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http://dx.doi.org/10.1017/S0021223700000376

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WHAT HUMAN RIGHTS LAW COULD DO: LAMENTING THE ABSENCE OF AN INTERNATIONAL HUMAN RIGHTS LAW APPROACH IN BOUNEDIENE & AL OD AH

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Research Paper No. 07-09
January 2009
WHAT HUMAN RIGHTS LAW COULD DO: LAMENTING THE ABSENCE OF AN INTERNATIONAL HUMAN RIGHTS LAW APPROACH IN BOUMEDIENE & AL ODAH

Fiona de Londras*

In December 2007 the U.S. Supreme Court heard oral arguments in its latest Guantánamo Bay cases, Boumediene v. Bush and Al Odah v. United States. Interestingly, the argumentation offered in this litigation was almost exclusively domestic—international human rights law did not feature in spite of its capacity to add significantly to the weight and persuasiveness of the arguments petitioners’

This Article both exposes the potentially significant international human rights law arguments that could have been advanced, and explores some possible reasons for the marginalization of this body of law. The Article concludes that this strategic decision on the part of counsel for the petitioners robbed the U.S. Supreme Court of an opportunity to assert the relevance of human rights law to the “War on Terrorism,” and to expand on the relationship between international and domestic constitutional standards and, for those reasons, is to be lamented.

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It was my pleasure to prepare this Paper for a conference honoring the work of David Kretzmer, whose commitment to human rights has resulted in a body of work as deep and thought-provoking as it is broad and insightful. This honor was only matched by the pleasure of finally meeting David at the conference; a pleasure that I have since enjoyed once more and which I hope to have on many future occasions.

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I. Introduction

Guantánamo Bay and the rights of those detained there are among the most enduring controversies in the “War on Terrorism.” One of the primary areas of concern has been the apparent unavailability of habeas corpus to those detained as “enemy combatants” until the cessation of hostilities; a point in time that even the United States’ administration accepts may be impossible to identify.¹ On December 5, 2007, the U.S. Supreme Court heard oral arguments in the latest cases to assert habeas corpus rights for these detainees—–Boumediene v. Bush and Al Odah v. United States, the decision in which was handed down in June 2008.² Interestingly, the arguments presented to the Court both orally and in the written submissions gave scant attention to international law and none at all to international human rights law (IHRL). This is surprising when one considers that IHRL has a well developed and contextually appropriate body of jurisprudence to be drawn on in relation to the two primary issues in the case: the geographical reach of rights-protecting provisions, and the essential elements of habeas corpus or adequate alternative.

Not only does IHRL have a well-developed jurisprudential corpus that would have served a prudential purpose in this case by adding another string to the petitioners’ bow, but it is also an appropriately formulated body of law to rely on when assessing the appropriate level of individual rights in the context of counter-terrorism. Unlike many domestic legal systems—including the United States'³—IHRL has an in-built emergency structure comprising derogation processes that offers a clear delimitation of allowable “security-motivated” action. IHRL not only offered additional authority for use by counsel for the petitioners in Boumediene, but also represents principles and doctrines of law that have been designed to ensure an achievable, sustainable, proportionate and appropriate balance between individual rights and the security-

¹ For an acceptance of the difficulty of identifying the cessation of hostilities in the “War on Terrorism” see, e.g., the Press Briefing of Tony Snow, June 12, 2007 when the following exchange took place: Reporter: “How do you declare an end to the War on Terror?”; Snow: “I don’t know,” available at http://www.whitehouse.gov/news/releases/2007/06/20070612-3.html.
³ For an argument in favor of an “emergency constitution” see BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006); for an analysis of “models of accommodation” in times of crisis see FIONNUALA NÍ AOLÁIN & OREN GROSS, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2007).
prerogatives of the state. As outlined in Part III below, there is no reason in law for the exclusion of IHRL argumentation—in fact, by analogy with the principles for consideration of comparative law in constitutional interpretation, reference to international human rights would have been entirely appropriate in this case.

This Article outlines the ignored jurisprudence and laments its exclusion from the litigation, particularly since this was not required by domestic law and denied the Supreme Court the opportunity to consider the appropriate relationship between constitutional and international rights protecting norms in times of conflict. Part II offers a background to the Boumediene and Al Odah litigation, including outlining the shortcomings in the review mechanisms available to those detained in Guantánamo Bay. Part III outlines the human rights law arguments that, it is proposed, ought to have been made in this case. These arise in two contexts—first, in relation to the extra-territorial reach of human rights law which, it is argued, could substantiate a claim for the application of constitutional rights to Guantánamo Bay; second, in relation to the content of habeas corpus which, it is argued, could have been advanced as indicators of the adequacy of a provided review mechanism to satisfy the constitutional right to habeas corpus or “adequate alternative.” Part IV then considers a number of reasons for the omission of IHRL, and shows that none of these possible motivations are convincing. The Article concludes (Part V) that the failure to argue IHRL in this latest Guantánamo Bay case is a missed opportunity to establish a more harmonious concert between the rights of suspected terrorist detainees under U.S. constitutional law and IHRL.

II. A Little Background to Boumediene and Al Odah

This is not the first time that the Supreme Court had been asked to decide on the availability of habeas corpus to suspected terrorists detained in Guantánamo Bay.

4 For a critical perspective on the emergency-ready design of international human rights law see Conor Gearty, Reflections on Civil Liberties in an Age of Counter Terrorism, 41 OSGOODE HALL L. J. 185, 202-204 (2003).


Such litigation is particularly contentious because one of the primary motivations for the use of Guantánamo Bay in the light of the attacks on the World Trade Centre and Pentagon on September 11, 2001 was its perceived immunity from oversight by the federal courts by means of *habeas corpus.* This perception can be primarily traced back to the World War II decision of *Johnson v. Eisentrager,* in which the Supreme Court held that aliens captured and detained outside of the United States in relation to offenses conducted outside of the United States, had no entitlement to access either constitutional or statutory *habeas corpus* procedures. Relying to a great extent on this precedent, the United States government resolved to detain non-citizen suspected Al Qaeda members in Guantánamo Bay and, initially, did not afford any review processes to those detainees by which they could challenge the lawfulness of their detention. The first of the Guantánamo cases—*Rasul v. Bush*—saw the Supreme Court assert a statutory *habeas corpus* entitlement on the part of these detainees, and the second—*Hamdan v. Rumsfeld*—essentially recognized the right of Congress to amend the *habeas corpus* statute in order to strip federal courts of this jurisdiction to as full an extent as desired. Neither of these cases, however, reached the question of the constitutional *habeas corpus* entitlements of Guantánamo Bay detainees—the issue that confronted the Supreme Court in the *Boumediene* litigation.

A. The Challenge

*Boumediene & Al Odah* concerned 37 non-U.S.-citizen detainees held in Guantánamo Bay for approximately six years. While all of these detainees had been through the Combatant Status Review Tribunal (CSRT), introduced as a result of the *Hamdi* and

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7 *Rasul v. Bush, id., 497-99* (Scalia J., dissenting); *See also Philippe Sands, Lawless World* 144 (2005).
9 U.S. Const, art. I, §(9)(2) “The 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.”
13 *Hamdan v. Rumsfeld, supra note 6.*
15 *Boumediene v. Bush; Al Odah v. United States, supra note 2.*
decisions and considered in some depth below, the detainees claimed that they were in fact entitled to habeas corpus or an adequate alternative under the U.S. Constitution, and that the CSRT and judicial review thereof did not constitute such an “adequate alternative.” The challenge, therefore, involved two primary questions: (a) does the U.S. Constitution extend to Guantánamo Bay, resulting in those detained there being constitutional rights-bearers?; and (b) what constitutes an “adequate alternative” to habeas corpus? Counsel for the petitioners based their argumentation on these matters largely on leasehold and sovereignty, in relation to the first question, and on the common law of habeas corpus in relation to the second.

The naval base in Guantánamo Bay in which the petitioners and other suspected terrorists are or were held is under the leasehold ownership of the United States by virtue of a perpetual lease formed through two treaty agreements between the U.S. and Cuba. This lease can be terminated by the United States only and, although it recognizes Cuba’s continuing sovereignty over the base, expressly grants the U.S. exclusive jurisdiction over the base. Thus, as counsel for the petitioners argued, any activities undertaken in the base—even by a Cuban national who might be working there—are governed by U.S. federal law and not actionable in Cuban courts. As a

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18 Infra Part II (B).
19 Constitutional jurisprudence makes it clear that the right to habeas corpus secured in art. I. §(9)(2), see supra note 9 [the Suspension Clause] is satisfied by the provision of an adequate alternative, Swain v. Pressley, 430 U.S. 372 (1977).
20 There is also some consideration of whether Sect. 7 of the Military Commissions Act of 2006 constitutes an unconstitutional suspension of habeas corpus in violation of Article I (9)(2) but lower federal courts have already found the statute not to suspend constitutional habeas corpus for the lack of express suspending words; a convincing argument that is likely to prevail in the Supreme Court—Hamdan v Rumsfeld, 2006 U.S. Dist. LEXIS 89933 (Dec. 13, 2006). For that reason, this element of the litigation is not considered in detail in this Paper although it is considered in Fiona de Londras, Hamdan v Rumsfeld, 54 NETH. INT’L L. REV. 539 (2007).
22 Brief for Petitioners Al Odah et al., supra note 21, at 31-39 (in which alleged inadequacies of the available review are frequently assessed by reference to the traditional, common law operation of habeas corpus); Brief for Petitioners Boumediene et al., supra note 21, at 18-33
result, the base itself is, to paraphrase Kennedy J. in the *Rasul* judgment, essentially an unincorporated territory of the United States and, under the *Insular Cases* jurisprudence, therefore subject to at least some constitutional governance, particularly in relation to fundamental individual liberties such as the right to *habeas corpus*. It is worth noting, however, that although what I class “the territorial approach” to constitutionalizing Guantánamo was largely successful in this case and is based in the familiar municipal conceptions of property, leasehold, and territorial jurisdiction, it carried with it a number of risks. Robert Chesney sums these risks up well when he writes:

[m]ight the extension of a robust form of judicial review to Guantánamo detainees cause the government to rely more than it otherwise would on detention facilities in Afghanistan and elsewhere, which are not only less secure and convenient, but also less transparent and less likely to be subjected successfully to litigation of any kind?

The territorial approach relied upon by counsel for the petitioners in this case, although successful in the instant proceedings, may thus endanger future detainees and deter the government from transferring future detainees to Guantánamo Bay or any other areas outside of the United States over which the U.S. may have analogous perpetual leasehold proprietorship. As considered below, a “effective control and


27 For a full consideration of this “territorial approach” see Fiona de Londras, *In the Shadow of Hamdan v Rumsfeld: Habeas Corpus Rights of Guantánamo Bay Detainees*, 17 IRISH CRIM. L. J. 8 (2007). For a political science consideration of whether Guantánamo Bay can be described as being within the United States see, e.g., Amy Kaplan, *Where is Guantánamo?*, 57 Am. Q. 831 (2005).


30 It does not, in fact, appear that there are any places over which the United States has an analogous leasehold proprietorship at the moment. This is reflected by the comment of Justice Bader Ginsburg in the oral argumentation in *Rasul* that “I think Guantánamo, everyone agrees, is an animal, there is no other like it” – Oral Transcript, Rasul v. Bush, Apr. 20, 2004, 51, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf.

31 *Infra* Part III (A).
authority” approach, based on international legal principles of extra-territoriality, appears to offer more promise of ensuring that individuals are detained as ‘enemy combatants’ only when there is an evidence-based belief of involvement in terrorism that requires detention as a matter of national security, and when this belief can be effectively challenged, through an adversarial process.

In relation to the argument that the current review system was “inadequate,” counsel for the petitioners argued that habeas corpus as it was in 1789 allowed for substantive and effective review that was not afforded to the petitioners, and without which the current system could not fulfil the constitutional requirement of habeas corpus or adequate alternative.\footnote{Oral Transcript, Boumediene v. Bush; Al Odah v. United States, supra note 24, at 39.} To this end, counsel was not only ignoring a vast body of jurisprudence from IHRL on the essential elements of effective review,\footnote{Infra Part III (B).} but also conceding that constitutional standards are not to be informed by contemporary international developments. Given that the operation of the detention facility in Guantánamo Bay is said to be required by and structured in the light of a novel and substantially “new” set of circumstances,\footnote{See, e.g., Press Conference by President Bush, July 7, 2006, available at http://www.whitehouse.gov/news/releases/2006/07/20060707-1.html.} the decision to argue adequacy almost exclusively by these 1789 standards appears short-sighted. Without doubt, the en vogue nature of originalism in constitutional interpretation in the United States warranted attention to such a line of argument,\footnote{Put relatively simply, the originalist position is that the text of the Constitution binds the future and the Constitution means what it meant when originally introduced in 1789. The debate between originalists and non-originalists rages in U.S. periodicals, but an excellent overview of both positions and critique of originalism itself is offered in Dennis Goldford, The American Constitution and the Debate over Originalism (2005).} but concentration thereon to the exclusion of IHRL standards deprived the litigation of valuable and contextually-appropriate conceptions of habeas corpus drawn from international institutions, considering habeas corpus for suspected terrorists in times of crisis.\footnote{Infra Part III (2).} As considered below, arguments drawing on international legal doctrine and principle would have afforded significant “added value” to those actually advanced and ought not to have been ignored by counsel.
B. The Available Review

It was originally the case that those detained in Guantánamo Bay had no mechanism to have the lawfulness of their detention there reviewed: they were classified as “enemy combatants” by the Executive, which then asserted a right to detain them “until the cessation of hostilities.”\(^{37}\) As a result of both \textit{Hamdi}\(^{38}\) and \textit{Rasul}\(^{39}\) however, it became clear that some review mechanism would have to be afforded to suspected terrorist detainees held in Guantánamo Bay. While the Supreme Court in both of these cases accepted that the Executive could, in fact, detain “enemy combatants” until the hostilities had ceased or until they no longer posed a threat to the security of the United States, the Justices also stressed the importance of ensuring that those detained have some mechanism of review available to them. As a result, CSRTs, which are now primarily regulated by the Detainee Treatment Act 2005,\(^{40}\) were established.\(^{41}\)

All those who appear before CSRTs are presumptively classified as enemy combatants,\(^{42}\) and the function of the review is merely to establish whether or not that classification is still appropriate, which in turn defines whether or not continued detention is justifiable. These reviews, which take place in Guantánamo Bay, are non-adversarial and administrative in nature. The tribunal itself comprises three commissioned officers, who are to be “neutral,”\(^{43}\) although they are not military judges and only one of them is required to be a lawyer.\(^{44}\) These members must then

\(^{37}\) By means of comparison, the Israeli Incarceration of Unlawful Combatants Law, 5762-2002, S.H. (2002) allows incarceration where there is reasonable cause to believe that a person being held by the state authorities is an unlawful combatant and that his release will harm state security. In this case, however, the incarceration order comes before a judge within 14 days for the detainee to challenge the lawfulness of the order and, by implication, the detention.

\(^{38}\) \textit{Hamdi v. Rumsfeld}, supra note 16.

\(^{39}\) \textit{See supra} note 6.


\(^{43}\) \textit{See Wolfowitz Memorandum}, \textit{id.} at section e.

\(^{44}\) England Memorandum, \textit{supra} note 41.
determine whether “the preponderance of evidence” supports the conclusion that the detainee is an enemy combatant, with evidence adduced by the government enjoying a rebuttable presumption of being genuine and accurate.\textsuperscript{45} The tribunal is “not bound by the rules of evidence such as would apply in a court of law,”\textsuperscript{46} but rather, can consider any evidence deemed to be both relevant and helpful to the matter under consideration.\textsuperscript{47} Although both parties may present evidence, and indeed the Tribunal is to consider evidence from both sides, there is no obligation to disclose evidence as between the parties, which compounds the plight of a detainee who is without counsel, and whose information flow is largely determined by whatever mail receipt rules are approved in his particular case. The detainee may call witnesses at his tribunal, but is not guaranteed that those witnesses will be secured for the proceedings as appearance is limited to those who are “reasonably available,”\textsuperscript{48} affecting not only the capacity to examine military officers who may have been involved in the capture, detention and interrogation of the detainee, but also individuals who may have relevant information but whose exact whereabouts or even full name might not be known to the detainee. The essentially illusory nature of the right to call, examine and cross-examine witnesses is borne out by the empirical study of Denbeaux and Denbeaux who found that the government never relied on testimony at a CSRT hearing.\textsuperscript{49}

Detainees are given only limited notice of the review date,\textsuperscript{50} frequently do not understand that this is a review as opposed to another form of interrogation,\textsuperscript{51} and are not provided with legal counsel. Rather than being entitled to the services of a lawyer, detainees are provided with a “personal representative” whose chief role is to “assist the detainee in connection with the review process.”\textsuperscript{52} However, the role of the representative may not be clear to the detainee. Section C obligates informing the detainee that the representative is not the detainee’s advocate.\textsuperscript{53} Moreover, the

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at sect. G(11).
\item \textsuperscript{46} Wolfowitz Memorandum, \textit{supra} note 42, at section G(9).
\item \textsuperscript{47} \textit{Id}.
\item \textsuperscript{48} England Memorandum \textit{supra} note 41, at section F(6).
\item \textsuperscript{50} The review must take place within 30 days of the detainee being given notice—England Memorandum, \textit{see supra} note 41, at section d.
\item \textsuperscript{51} \textit{See} Denbeaux & Denbeaux, \textit{supra} note 49, at 16.
\item \textsuperscript{52} \textit{See} Wolfowitz Memorandum, \textit{supra} note 42 at section c.
\item \textsuperscript{53} \textit{See} England Memorandum, \textit{supra} note 41, at enclosure (3) 3.
\end{itemize}
representative is a military officer,\textsuperscript{54} and in reality the role of the representative is to visit with the detainee and read a list of the accusations against him on the basis of which the detainee is being held.\textsuperscript{55} As this is generally the same list of accusations as the detainee has responded to in numerous interrogations, the blurred lines between interrogation and review are arguably further distorted in the eyes of the detainee by the involvement of the personal representative, exacerbating the difficulties detainees face in making out a viable case before a CSRT.

The decision of a CSRT is subject to limited review in the U.S. federal courts, at which point in a proceeding the detainee will have access to legal representation. The Detainee Treatment Act confers jurisdiction on the Court of Appeals for the District of Columbia “to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”\textsuperscript{56} This does not allow for a substantive hearing on the merits, however. Rather, the Court of Appeals is statutorily limited to considering whether the CSRT in question made its determination in a manner “consistent with the standards and procedures” specified for CSRTs, and whether the application of these standards is consistent with “the Constitution and laws of the United States” to the extent to which those laws are deemed applicable.\textsuperscript{57} This is clearly an extremely restrictive review, particularly if the Court of Appeals were to find that the Constitution did not apply—as was the \textit{status quo ante} at the time of the Supreme Court argumentation in \textit{Boumediene}. The fact that the Military Commissions Act 2006 itself attempts also to preclude reliance on international law as a source of rights in these reviews of the CSRT decisions, makes the inadequacy of the review mechanism even more evident.\textsuperscript{58}

This procedure—CSRT with limited review in the federal courts—was the sole review mechanism available in statute to those detained in Guantánamo Bay. Although the Supreme Court found that federal courts have statutory \textit{habeas corpus}

\textsuperscript{54} See Wolfowitz Memorandum, \textit{supra} note 42, at section c.

\textsuperscript{55} See \textit{supra} note 50.

\textsuperscript{56} Detainee Treatment Act, \textit{supra} note 40, at section 1005 (e)(2)(a).

\textsuperscript{57} \textit{Id.} at section 1005 (e)(2)(c)


No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.
jurisdiction over Guantánamo Bay, Congress subsequently stripped that jurisdiction in the Detainee Treatment Act and replaced it with the process described above. When the Supreme Court then held, in *Hamdan*, that the 2005 statute did not strip jurisdiction over habeas corpus petitions lodged and pending at the time it was introduced, Congress introduced Section 7 of the Military Commissions Act 2006 which provides—in unequivocal terms—that federal courts have no jurisdiction over habeas corpus petitions lodged by enemy combatants and that this “jurisdiction stripping” provision has retrospective effect. Thus, the *Boumediene* litigation represented an important challenge to the combined decision of Congress and the Executive to exclude the judiciary from determinations as to detention in the War on Terrorism. If, on the one hand, the Supreme Court affirmed the lower court ruling under review, (i.e., that Section 7 is an effective stripping provision and there is no federal habeas corpus) then Guantánamo Bay detainees would have been reliant solely on the statutory processes outlined above. If, on the other hand, the Court found that the Constitution applies in Guantánamo, it would then proceed to assess the adequacy of these statutory proceedings to act as a constitutionally acceptable alternative to habeas corpus.

III. Human Rights Law Arguments

Following an exchange of various applications and petitions by both parties, in which the arguments outlined above, are made out, the U.S. Supreme Court heard oral arguments in *Boumediene* on Dec. 5, 2007. Of primary interest in this Article, is the distinct absence in both the documentary submissions and the oral argumentation, of reference to international human rights standards. The transcript of the oral hearings

59 Detainee Treatment Act, supra note 40, at Sect 1005(e).
60 See *Hamdan v. Rumsfeld*, supra note 6.
61 See supra note 58.
62 Section 7 amends Section 1005(e)(1) of Public Law 109–148, 119 Stat. 2742, to read:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

features no reference to IHRL whatsoever. International law fares only marginally better in the documentary briefs submitted by the parties, where once more IHRL features not at all. The original Brief for Petitioners Al Odah et al focuses on international law in respect of cessation of Guantánamo Bay and the concept and definition of “enemy combatant.” The Brief for Petitioners El-Banna et al invokes international law only inasmuch as it refers to the Geneva Conventions. The Brief for Petitioners Boumediene et. al similarly invokes only international humanitarian law (both the Geneva Conventions and customary international law) when considering whether the United States has lawful authority to detain the particular detainees at all, particularly in relation to the concept of direct participation in hostilities. The only reply brief to make any meaningful reference to international law is Reply Brief for Petitioners Al Odah et al which states, that “CSRTs are not contemplated or governed by international law and are not sufficient under international or U.S. law to justify detention without meaningful judicial review in territory under the exclusive, and effectively permanent jurisdiction of the United States” but does not specify whether this conclusion is drawn from international humanitarian law, IHRL, or both.

The absence of sustained IHRL argumentation is striking given the fact that the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992 and has not entered any War on Terrorism related derogations, and given the potential for principles of IHRL to play an exceptionally effective persuasive role in relation to both the “reach” of U.S. constitutional standards and the content of those standards. This is not to say that IHRL would have trumped constitutional or, indeed, legislative standards in the case. The argument of this Article is that IHRL offered a rich source of argumentation as to the possible interpretation of the

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64 See supra note 2.
65 Brief for Petitioners Al Odah et al., supra note 21.
66 Id. at 16-23.
67 Id. at 38, 41.
69 Id. at 48-49.
70 Brief for Petitioners Boumediene et al., supra note 21.
71 Id. at 37-42.
73 Id. at 6.
Constitution and its geographic scope. This is particularly so given the common objectives of constitutional bills of rights and IHRL—neither body of law intends to act as a “suicide pact” or to unconscionably tie the hands of the state in times of crisis or strain; rather, both are flexible, accept the need for more restrictive measures than normal in times of strain, and recognize that individual rights flowing from individual dignity and humanity (and not from status,\textsuperscript{75} citizenship\textsuperscript{76} or law-abidingness) ought only to be infringed to the extent strictly necessary in a time of crisis or emergency. In constitutional terms this is particularly evident from the U.S. Supreme Court’s decision in \textit{Matthews v. Eldridge}\textsuperscript{77} in which the Court outlined a calculus by which public good can be balanced against individual rights in order to identify the scope of entitlements. This calculus was cited by O’Connor J. in \textit{Hamdi}.\textsuperscript{78} In international law, human rights law has long emphasized the need for international legal standards to take prevailing circumstances into account both where derogations have been entered and where they have not been entered but where the prevailing circumstances require some additional flexibility on the part of IHRL.\textsuperscript{79} Given these commonalities, recourse to principles of IHRL in \textit{Boumediene} and \textit{Al Odah} would have been appropriate.

A. Extra-Territorial Application

States’ obligations to comply with IHRL extend beyond their immediate geographic territory and to all areas within their effective power or control. This part of the Article exposes some of the key decisions at U.N. and regional level outlining this principle and identifies a common concern with ensuring that human rights treaties fulfil their

\textsuperscript{75} In \textit{Hamdi} the Supreme Court found that the petitioner had a \textit{habeas corpus} right notwithstanding his status as a suspected terrorist ”enemy combatant,” see \textit{Hamdi v. Rumsfeld, supra} note 16. International institutions have consistently held that one’s status as a suspected terrorist is not relevant to one’s human rights entitlements, see jurisprudence considered \textit{infra} in Part III (B).


\textsuperscript{78} See \textit{Hamdi v. Rumsfeld, supra} note 16, at 529.

protective purpose as the underlying rationale for this (admittedly exceptional) extra-territoriality.

Article 2(1) of the ICCPR defines the scope of the covenant in the following terms:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The terms of Article 1 of the First Optional Protocol to the ICCPR are also worthy of note in this relation. Under this provision signatory parties recognize the competence of the Human Rights Committee to consider communications “from individuals subject to [the state’s] jurisdiction who claim to be victims of a violation” of the ICCPR by that state.\(^{80}\) The expressed terms of Article 2(1) thus provide that individuals subject to a state’s jurisdiction are rights-bearers under the Convention. This is of particular significance in the context of Guantánamo Bay given the United States’ “exclusive jurisdiction” over the base.\(^{81}\) On a positivistic level, therefore, there seems little scope for dispute that Guantánamo detainees are “subject to [the US’] jurisdiction.” The Human Rights Committee has, however, gone beyond such apparently positivistic declarations of jurisdiction in assessing the nature of states’ obligations under Article 2(1), and has found that the provision “means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party” and that “[t]his principle also applies to 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.”\(^{82}\) This stated principle in General Comment No. 31 reflects established authority in the jurisprudence of the Committee itself.

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\(^{80}\) First Optional Protocol to the ICCPR, *supra* note 74.

\(^{81}\) *Supra* note 23.

The U.N. Human Rights Committee considered the meaning of the phrase “within its territory and subject to its jurisdiction” in a number of complaints against Uruguay,\(^83\) many of which involved claimants who had not been within the territorial jurisdiction of Uruguay at the time of the alleged violation.\(^84\) In respect of these cases the Human Rights Committee’s approach is perhaps best encapsulated in this extract from its decision in *Lopez Burgos v. Uruguay*\(^85\) and *Celeberti de Casariego v. Uruguay*\(^86\) to the effect that “the reference in [Article 1 of the Optional Protocol] is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of” Convention rights.\(^87\) Importantly legal citizenship is of no consequence to a state’s obligations towards individuals.\(^88\) This appears therefore to be a reading of “jurisdiction” that is intends to give full effect to the Convention rights; that recognizes that the purpose of the Convention requires an extra-territorial approach in cases where the behaviors in question occur in the context of a relationship between state and individual that requires Convention protection. Thus, the Human Rights Committee has concluded that the Convention applies to Israel in its behavior in and in relation to the Palestinian Occupied Territories\(^89\) and to the United States in its behavior in and in relation to those detained at Guantánamo Bay, Cuba.\(^90\)


\(^{84}\) See, e.g., *Montero v. Uruguay; Lopez Burgos v. Uruguay*; and *Celeberti de Casariego v. Uruguay*, *supra* note 83.

\(^{85}\) *Supra* note 83.

\(^{86}\) *Lopez Burgos v. Uruguay*, *supra* note 83, ¶ 12.1-12.3; *Celeberti de Casariego v. Uruguay*, *supra* note 83, ¶ 10.1-10.3.

\(^{87}\) But c.f. Individual Opinion of Christian Tomuschat in *Lopez Burgos v. Uruguay* and *Celeberti de Casariego v. Uruguay*, *supra* note 83. It should be noted that some elements of this individual opinion are subject to criticism including Tomuschat’s focus on the citizen and nonsensical distinction between “wilful and deliberate violations” of the ICCPR and “objective impediments to implementation.” A good review of the opinion is available in Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Isr. L. Rev. 17, 71-74 (2003-2004).


Article II of the American Declaration on the Rights and Duties of Man\textsuperscript{91} does not include any express jurisdictional scope, primarily because it is not a treaty and was not originally intended to be applied to the member states of the Organisation of American States; rather it was intended to be a non-binding document expressing aspirational standards for achievement in the region.\textsuperscript{92} It was not until 1965, when the Inter-American Commission was given authority to hear individual complaints alleging human rights violations, that the Declaration was applied to the member states. In contrast the American Convention on the Rights and Duties of Man contains a jurisdictional clause: “The States Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms …”\textsuperscript{93}

Article 1(1) is clearly distinguishable from Article 2(1) of the ICCPR because it makes no mention whatsoever of “territory” in setting out the jurisdictional scope of the treaty. While the practice of defining jurisdiction by reference to territory might suggest that the treaty is primarily applicable to those within the territory of a member state, the case law of the Inter-American Court of Human Rights clearly demonstrates a broader scope for the treaty. In the first place, the Court has established that state actors can be liable under the Inter-American human rights regime for the effect on people outside of their territorial jurisdiction of actions done inside of the territorial jurisdiction. Thus, in the \textit{Haitian Interdiction Case}\textsuperscript{94} the Commission found the United States liable for interfering with Haitians’ attempts on the High Seas to seek safe haven in third countries. Although the United States argued that the prohibition on \textit{refoulement} would apply only where asylum-seekers had reached the territory


\textsuperscript{92} Resolution XXII of the Second Special Inter-American Conference in 1965 resolves to authorize the Commission to examine communications submitted to it and any other available information, so that it may address to the government of any American State a request for information deemed pertinent by the Commission, and so that it may make recommendations, when it deems appropriate, with the objective of bringing about more effective observance of fundamental human rights.


\textsuperscript{93} American Declaration on the Rights and Duties of Man, \textit{supra} note 91, art. 1(1).

of a member state, the Commission referred to *Soering v. United Kingdom*\textsuperscript{95} and its progeny in the European Court of Human Rights in finding the United States had breached the Declaration. In addition, all those who come within the effective control of a member state are protected by the Inter-American regime even if the relevant events take place outside of a state’s territorial jurisdiction.\textsuperscript{96}

Article 1 of the European Convention on Human Rights (ECHR) obliges member states to “secure to everyone within their jurisdiction the rights and freedoms”\textsuperscript{97} contained within the Convention and has espoused a particularly rich jurisprudence on the extra-territorial scope of the Convention. While it has long been accepted that Article 1 lays down the principle that the Convention’s application is *primarily* territorially limited,\textsuperscript{98} early jurisprudence from the European Commission on Human Rights provided that states have an obligation under the treaty to secure the rights of all those under their actual authority and control including those outside of the respondent state’s territorial space.\textsuperscript{99} Article 1 jurisprudence now suggests that there are three categories of circumstance in which the Convention might have extra-territorial effect:\textsuperscript{100}

1. situations engaging the principle of *non-refoulement,* cases in which a state has effective control over a territory outside of its own territorial jurisdiction;\textsuperscript{101}
2. situations where individuals come under the somewhat incidental control of a state—very often in an administrative manner—although that state may not have control over the territory in question.\textsuperscript{102}

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\textsuperscript{98} *Soering v. United Kingdom,* supra note 95, at 86.
\textsuperscript{100} The categorization of these cases reflects that used by Michal Gondek in *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?,* 52 NETH. INT’L L. REV. 349 (2005).
In spite of the reasonably solid classification of “extra-territoriality” principles into these three genera of cases, the Grand Chamber did not consider the meaning of the jurisdiction clause in Article 1(1) of the Convention until *Banković v. Belgium*\(^\text{103}\) in 2001. In this case the Court considered whether member states who were involved in the aerial bombing of *Radio Televizije Srbije* in April 1999, had Convention-based responsibilities towards residents of the area and concluded that no jurisdictional link between the complainants and the respondent state could be established.

The Court reiterated the principle that the Convention is *primarily territorial* so that extra-territorial application of the Convention is a strictly exceptional occurrence. In essence this element of *Banković* was a mere restatement of existing principle; the Court had laid down the same principle in its early *Soering*\(^\text{104}\) decision and is perfectly in-keeping with the inclusion of a “territory clause” in Article 1. As the pre- *Banković* jurisprudence suggested, the exceptional circumstances in which the Convention could be applied extra-territorially fall into three categories:

*The Court’s* recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.\(^\text{105}\)

Very controversially, the Court then held that the Convention applies within a quite-strictly-delineated *espace juridique* comprising the territories of the member states of the Convention.\(^\text{106}\) If, as happened in *Cyprus v. Turkey*,\(^\text{107}\) individuals were in an area in which they enjoyed Convention rights, then the assumption of authority by another member state would not result in a gap in protection: rather continuity of protection could be assured by means of holding the new authority state liable


\(^{104}\) *Soering v. United Kingdom*, supra note 95.

\(^{105}\) *Banković v. Belgium*, supra note 103, at 71.

\(^{106}\) *Id.* at 80.

\(^{107}\) *Cyprus v. Turkey*, supra note 101.
for the Convention in spite of the fact that this state would be acting outside of its
own territory. The Court has subsequently handed down decisions that suggest that
the espace juridique principle from Banković may not in fact be as expansive as it
first appears. In Öcalan v Turkey\textsuperscript{108} for example, the Court found the respondent
state bound by the Convention in respect of an individual over whom it had authority
and effective control, notwithstanding the fact that the acts impugned occurred in
Nairobi airport. The Banković decision notwithstanding, therefore, there remains a
clear extra-territorial scope for the ECHR albeit in limited situations.

If the major human rights treaties have at least some extra-territorial application
inasmuch as they can be enforced against a state for its activities outside of its
own territorial borders, this may suggest something important about the nature of
rights-protecting provisions and the structural requirements for their effective
implementation. While the U.N. Human Rights Commission has not expanded
significantly on the rationale for its application of the ICCPR extra-territorially, there
are some indications in its opinions and concluding observations that suggest that the
principle is necessary in order to give effect to the rights protected by the Convention.
Effective implementation of rights is clearly within (if not in fact central to) the
object and purpose of human rights instruments and this can therefore be classified
as a purposive approach to the reach of the Convention. The purposive approach is
far more clear-cut in both the Inter-American and European regimes, however. In
both the Coard\textsuperscript{109} and Armando Alejandro\textsuperscript{110} cases the Inter-American Commission
endorsed extra-territorial application of the human rights regime on the basis of the
object and purpose of the Declaration and Convention.

Perhaps the most express example of the purposive approach to the physical
reach of IHRL can be found in the Article 1 jurisprudence of the European Court
of Human Rights. In Soering the Strasbourg Court referred to the Convention’s
“special character as a treaty for the collective enforcement of human rights and
fundamental freedoms” and to the “object and purpose of the Convention” in finding
that the United Kingdom had a responsibility under Article 3 to ensure, to the extent
possible, that they did not transfer the complainant to a place where his Convention
rights may be violated.\textsuperscript{111} Equally in Banković the Court reasserted its longstanding

\textsuperscript{109} See Coard v. United States, supra note 96, at 467.
\textsuperscript{110} Id.
\textsuperscript{111} See Soering v. United Kingdom, supra note 95, at 87.
purposive approach by asking “[What is] the ordinary meaning to be given to the phrase “within their jurisdiction” in its context and in the light of the object and purpose of the convention.” Post-Banković case law shows that the Court has not abandoned “object and purpose” based approaches to the scope of the Convention. In *Ilașcu v. Moldova and Russia*113 the Court affirmed the principle that the Convention can apply to military operations, even where the state gains only temporary overall control of all or part of another state.114 In *Öcalan v. Turkey*115 the Court further held that the Convention could be applied when the complainants are within the “authority and control” of a member state, even if geographically the events complained of take place outside of the *espace juridique* of the Convention.

Thus, the concept that a state would be bound by its obligations where it is in effective control of an area—even if that area is not within the state’s territorial jurisdiction—is now well established in IHRL. The rationale for this principle is the effective implementation of the objects and principles of those human rights instruments; namely, the effective protection of individual rights against unlawful, unjustifiable, and disproportionate state action that undermines and violates individual dignity. In this respect one’s citizenship, behavior, race, religion, etc., do not disqualify one from the enjoyment of rights, although they may result in a re-balancing of rights in relation to a particular category of person if that is justified by the circumstances. So committed is IHRL to the universality of its application, that some rights—such as the right to be free from torture—have been elevated to the status of *jus cogens* rights116 and others—such as the right to challenge the lawfulness of one’s detention—have been deemed non-derogable by implication within discrete human rights systems.117 If, as outlined above, constitutional bills of rights also have at their heart the object and purpose of limiting state action irrespective of the characteristics of the individual at bar, then a principle of extraordinary extra-territorial application would be apposite and the omission of this line of argumentation from *Boumediene* is perplexing.

112 *See Banković v. Belgium supra* note 103, at 51.
114 *Id.*
115 *Supra* note 108.
The second step in this case involved challenging the current review procedures operating in Guantánamo Bay, for even if the petitioners convinced the Court that they are constitutional rights bearers, the petitioners’ constitutional habeas corpus entitlements would be fulfilled if the Court could be satisfied that the available review processes are an “adequate alternative” to habeas corpus. In this context, again, IHRL offered the petitioners a source of law and principle concerning the vital elements of the right to challenge the lawfulness of one’s detention and its operation in times of emergency that could have been drawn upon in order to identify the benchmarks against which the current review processes could be assessed.

All international human rights documents protect the right to be free from arbitrary detention and many of them expressly protect the right to challenge the lawfulness of one’s detention. International law’s concern with detention is not directed toward prohibiting detention per se; the international legal order recognizes that detention of individuals may be required in certain circumstances. Its concern, rather, is with the prevention of arbitrariness in detention. One of the primary mechanisms of ensuring that one is not arbitrarily detained is the capacity to challenge that detention before a court, primarily achieved in common law jurisdictions through habeas corpus.

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118 Swain v. Pressley, supra note 19.
120 ICCPR, supra note 74, art. 9(4); Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 119, art. 5(4); ACHR, supra note 119, art. 7(6); CIS, supra note 119, art. 5(3).
121 Arbitrariness in this context can be taken to mean detention that is unjust or incompatible with the principles of justice and human dignity see, e.g., Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (A v. Australia Complaint No. 560/1993), U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997). For more on international’s law concern with preventing arbitrary deprivations of liberty see, e.g., NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL APPROACHES, Chapter 13 (2002).
procedures. Article 5(4) of the ECHR provides that detainees “shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” Article 9(4) of the ICCPR and Article 7(6) of the American Convention on Human Rights (ACHR) are expressed in almost identical terms, while Article 5(3) of the Convention on Human Rights and Fundamental Freedoms in the Commonwealth of Independent States (CIS) requires that a detainee “shall be entitled to have the lawfulness of his arrest or detention examined by a court.”

This suggests that a judge or court ought to be able to assess compliance with procedural requirements in domestic law; the reasonableness of the suspicion that forms the basis for the detention; and the legitimacy of the purpose of detention. *Habeas corpus* petitions normally allow for these three levels of assessment.

In order to satisfy international legal obligations, detainees must have the opportunity not only to lodge a petition but to have the lawfulness of their detention substantively reviewed, by reference to both domestic and international law.

In the course of elaborating upon this element of international law, the various enforcement mechanisms have outlined a number of required elements of such processes. It is clear that what this right requires will very much depend on the circumstances of the particular case; thus where detention results from an administrative decision, the detainee must have recourse to a court, but where the detention results from a court procedure, the opportunity to challenge its lawfulness can be rolled into the court decision provided the court procedure observes and respects the rights of the individual.

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123 Earlier drafts of the ICCPR expressly refer to *habeas corpus* but these references were removed out of deference to non-common-law legal systems (U.N. Doc. A/2629).


126 For example, in Boumar v. Belgium, 11 Eur. Ct. H.R. 1 (1989), the European Court of Human Rights held that “the scope of the obligation...is not identical in all circumstances or for every kind of deprivation of liberty,” id. at ¶ 60. This matter is considered more fully in Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on U.S. Detention of Suspected-Terrorists*, 12 J. CONFLICT SEC. L. 223, 246-47 (2007).

The absence of an IHRL approach in Boumediene & Al Oda'h detainee would have the opportunity to mount a challenge before a “court,” what this actually requires is that the challenge would be brought before a tribunal in which “the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.” The authority hearing the challenge must be capable of ordering the release of the detainee and should be “independent, objective and impartial in relation to the issues dealt with.” The “guarantees appropriate” to the detention and detainee in question will be entirely dependent on the particular circumstances of the case—“the scope of the obligation…is not identical in all circumstances or for every kind of deprivation of liberty.”

Thus, while international law appears to require that detainees would be provided with an adversarial procedure in which they can participate, (or be represented by an advocate), the exact format of that procedure will depend on the circumstances of the case.

In times of strain or emergency, international law affords substantive flexibility to nation states in their detention policies. That said, however, the international human right to challenge the lawfulness of one’s detention would appear not to be subject to derogation. The non-derogable nature of the right is not expressly outlined in any of the primary documents of IHRL, but has rather been implied into the right as a result of its fundamentality to the protection of detainees from violations of expressly non-derogable and jus cogens rights, such as the protection from torture. Thus, while the right to be free from arbitrary detention is subject to derogation in a

128 Boumar v. Belgium, supra note 126, at ¶ 57.
131 Boumar v. Belgium, supra note 126, at ¶ 60.
134 See supra note 129 and infra note 142 and accompanying text.
time of emergency, the availability of an effective mechanism by which detainees may challenge the lawfulness of their detention is an important factor in determining the proportionality and lawfulness of the measures introduced.\textsuperscript{135}

In this respect, the United Nations Special Rapporteurs on States of Emergency, Torture and a Right to a Fair Trial have reflected on the high potential for abuse where individuals are held incommunicado, and suggested that “\textit{habeas corpus} or other prompt and effective remedy” ought to be non-derogable,\textsuperscript{136} and the U.N. Special Rapporteur on Terrorism and Human Rights has proposed that the Principles and Guidelines Concerning Human Rights and Terrorism, currently be drafted, would state that “[t]he writs of habeas corpus and \textit{amparo} may not be denied any person arrested and charged for terrorist acts.”\textsuperscript{137}

The HRC has also made it clear that the ICCPR requires that the right to challenge the lawfulness of detention through \textit{habeas corpus} or an equivalent writ would remain fully available in times of emergency. In \textit{Alegre v. Peru},\textsuperscript{138} for example, the HRC found that Peru’s Decree Law No. 25659\textsuperscript{139} violated Article 9(4) of the Convention.

\textsuperscript{135} Id.


\textsuperscript{139} Decree Law 25659, el Peruano, Aug. 12, 1992.
This law deals with terrorist offenses including high treason, and severely restricts the possibility of people held on suspicion of such offenses challenging the lawfulness of their detention through habeas corpus petitions. While the Peruvian government argued that this was necessary in order to ensure national security, the HRC found that emergencies cannot justify the deprivation of the right to challenge the lawfulness of detention.¹⁴⁰ This case reflects the Committee’s view as to the fundamentality of judicial controls of detention; they are the recognized means of both avoiding abuses and providing an effective remedy to human rights violations.¹⁴¹

In October 1986, the Inter-American Commission of Human Rights submitted a request for an advisory opinion from the Court as to whether the judicial protection afforded by habeas corpus can be suspended in times of emergency. The Court held that habeas corpus (and amparo) cannot be suspended in times of emergency as these judicial protections are essential guarantees to the protection of individual rights (including non-derogable rights such as the right to be free from torture) and to the “effective exercise of representative democracy.”¹⁴² While an emergency situation may necessitate a suspension of certain guarantees, the Court stressed that the Rule of Law or the principle of legality are never suspended; these continue to be the guiding principles for governance even in times of strain.¹⁴³ Judicial protections are an essential guarantee of the application and respect for these principles, and habeas corpus is the means of guaranteeing protection from what international law recognizes as the most egregious human rights violations (as defined by jus cogens and non-derogable rights).¹⁴⁴ These

¹⁴³ Advisory Opinion on Habeas Corpus in Emergency Situations, supra note 142, ¶ 24.
¹⁴⁴ Id., ¶¶ 29, 35.
protections have a particular importance in cases of emergency, when some rights and freedoms might be suspended\textsuperscript{145} and are therefore non-derogable.

In contrast, the European Court of Human Rights has never held that the right to challenge the lawfulness of one’s detention, contained in Article 5(4) of the ECHR, is non-derogable. Rather, the Court has consistently taken the continuing availability of \textit{habeas corpus} to suspected terrorist detainees, to be a relevant factor in assessing the proportionality of emergency-related periods of protracted detention without charge or trial.\textsuperscript{146} Admittedly, the Court’s reasoning has generally been somewhat weak on this matter: as a general principle, the Court merely considered whether or not the petition was available to a detainee and did not interrogate the extent to which \textit{habeas corpus} processes would constitute a substantive review of lawfulness in any particular circumstance. That notwithstanding, however, later litigation relating to Northern Ireland indicated something of a shift in this respect, with the Strasbourg court actually engaging in a deep review of the nature and effectiveness of the \textit{habeas corpus} petition available to suspected terrorists. Thus, in \textit{Fox, Campbell & Hartley v. United Kingdom}\textsuperscript{147} the Court noted that not only ought suspected terrorists be in a position to challenge the reasonableness of a police officer’s belief that he was involved in terrorist activities, but also that the police officer’s belief was not to be deemed reasonable if based on slender materials, such as prior convictions. In other words, the exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the essence of the right to liberty would be impaired.\textsuperscript{148} \textit{Fox et al.} at least suggests that the European Court of Human Rights is concerned not only with the availability of a review, but with the availability of a meaningful and adequate review, appropriate to ensuring that the right to liberty is not covertly undermined through ineffective review processes. As a result, it seems reasonable to suggest that in a future apposite case, the Strasbourg court might follow its international and regional counterparts and elevate Article 5(4) to the status of impliedly non-derogable rights.

\textsuperscript{145} \textit{Id.} ¶ 40.


\textsuperscript{148} \textit{Fox, Campbell & Hartley v. United Kingdom}, supra note 146, ¶¶ 34-36.
Thus, IHRL has much to offer domestic legal systems in terms of elucidation of the vital component parts of an effective and appropriate review process that vindicates the right to be free from arbitrary detention, or the right to liberty. Counsel for the petitioners in Boumediene could certainly have drawn on this rich stream of jurisprudence in order to bolster its argument that the CSRT process does not offer an “adequate alternative” to habeas corpus.

IV. Understanding the Lack of IHRL Argumentation

The preceding section outlines the rich body of IHRL that remained un-mined by counsel for the petitioners in Boumediene in spite of its relevance. Given the strength of international human rights standards for the petitioners’ case, the failure to avail of that body of law is worthy of some contemplation. It can not reasonably be expected that counsel for the petitioners were unaware of the law outlined above—after all, the extraterritorial application of human rights law and the right to challenge the lawfulness of one’s detention have been among the most topical areas of scholarship and indeed litigation in the War on Terrorism, particularly in the Superior Courts of the United Kingdom.\footnote{This is particularly evident in the recent decision of the House of Lords in R (Al-Skeini) v. Secretary of State [2007] 3 WLR 33. For an argument that the House of Lords approach in Al-Skeini ought to be adopted as a template for future decision making by the U.S. Supreme Court see Fiona de Londras, Guantánamo Bay: Towards Legality?, 71 Modern L. Rev. 36 (2008).} It is more reasonable to assume that IHRL was deliberately and strategically omitted from arguments for the petitioners. This part of the Article considers two possible explanations for this: first, the uncertain status of IHRL in municipal US law, and second, the pervasiveness of the view that IHRL is irrelevant and indeed inappropriate in the context of the post-9/11 counter-terrorist campaign.

It might be the case that counsel for the petitioners in Boumediene failed to argue international human rights norms because of the unfavorable status of these norms in the United States. Once a treaty has been concluded by the President in accordance with the requirements of Article II of the Constitution it then becomes the “law of the land” by virtue of its inclusion in the Supremacy Clause of Article VI.\footnote{U.S. Const. art. VI}

\textit{This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.}
hand it is clear that the treaty then binds the United States in its external relations with other treaty parties, however what is unclear is what effect, if any, the treaty will have on internal law and affairs within the United States. The United States Constitution appears to eschew the traditional classifications of monist and dualist in relation to international law,\textsuperscript{151} and has instead developed its own categorization of treaties which then dictates the actions needed for the implementation of treaties in domestic law: self-executing and non-self-executing.

This distinction was introduced by Chief Justice Marshall in \textit{Foster v. Neilson}:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.\textsuperscript{152}

In other words, if a treaty creates an obligation to carry out a certain act, that requires action by a branch of government that holds the constitutional obligation to engage in such behavior (e.g. making something a criminal offense), the treaty will be seen as non-self-executing and therefore require implementation by Congress. All other treaties will be self-executing and become part of domestic law without any Congressional intervention. Importantly, even non-self-executing treaties will bind the United States in their relations with other treaty parties; they simply fail to be enforceable in the United States courts. This distinction is expressly accepted in the Restatement (Third) of Foreign Relations Law which states that “[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States, except that a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”\textsuperscript{153} It is now generally accepted

\textsuperscript{151} See \textsc{John F. Murphy, The United States and the Rule of Law in International Affairs} 74-75 (2004).
\textsuperscript{152} 27 U.S. 253 (1829), at ¶ 254.
\textsuperscript{153} § 111 (3) (1987).
that international human rights treaties are never self-executing\textsuperscript{154} and therefore not internally binding on the United States unless they have actually been incorporated and, thereby, executed by Congress. The ratification of the ICCPR by the United States in 1992 was done subject to a Senate declaration that “the provisions of Article 1 through 27 of the Covenant are not self-executing.”\textsuperscript{155} Although the Senate stated that the declaration was meant to “clarify that the Covenant will not create a private cause of action in U.S. Courts,”\textsuperscript{156} this does not appear to bar reliance on the Covenant and jurisprudence of the Human Rights Committee to argue for a contemporary and human rights compliant interpretation of the requirements of the U.S. Constitution.

International human rights norms are not, of course, merely confined to treaty provisions; they can also take the form of customary international law. The law of the United States has, until recently, accepted almost without question the proposition that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”\textsuperscript{157} International law, in this context, refers to customary international law, which is said to be federal common law.\textsuperscript{158} As a result of the Supreme Court’s long-standing position, that it would apply customary international law “where there is no treaty, and no controlling executive or legislative act or judicial decision,”\textsuperscript{159} what is known as the “last in time” rule has emerged. According to this rule, customary international law can be overridden in domestic law by a contrary domestic enactment.\textsuperscript{160}

\footnote{138 Cong. Rec. S4781-84 (1992).}
\footnote{S. Exec. Rep., No. 102-23, at 15 (1992).}
\footnote{The Paquete Habana, 175 U.S. 677 (1900), \textit{per} Gray J., at 700.}
\footnote{The Paquete Habana, \textit{supra} note 157, at 700.}
Given the capacity of the domestic institutions to override international law, it may well have been the case that counsel for the petitioners felt they were on more secure ground in making primarily constitutional arguments. That said, however, the somewhat insecure status of international law in the United States did not preclude reliance on these standards in order to argue that constitutional norms themselves ought to be interpreted in a manner that is consistent with, and influenced by, international law. Indeed, international standards have frequently played a role in the elucidation of contemporary understandings of constitutional standards. If, as Diane Amann has noted, comparative standards are often relied upon by the Supreme Court “when circumstances warrant” it,¹⁶¹ the same might be said of IHRL. If such an argument by analogy, with reference to comparative law had been made, it would have pointed strongly towards consideration of IHRL in this case.

Amann identifies two important factors in discerning which cases warrant consideration of and reliance on “external norms”: (1) where these norms have been formed through the consideration of analogous questions in analogous circumstances to those currently before the law, and (2) where the norms emanate from nations or systems that share the United States’ commitment to fundamental rights. Applying these criteria to the current litigation, it becomes clear that there would be nothing novel about reliance on external norms, including those emanating from IHRL in the current circumstances. Norms and standards relating to the availability and essential features of the right to challenge the lawfulness of one’s detention have been shaped in international law through, inter alia, considerations of the operation of this right in respect of suspected terrorists and states under threat from terrorist activity. In addition, IHRL not only share a commitment to fundamental rights with the United States, but have in fact been substantially shaped by the United States and “illuminate [the U.S.’] constitutional values of liberty, equality, property.”¹⁶² Thus it would have been appropriate and, indeed, in line with constitutional practice, to rely on international law in order to enrich, and attempt to shape the meaning and reach of constitutional standards in Boumediene.

A further reason for the reluctance to rely on international human rights norms in the Boumediene litigation may well lie in an implicit acceptance of the Administration’s position that IHRL has no relevance in the context of Guantánamo Bay. This position

¹⁶¹ Amann, supra note 5, at 598.
¹⁶² LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES 322 (2nd ed. 1996).
is based on two fundamentally flawed premises: (1) that international humanitarian law entirely displaces IHRL in times of armed conflict as a result of the *lex specialis* rule, and (2) that IHRL is not binding on the United States outside of its own territorial borders. The second of these premises is clearly disproved by the principle that, while international human rights norms are usually territorially limited, they can be subject to extra-territorial application in exceptional circumstances, including where the U.S. has effective control over an area as it does over Guantánamo Bay. The former premise is, however, worthy of more sustained consideration.

While it was originally thought that international humanitarian law and IHRL were best seen as completely distinct bodies of law that would not apply in parallel to one another, this position has been generally rejected since the 1960s. While this complementary conception of the relationship between the two bodies of law has not displaced the *lex specialis* rule, it has perhaps changed its nature to a rule that recognises that a “more specific norm … supplements the more general one without contradiction”; that “[t]he *lex specialis* and the *lex generalis* then simply accumulate.” This accumulation of international humanitarian law and human rights law has twice been expressly and forcefully asserted by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* and *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. It has also been reiterated by both

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165 *Id.*


the Inter-American Court of Human Rights\textsuperscript{168} and the European Court of Human Rights.\textsuperscript{169}

Thus, while the Supreme Court has recognized the applicability of international humanitarian law to the War on Terrorism in \textit{Hamdan}\textsuperscript{170} and had, as a result, recognized Al Qaeda detainees as rights-bearers under Common Article 3 of the Geneva Conventions,\textsuperscript{171} this did not preclude argumentation from IHRL. Although counsel for the respondent would inevitably have argued that IHRL had no relevance in times of armed conflict, the petitioners could certainly have constructed a strong argument for the relevance of IHRL based on the contemporary operation of the \textit{lex specialis} rule.

The Administration’s position, therefore, ought not to have resulted in the petitioners neglecting IHRL completely. In fact, the decision to all but ignore IHRL, reads as a concession to the Administration’s position that domestic law has a monopoly on the treatment of Guantanamo Bay detainees. This decision is lamentable on both practical and doctrinal levels. On a practical level it is to be lamented because the protections afforded by an understanding of constitutional standards informed by contemporary international norms arguably affords more secure protection to suspected terrorists. On a doctrinal level it is to be lamented because it acquiesces in a view of domestic law, as a thing untouched by international standards and understandings of individual rights, that is not only antiquated but also out of step with the original conception of U.S. law, which seems to have been one of a body of rules receptive to (if not


\textsuperscript{170} Supra note 6.

\textsuperscript{171} It should be noted that the Supreme Court’s decision that international humanitarian law applies to the “War against Al Qaeda” and that Al Qaeda detainees are entitled to the protections of Common Article 3 is not without controversy from within the international humanitarian law field itself. For an excellent critical consideration of the decision from this ‘insider’ IHL perspective see Fionnuala Ní Aoláin, \textit{Hamdan and Common Article 3: Did the Supreme Court Get it Right?}, 91 \textsc{Minn. L. Rev.} 1523 (2007).
occasionally in need of) external influence. The exclusion of international law in this litigation is intellectually incomprehensible—although Section 5 of the Military Commissions Act 2006 expressly prohibits reliance on the Geneva Conventions as a source of rights in habeas corpus or other proceedings taken by enemy combatants, some minor references to the Conventions are to be found in the argumentation and, in any case, the litigation constitutes a challenge to this legislation. Thus, Section 5 is equally insufficient as an explanation for counsel’s decision to side-line IHRL in this case. It seems difficult, if not impossible, to read this strategic decision as anything other than one that indicates a willingness to play out the drama of Guantanamo detainees’ rights on the pitch chosen by the administration, rather than to change its intellectual location through the injection of contextually relevant international legal standards.

V. Conclusion

Although the petitioners in Boumediene constructed strong arguments on the reach of the Constitution and the content of habeas corpus based on domestic law, this Article

172 Critics of the Supreme Court’s intervention in the War on Terrorism frequently cite to the Founders in order to support their position that decision in “wartime” ought to be taken by the Executive alone, or perhaps sometimes with the compliance of Congress, and that the judiciary ought to remove itself from such considerations. Two major critics of the Hamdan decision (supra note 6)—John Yoo and Julian Ku—make this and other arguments in John Yoo & Julian Ku, Hamdan v Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch, 23 CON. COM 179 (2006). This argument suffers from many of the same deficiencies levelled at originalist constitutionalism: the world is not the same now as it was when the U.S. constitution was introduced—among other things sophisticated international organizations have been developed and standards have become constitutionalized within the concept of an international Rule of Law. In addition, although the authors are quick to quote from Hamilton and Madison’s contributions to The Federalist Papers in this section of their work, they selectively ignore the second half of the Madisonian vision of wartime/emergency law making, namely reliance on international standards. James Madison argued that the American political branches should abstain from lawmaking in times of war and fall back on international standards instead: to his mind stress does not make for good law and individual liberties suffer as a result see James Madison, An Examination of the British Doctrine Which Subjects to Capture a Neutral Trade not Open in Time of Peace (1806). The Framers’ intent with which so many commentators are concerned is more complex than it is often represented to be: Madison may have advocated judicial restraint in times of emergency or war but he did so with an internationalist and temperate political system in mind. In other words, for Madison at least there was only to be judicial restraint if there was accompanying legislative and executive restraint.
shows that IHRL offers persuasive supporting arguments that, if accepted, may well have allowed for a broader and more rights-protecting conclusion than reliance on domestic law alone. In addition, such reliance on international law would also have offered the Supreme Court an opportunity to make an important statement about the relationship between human rights law and the individual liberties protected in the U.S. Constitution and the capacity of international standards to enrich domestic constitutional standards. By failing to make the two exceptionally persuasive IHRL arguments available to them, counsel for the petitioners in Boumediene missed an opportunity to reorient the legal dispute on the habeas corpus entitlements of suspected terrorists held in Guantánamo Bay and to afford the justices of the Supreme Court the chance to draw conclusions on the continuing relevance of human rights law in a post-9/11 world analogous to their assertion of international humanitarian law applicability in the Hamdan decision.