Rethinking the Procedural Right of Habeas Corpus in International Law

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This article was originally submitted as a seminar paper as part of the Philosophy of Law study-unit (CVL1024) and is being reproduced on the OLJ with the author's permission. In it, **Laura Chetcuti Dimech** explores the application of the right of habeas corpus from an international law perspective and the enforcement issues this gives rise to.

TAGS: International law; Human rights; Habeas corpus

Biography Laura Chetcuti Dimech is a second year student reading for a Bachelor of Laws degree at the University of Malta. She is particularly interested in the field of public law. Additionally, she is very invested in a holistic and practical approach to studying law, and thus has taken up a role in GħSL's executive committee for the year 2022/23 as Moot Court Officer.

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ONLINE LAW JOURNAL

1. Introduction

1.1 Overview

Contrary to popular belief, arbitrary arrest is still occurring in this day and age. This is seen through the detainees at Guantanamo Bay and the number of cases instituted in the European Court of Human Rights (ECtHR) on a daily basis. Habeas corpus is a fundamental right that has been around since the time of the Magna Charta (1215). The famous jurist, William Blackstone, defined it as a 'great and efficacious writ in all manner of illegal confinement'.[1] It essentially means 'that you have the body' and it is a mechanism used by detainees to challenge their unlawful detention. The procedure is relatively simple. If a person feels that the reason for his detention in State property is illegal, for whatever reason, he may issue this 'Great Writ' and temporarily leave his prison and obtain a fair and impartial trial in front of a competent court.[2]

Originally it was contained in Chapter 39 of the Magna Charta written in 1215.[3] As Albert Dicey rightly pointed out, 'The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'.[4] Given that the topic of human rights has grown significantly since then, during my research I encountered many 'niche substantive rights' that have elements in common with the procedure of habeas corpus, begging the question, which rights does habeas corpus really cover? By looking at the Universal Declaration of Human Rights (UDHR), given that it is a model for international law, I believe that the procedural right of habeas corpus safeguards 6 of the 29 rights included in the declaration:

> Article 3. *Everyone has the right to life, liberty and security of person.*
>
> Article 5. *Freedom from torture or cruel, inhuman or degrading treatment*
>
> Article 6. *Right to recognition as a person before the law*
>
> Article 8. *Right to an effective remedy*
>
> Article 9. *Freedom from arbitrary arrest, detention or exile*

[1] William Blackstone, *Commentaries on the Laws of England: A facsimile of the first edition of 1765–1769*, vol 3 (University of Chicago Press 1979) 129–137.
[2] Tom Bigham, *The Rule of Law* (2nd edn, Penguin Books 2011) 2.
[3] ibid 10.
[4] Albert V Dicey, *Introduction to the Law of the Constitution* (8th edn, Liberty Classics 1915) 226.

Article 10. *Right to a fair and public hearing by an independent and impartial tribunal*[5]

1.2 Issue of Enforceability in International Law

As seen above, the right to habeas corpus is codified in various pieces of international legislation. However, the problem with international law is its enforceability. As the positivist philosopher Hans Kelsen puts it, individuals can only be the subject of international law through the medium of the State and the only sanctions of international law are probably reprisals and war.[6] Moreover, States may choose which treaties to ratify, may place objections on certain provisions, and despite the ratification, States still commit heinous crimes against humanity.[7] Thus, there is a gap between what the State does on paper and its practices.

At the end of the day, the sole anchor that keeps States from violating the most sacred of human rights are its values. Therefore, international law is ultimately rooted in Fuller's theory, secular natural law. This is because, due to the issue of sovereignty, States can cherry pick which laws and customs to apply to their territory, and in order to keep the peace, the only sort of punishment is that of embarrassment within the international community and sanctions, such as to trade. Enforcement in international law is almost entirely political and not judicial, very much a case of treat others the same way you would want to be treated yourself.

2. What are the remedies an individual has if he is being detained illegally in another country?

2.1 International Tribunals

The focus of my research shall appertain to what steps an individual can take if he is illegally detained by a State, in his country of origin or any another country. International courts such as the International Court of Justice (ICJ) and International Criminal Court (ICC) only have jurisdiction over the signatories of their respective treaties; 'Only States (States Members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases'.[8] The IJC may be empowered to give an advisory opinion, however, '[it] does have binding force'.[9] In the latter's case, according to the Rome Statute of 2002, only 123 out of 196[10] States are

[5] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[6] Hans Kelsen, *The Pure Theory of Law* (2edn, University of California Press 1970).
[7] Jeremy Sarkin, 'Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law' (2012) 81(4) Nordic Journal of International Law 537.
[8] ICJ, 'How the Court Works' (2017) <https://www.icj-cij.org/en/how-the-court-works> accessed 16 April 2022.
[9] ibid.
[10] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en> accessed 15 March 2022.

members of the ICC, excluding the great world powers of the United States of America, China, and Russia. A special mention must be given to Turkey who is not a signatory; however, in front of the European Court of Human Rights, from 1959-2021, out of 3,820 cases brought against its government, 816 were all violations of the right to liberty and security.[11] Why am I saying all this? This is simply to show that despite the substantive rights in place, people in need still fall between the cracks.

Nevertheless, one must consider that the subjects of international courts are the States, with exception of the European Court of Human Rights, which may be accessed by individuals under the European Convention on Human Rights after having exhausted domestic remedies. I will delve deeper into this later on.

2.2 UN Working Groups

In the recent past there have been attempts to try and broaden the reach of the habeas corpus mechanism. I am referring to the UN Working Group on Arbitrary Detention[12] and a separate working group that deals with Enforced Disappearance.[13] Obviously these two structures, despite being separate, overlap, as through deductive reasoning, every enforced disappearance consists of arbitrary detention, but not necessarily vice-versa. Their objective is to investigate individual cases of habeas corpus by receiving complaints from individuals, be it relatives or non-governmental organisations (NGOs), and, by using diplomatic methods, relay the information to the State in question. Additionally, they also conduct on-site visits and publish yearly reports of their findings.[14] Nonetheless, even though their publications are of large persuasive value, they are not enforceable on the State responsible.

> States provided a timely response to the Working Group's communications and requests for information in approximately 53 per cent of the cases in which it adopted an opinion in 2020.[15]

Therefore, using this mechanism, people are given their humanity back in a little over half of the cases, highlighting that it is not enough.

3. Possible Solutions: How to keep States Accountable for their Actions

3.1 Establish Jus Cogens Status

[11] European Court of Human Rights, 'Violations by Article and by State 1959-2021' (2022). <https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf> accessed 16 April 2022.
[12] United Nations; Office of the High Commissioner on Human Rights <https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention> accessed 16 April 2022.
[13] United Nations; Office of the High Commissioner on Human Rights <https://www.ohchr.org/en/special-procedures/wg-disappearances> accessed 16 April 2022.
[14] ibid.
[15] UNCHR, 'Report of the Working Group on Arbitrary Detention' (6 August 2021) UN Doc A/HRC/48/55.

Jus cogens, also known as peremptory norms, are universally, *erga omnes*, binding norms from which no derogation may take place. They aim to protect the minimum morality threshold of maintaining the *salus populi*, when the State has failed to do so by committing crimes against its own people.[16] Therefore, if a crime obtains jus cogens status, it cannot be excusable through treaty, sovereign immunity, or custom.[17] As of right now, habeas corpus does not seem to be on that list. It is an influence of the natural law thinking, that a moral standard can nullify a treaty to some extent.[18]

This is because most of these recognised rights are substantive. Not much emphasis has been placed on the procedural aspect of these rights, such as the right to a free and impartial trial, the notion of reasonable time, and the right not to be discriminated against.

Jus cogens was first recognised in Article 53 of the Vienna Convention on the Law of Treaties, 1969.[19] It was mainly forgotten, but due to the rise of a number of international tribunals, the philosophical debate was revived.[20] There is no official list *per se* of what jus cogens are or how a right obtains jus cogens status. Though this might change soon as in the 71st session of the International Law Commission, much discussion was given to the introduction of a non-exhaustive list.[21] Many States supported the idea, however the Commission did not want to actively exclude other rights as not having a jus cogens status, therefore they considered other possible norms not included in the final draft list, including the prohibition of enforced disappearance. There is already evidence of international courts supporting this. The Inter-American Court in the case of *Goiburú et al v Paraguay*[22] ruled that not only does the prohibition from enforced disappearance have jus cogens status, but so is the corresponding obligation to investigate and punish those responsible.[23] Moreover, certain jurists, like the ICJ's influential Judge Tanaka, take a wider approach stating that all human rights should be given the jus cogens status.[24] Manfred Nowak who served as the United Nations Special Rapporteur on Torture argues that given that the prohibition of torture is a jus cogens norm, so should the right to habeas corpus, as being arbitrarily detained is by deductive reasoning, a form of torture.[25]

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[16] Larry May, 'Habeas Corpus as Jus Cogens in International Law' (2010) 3(4) Criminal Law and Philosophy <https://www.proquest.com/docview/755544629?parentSessionId=YIu2trDXZvhL4xx6MAYV2QhfPN2iB1v7RWmv2qsZVt4%3D&pq-origsite=primo&accountid=27934> Accessed 18 April 2022.
[17] European Court of Human Rights (n 11).
[18] Malcom N Shaw, *International Law* (5th edn, CUP 2003).
[19] Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 art 53.
[20] European Court of Human Rights (n 11).
[21] UNGA, 'Fourth Report on peremptory norms of general international law (jus cogens) by Dire Tlandi Special Rapporteur' (9 August 2019) A/CN.4/727.
[22] *Case of Goiburú et al v Paraguay* (Judgment (Merits, Reparations and Costs)), Inter-American Court of Human Rights Series C No 153 (22 September 2006) 84.
[23] ibid 24.
[24] *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Second Phase) (dissenting opinion of Judge Tanaka) [1966] ICJ 298 <https://www.icj-cij.org/public/files/case-related/46/046-19660718-JUD-01-06-EN.pdf>.
[25] European Court of Human Rights (n 11).

Introducing habeas corpus as jus cogens will heighten its significance in international law, giving obligations *erga omnes* for States to codify in their domestic law, awarding it a higher profile of importance, thus States will take meaningful steps in eradicating the practice of arbitrary arrest in order to avoid embarrassment and reprisals.[26] It may also possibly make it prosecutable by existing international courts.

3.2 A Specialized International Tribunal: World Habeas Corpus

There are those who advocate for the creation of a new tribunal dealing with cases of habeas corpus. Author and human rights activist Lewis Kutner firmly believes that this is the way to go. This would be done through a treaty statute within the present UN structure. However, the focus is to bring the individual as a direct subject of international law after having exhausted available, practical, local remedies. It is also essential to note that in Kutner's draft statute, the detaining State need not ratify the treaty or submit to the jurisdiction of the court.[27]

The proposed court will be composed of 9 regional courts with 7 judges presiding over each and an additional Supreme Court, acting as a court of appeal, with 9 judges, one from each circuit court. The former tribunals may either order to continue the detention, release, or remand the case to the national court. If the court holds that the detention is legal, the petitioner has the right to appeal. In order to enforce its decisions, there must be compliance from the State involved, mostly due to the fact that most of the time States choose to agree with international courts, the treaty of which it has recognized, to avoid embarrassment or reprisals.[28]

There would obviously be reservations by States due to the issue of sovereignty yet Judge Tanaka has expressed his support to this idea.[29]

3.3 Inspiration from the European Convention

3.3.1 Individual Appeals

The European Convention on Human Rights is probably the most successful international instrument that provides remedies to individuals without the need for a State medium.

Under Article 34 and Protocol 11 of the European Convention, individuals including groups and NGOs, may submit an application to the court alleging a breach of the Convention. Moreover, '*the High Contracting Parties undertake*

[26] European Court of Human Rights (n 11)
[27] Luis Kutner, 'World Habeas Corpus: The Legal Ultimate for the Unity of Mankind' (1965) 40(6) Notre Dame Law Review 570.
[28] Hans Kelsen, 'Compulsory Adjudication of International Disputes' (1943) 37(3) The American Journal of International Law 397.
[29] Address by Kotaro Tanaka, Conference on *Pacem in Terris*, February 1965.

not to hinder in any way the effective exercise of this right'[30] whether through direct oppression, intimidation of families or legal representatives, or interference with correspondence and domestic legal-aid representation as seen in *Feilazoo v Malta*.[31]

The initial application must be filed 6 months from the execution of the national court judgment after exhausting domestic remedies. The applicant must send the Court a duly completed application form available at the registry along with any essential documents such as documents of previous decisions.[32]

If a breach is indeed found, the State must award just satisfaction; that is, monetary compensation, for damages incurred, and that judgment is binding on the parties of the case under Article 46. If the State refuses to implement that decision, sanctions will be considered by the Committee of Ministers who are authorized to supervise the implementation of judgements.[33]

3.3.2Procedural Guarantees

Article 5(4) of the European Convention is the closest to the original habeas corpus, with an addition of judicial review and the notion of reasonable time.[34]

> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

Through case-law rose arose various procedural guarantees annexed to cases of breach of such rights mentioned above.

In the case of *De Wilde, Ooms and Versyp v Belgium* the plenary court pointed out that the procedure adhered to does not necessarily have to be identical in each case but must match with the nature of the circumstances. So, if for argument's sake, the deprivation of liberty resembles that imposed by a criminal court, the follow-up procedure must be identical to that followed in criminal proceedings.[35]

In the case of *Chahal v United Kingdom*[36] it was made clear that in cases of habeas corpus, the applicant must have access to legal counsel and that counsel must be confidential, as explained in the case of *Castravet v Moldova*.[37]

In the case of *Farmakopoulos v Belgium* the issue of having adequate time to prepare one's case was established, as the victim was given an unreasonable

[30] European Convention on Human Rights, Article 34.
[31] *Feilazoo v Malta* App No 6865/19 (EctHR, 11 March 2021).
[32] ECHR, 'Rules of Court' (Registry of the Court, 17 March 2022) <https://www.echr.coe.int/documents/rules_court_eng.pdf> accessed on 19 April 2022.
[33] David Harris, Michael O'Boyle, Ed Bates, Carla Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014).
[34] ibid.
[35] *De Wilde, Ooms and Versyp v Belgium* App No 2832/66 (ECtHR, 18 June 1971).
[36] *Chahal v United Kingdom* App No 22414/93 (ECtHR, 15 November 1996) 130.
[37] *Castravet v Moldova* App No 23393/05 (ECtHR, 13 March 2007).

time of 24 hours to prepare his case, which makes the whole point of even having a remedy fall through.[38]

Through Article 5(4) an applicant may have his deprivation of liberty reviewed at reasonable intervals, especially when the nature of the case is very fickle, such as the detention of a mentally unsound person seen in *Winterwerp v Netherlands*.[39] The notion of reasonable interval depends on the case itself. In the case of insanity, a period of one year is deemed to be excessive,[40] but in cases of detention of remand, the limit is one month.[41]

4. Conclusion

After much contemplation, I have seemed to settle on the idea proposed by Manfred Nowak. This is to include any right protected by habeas corpus under the prohibition of torture, as essentially being arbitrarily detained is not only a form of physical and mental torture for the detainee, but mental anguish for his relatives. That being said, I do believe that there should be coordination between States to harmonise their laws in order not to allow any individual to fall between the cracks, subsequently preventing substantive technicalities to hinder an essential procedural right such as habeas corpus.

[38] *Farmakopoulos v Belgium* App No 11683/85 (ECtHR 27 March 1992).
[39] *Winterwerp v Netherlands* App No 6301/73 (ECtHR, 5 December 1977).
[40] *Herczegfalvy v Austria* App No 10533/83 (ECtHR, 24 September 1992).
[41] *Bezicheri v Italy* App No 11400/85 (ECtHR, 25 October 1989).

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