. In the intervening period, the uncertainty around "arbitrary" being synonymous with "illegal" has rested. Over some twenty years, "arbitrary" has acquired a "special meaning" in the international instruments on human rights adopted by the United Nations. It has developed to mean "illegal and unjust."

Contrary to some thinking, we do not believe that the task of determining "standards" of justice is an impossible one. We recommend to decision-makers the relevance of the general principles of law recognized in the principal legal systems. As a first step, we suggest the ten principles noted earlier that the Covenant itself accepts as essential to the right of everyone to be free from arbitrary arrest and detention.

For support and elaboration of the ten principles, the decision-maker could further look to the notion of wrongful arrest and detention in other areas. First, there is the area of State Responsibility. The laws of human rights and those of State Responsibility are mutually reinforcing. Thus, while

37. 12 GAOR, Third Comm. 271 (1957).
38. See, e.g., the reply of the French Government cited in supra note 33.
39. See pp. 12-13 supra. See also the Draft Principles cited in supra note 30; Commission on Human Rights, Study of the Right of Arrested Persons to Communicate With Those Whom it is Necessary for them to Consult in Order to Ensure their Defence or to Protect their Essential Interests, E/CN.4/996 (Jan. 23, 1969).
40. Art. 38 of the Statute of the International Court of Justice recognizes the following "sources and subsidiary means" of international law:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

A study of the concept of "arbitrary arrest and detention" in the light of these "sources" could well be the subject of another paper. We will, therefore, merely highlight some of the guidelines that the decision-maker could turn to for interpreting "arbitrary arrest" in article 9 of the Covenant.
scholars of State Responsibility invoke human rights standards, those trying to elaborate the human rights prescriptions in the Covenant refer to the reservoir of the practice concerning State Responsibility. The Harvard Convention on the International Responsibility of States for Injuries to Aliens (1961), and Garcia-Amador's Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens (1961) are the most recent and comprehensive attempts to codify the law on the subject. Article 5 of the Harvard Convention and article 4 of the Garcia-Amador Revised Draft deal with arrest and detention and should therefore merit special attention.

Concerning international standards to be found in treaties, the two regional Conventions on Human Rights are particularly significant. As Baxter has remarked about the European Convention, [It] furnishes evidence of the common standard prevailing in the legal systems of the parties. But more than this, it indicates what standard as to the treatment of nationals a State has been willing to accept for international purposes. In this aspect, a treaty to which fifteen States are parties is more compelling evidence of an international standard than the municipal statutes and constitutional provisions that the same number of States are willing to apply for purely municipal purposes.


43. See supra note 41.


46. The writer is grateful to Professors Sohn and Baxter for allowing consultations with their preparatory work on this article.


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Article 5 of the European Convention\textsuperscript{50} deals with arrest and detention. Through decisions of the European Commission and the European Court of Human Rights concerning this article, the concept of freedom from arbitrary arrest and detention has assumed new dimensions.\textsuperscript{51}

In the Americas, the Inter-American Commission on Human Rights has so far\textsuperscript{52} rested its efforts to protect individual liberties on articles I and XXV of the American Declaration of the Rights and Duties of Man which provide:

\begin{quote}
Article I. Every human being has the right to life, liberty and the security of his person.

Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by preexisting law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.\textsuperscript{53}
\end{quote}

Presently, a Draft Inter-American Convention on Protection of Human Rights\textsuperscript{54} awaits action at the forthcoming Inter-American Specialized Conference.\textsuperscript{55} If adopted, its article 6 will supplement article 9 of the Covenant at the regional level.

Bilateral treaties can also provide good evidence of community expectations.\textsuperscript{56} Modern treaties of friendship, commerce and navigation and consular conventions increasingly contain elaborate provisions on the protection against wrongful arrest and detention of the nationals of the signatory States.\textsuperscript{57} Fur-

\begin{footnotes}
\item[50.] 213 U.N.T.S. 221
\item[53.] Pan American Union, Inter-American Commission on Human Rights: Basic Documents, OASOR, OEA/Ser.L/V/1.4, at 1, 2, 6 (Dec. 1, 1960).
\item[54.] OASOR, OEA/Ser.G/V, C-d-1631 (Oct. 2, 1968).
\end{footnotes}
thermore, some of the ten principles find support in article 36 of the Vienna Convention on Consular Relations. 68

Yet another form of treaty that synthesizes international standards is the Status of Forces (SOF) Agreement. The pioneering example of article VII(9) of the NATO Status of Forces Agreement 69 has led to similarly detailed provisions concerning some of the ten principles in United States SOF Agreements with, for example, Australia, 60 Barbados, 61 Iceland, 63 Japan, 63 Libya, 64 Nicaragua, 65 provisions in bilateral treaties between the United States and other countries. Citations to such provisions may also be found in 8 M. WIlKIN, supra note 47, at 721-22. Article III of the United States-Pakistan Treaty of Friendship and Commerce is typical of these provisions:

1. Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security, in no case less than that required by international law.

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. Such national shall (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial with all convenient speed, with due consideration to the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

58. UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS, OFFICIAL RECORDS (A/Conf.25/16/Add.1), at 175, 181 (1963). See also arts. 41 and 42, id. at 182, concerning arrest and detention of Consuls. A recent discussion of arts. 36, 41-42 may be found in Lee, Vienna Convention on Consular Relations, in P. CAHILL & L. LEE, VIENNA CONVENTIONS ON DIPLOMATIC AND CONSULAR RELATIONS 41, 63-66 (1969).

59. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled

(a) to a prompt and speedy trial;
(b) to be informed, in advance of trial, of the specific charge or charges made against him;
(c) to be confronted with the witnesses against him;
(d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
(e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial. (199 U.N.T.S. 67; 4 U.S.T. 1792; T.I.A.S. 2845).

See generally R. ELLERT, NATO "FAIR TRIAL" SAFEGUARDS (1963). Note the statement of the U.S. Attorney General Brownell cited id. at 22 to the effect that the procedural safeguards provided by art. VII(9) are in accordance with "civilized standards of justice."


61. Art. IX(9) of the Agreement Concerning United States Defense Areas in the Federation of the West Indies, entered into force Feb. 10, 1961, 409 U.N.T.S. 67; 12 U.S.T. 408; T.I.A.S. 4734. This Agreement with the Federation of the West Indies was terminated with respect to Jamaica, U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 117 (1964), but is still in effect with respect to Barbados, id. at 13; and Trinidad and Tobago, id. at 205.


aragua, Pakistan, and Trinidad and Tobago. On the basis of the “so far workable and satisfactory” experience of the United States with these Agreements, one can safely venture the suggestion that more and more SOF Agreements will incorporate procedural safeguards on the arrest and detention of visiting armed forces.

In another sphere, a United Nations Committee has recently prepared about ninety “Country Monographs” on national laws and practices concerning arrest and detention. On the basis of a comprehensive comparative study of this national practice, the Committee has proposed certain Draft Principles which attempt to “codify” in more details than article 9 of the Covenant the international standards of the right against arbitrary arrest and detention.

Finally, the “most highly qualified publicists” have regarded the ten principles as basic to human dignity. Hersch Lauterpacht, for instance, indicated this priority by including the following provisions as article 1 of his Draft International Bill of the Rights of Man:

The ... liberty of the person shall be inviolate within the limits of the law.

No person shall be deprived of liberty save by a judgment of a court of law or pending trial in accordance with the law. Detention by purely executive order shall be unlawful in time of peace.

There shall be protection from and compensation for arbitrary and unauthorised arrest and detention.

The law shall provide safeguards against prolonged detention preceding trial, against excessive bail or unreasonable refusal thereof, against denial of just guarantees in respect of evidence and procedure...
in criminal cases, against the refusal of protection in the nature of the writ of habeas corpus ... and against punishment which is cruel, inhuman, or offensive to the dignity of man.\textsuperscript{73}

In fact, so widespread is the acceptance of the ten principles that writers have zealously included them in the "minimum standard of international justice."\textsuperscript{74} By reference to the writings of these publicists and to the other sources mentioned earlier, it should be possible to elaborate the obligations imposed by the term "arbitrary" in article 9 of the Covenant.

This paper has attempted to point out the importance of clarifying with precision certain fundamental terms in the Covenants. It would well serve international and national human rights efforts if similar studies of the other vague terms such as "ordre public" and "reasonableness" were undertaken.

\textsuperscript{73} H. LAUTERPAHRT, INTERNATIONAL LAW AND HUMAN RIGHTS 313, 327 (1950). Over the years, several U.N. Seminars on Human Rights have brought together leading scholars, judges and lawyers from all over the world. Significantly, consensus on the ten principles was commonplace at these seminars. See, e.g., the reports of the seminars held in Baguio City (Philippines), ST/TAA/HR/2 (1958); Santiago (Chile), ST/TAA/HR/3 (1958); Tokyo (Japan), ST/TAO/HR/7 (1960); Vienna (Austria), ST/TAO/HR/8 (1960); Wellington (New Zealand), ST/TAO/HR/10 (1961); Mexico, ST/TAO/HR/12 (1961); Kabul (Afghanistan), ST/TAO/HR/21 (1964); Dakar (Senegal), ST/TAO/HR/25 (1966).

\textsuperscript{74} Some of the more persuasive pleas for a "minimum standard of justice" include Wise, Note on International Standards of Criminal Law and Administration, in INTERNATIONAL CRIMINAL LAW 135-63 (G. Mueller & E. Wise eds. 1965); Borchard, The "Minimum Standard" of the Treatment of Aliens, 38 Mich. L. Rev. 445-61 (1940); A. FREEMAN, supra note 29, at 497-370. See also Orfield, What Constitutes Fair Criminal Procedure under Municipal and International Law, 12 U. Pitt. L. Rev. 35-46 (1950).