

## Introduction

A month after the terrorist attacks of September 11, 2001, six Algerian men were arrested by authorities in Bosnia and Herzegovina for their alleged involvement in a plot to bomb the U.S. embassy in Sarajevo.<sup>1</sup> A Bosnian court investigating the claim determined the charges were unfounded and ordered their release.<sup>2</sup> The men were released from prison on January 17, 2002. Immediately after their release, they were detained by Bosnian and U.S. authorities<sup>3</sup> and transferred to a U.S. naval station at Guantánamo Bay on the island of Cuba on January 20<sup>4</sup> where they were held in a makeshift detention center known as Camp X-Ray, which had opened the week before.<sup>5</sup>

The U.S.A. held Guantánamo Bay under a 1903 lease agreement under which Cuba retained ultimate sovereignty.<sup>6</sup> Less than a month before the Algerian men arrived at Guantánamo Bay, lawyers with the U.S. Department of Justice had written a memorandum concluding that “the great weight of legal authority” indicated U.S. federal courts would not have jurisdiction over aliens detained there.<sup>7</sup> The government’s decision to house detainees at

<sup>1</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193 (D.D.C. 2008).

<sup>2</sup> Lakhdar Boumediene, “My Guantánamo Nightmare,” *New York Times*, Jan. 8, 2012, p. SR9.

<sup>3</sup> *Boumediene*, 579 F. Supp. 2 at 194.

<sup>4</sup> *Ibid.*

<sup>5</sup> “A Prison Camps Primer,” *Miami Herald*, June 15, 2014, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1939250.html>.

<sup>6</sup> Agreement between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.–Cuba, art. III, Feb. 16–23, 1903, T.S. No. 418.

<sup>7</sup> Memorandum from Patrick Philbin and John Yoo, Dep. Asst. Att’y’s Gen., U.S. Dep’t of Justice, to William Haynes II, Gen. Counsel, Dep’t of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf>.

Guantánamo Bay was a deliberate one, intended to place them in “the legal equivalent of outer space.”<sup>8</sup>

The Algerian men were detained on the basis that they were “enemy combatants.”<sup>9</sup> They were not charged with any crime. They were not given an opportunity to challenge the basis of their detention before a court. They faced indefinite detention on an island purported to be beyond the reach of the law. Over seven years after their ordeal began, a U.S. district court judge in a courtroom 1,000 miles away filed a 14-page order.<sup>10</sup> It ended with this phrase: “it is, this 20th day of November, 2008, hereby . . . ORDERED that [the] petition for habeas corpus is GRANTED.”<sup>11</sup> The petitioners were released in 2009.<sup>12</sup>

Habeas corpus is a simple process by which a court determines the lawfulness of a person’s detention. Habeas corpus was the vehicle that Guantánamo Bay detainees first utilized to seek access to the civilian courts in the U.S.A. It was a vehicle that the U.S. Supreme Court determined capable of reaching even to the legal equivalent of outer space.<sup>13</sup> It was the vehicle by which a trial judge in Washington, D.C., set five Algerian men free from a prison run by the world’s most powerful government on a piece of land that had previously been called a “rights-free zone.”<sup>14</sup> The saga of these Guantánamo Bay detainees provides a pointed illustration of the power of habeas corpus. It reached across the sea and cut through legal obstructions. It restored the liberty of five men. It brought the conduct of the government within legal constraints and the scrutiny of the judiciary.<sup>15</sup>

At the same time, this story shows the lengths to which a state will go to resist the reach of habeas corpus. The decision to hold detainees at Guantánamo Bay was motivated by the desire to avoid habeas corpus review. The Justice Department memorandum provided the legal argument against the availability of habeas corpus at Guantánamo Bay. After that argument was rejected by the U.S. Supreme Court,<sup>16</sup> the U.S. Congress passed a law that attempted to statutorily circumvent habeas corpus review.<sup>17</sup> Relief only came to the Algerians after this law was declared unconstitutional.<sup>18</sup>

<sup>8</sup> David Bowker, NYU Law and Security Colloquium: Unwise Counsel in the Wake of 9/11: How Bad Legal Advice and the Avoidance of Process Led to Unlawful Conduct in the War on Terrorism (Nov. 17, 2008), [http://www.law.nyu.edu/news/BOWKER\\_COLLOQUIUM](http://www.law.nyu.edu/news/BOWKER_COLLOQUIUM).

<sup>9</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191, 196 (D.D.C. 2008).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, 198. The application of the sixth petitioner was denied.

<sup>12</sup> Boumediene, “My Guantánamo Nightmare,” p. SR9.

<sup>13</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>14</sup> Harold Hongju Koh, “America’s Offshore Refugee Camps” (1994) 29 *University of Richmond Law Review* 139, 140–41.

<sup>15</sup> *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

<sup>16</sup> *Rasul*, 542 U.S.

<sup>17</sup> Military Commissions Act of 2006, 120 Stat. at 2635.

<sup>18</sup> *Boumediene*, 553 U.S. at 723.

The court decisions in the Guantánamo Bay case were made by domestic courts interpreting domestic constitutional guarantees of habeas corpus. The right to habeas corpus is widely protected in domestic legal systems throughout the world.<sup>19</sup> Habeas corpus guarantees are also found in international human rights law. The Universal Declaration of Human Rights,<sup>20</sup> the International Covenant on Civil and Political Rights,<sup>21</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>22</sup> the American Declaration of the Rights and Duties of Man,<sup>23</sup> and the American Convention on Human Rights<sup>24</sup> all contain a habeas corpus guarantee. These provisions guarantee every individual the right to a determination of the lawfulness of his or her detention by a domestic court.

The right to habeas corpus developed as a way for the king, through his courts, to regulate the detention of one of his subjects by another of his subjects.<sup>25</sup> The international guarantee of habeas corpus serves the same function, but to protect a different interest. It is a way for the international community, through domestic courts potentially subject to international review, to regulate the detention of one subject of international law by another subject of international law. The international law of habeas corpus is the subject of this book, which seeks to determine its location, scope, application, and significance.

#### DEFINING HABEAS CORPUS

The Latin term habeas corpus was used to describe a number of ancient English writs, or judicial commands.<sup>26</sup> Over time, it became associated with the form most commonly used to inquire into detention, known as *habeas corpus ad subjiciendum*.<sup>27</sup> Habeas corpus was well established in English law as a check against unlawful detention by the end of the seventeenth century<sup>28</sup> and spread to other legal systems.<sup>29</sup> When the idea of a right guaranteeing judicial review of detention

<sup>19</sup> See below, § 7.1.1.

<sup>20</sup> U.N.G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter “UDHR” or “Universal Declaration”].

<sup>21</sup> International Covenant on Civil and Political Rights, New York, Dec. 16, 1966, in force March 23, 1976, 999 U.N.T.S. 171 [hereinafter “ICCPR” or “Covenant”].

<sup>22</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, Nov. 4, 1950, in force Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter “European Convention”].

<sup>23</sup> OAS Res. XXX (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82, doc. 6 Rev. 1 at 17 (1992) [hereinafter “American Declaration”].

<sup>24</sup> American Convention on Human Rights, San José, Costa Rica, Nov. 22, 1969, in force July 18, 1978, 1144 U.N.T.S. 123 [hereinafter “American Convention”].

<sup>25</sup> Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass.: Belknap Press, 2012), p. 41.

<sup>26</sup> *Ibid.*, pp. 39–41.

<sup>27</sup> *Ibid.*

<sup>28</sup> See below, § 1.1.3 (discussing the Habeas Corpus Acts).

<sup>29</sup> See below, § 1.2 (explaining the spread of habeas corpus).

was introduced in international human rights law following World War II, several proposals simply referred to the right of habeas corpus. Drafters correctly recognized, though, that habeas corpus was an unfamiliar term in some legal systems.<sup>30</sup> Each of the human rights treaties therefore employed a similar approach, using descriptive language without using the term habeas corpus. The International Covenant provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.<sup>31</sup>

The corresponding articles of the European Convention and American Convention track this language very closely, with only slight differences in the choice of words.<sup>32</sup>

These provisions are commonly referred to as habeas corpus guarantees. The use of the term habeas corpus to describe these international guarantees, admittedly, has important shortcomings. While commonplace in many legal systems, the term habeas corpus is less familiar in others, and even when it is recognized it may carry a particular Anglo-American connotation which can be seen as running contrary to the idea of a universal right. Conversely, lawyers in the Anglo-American tradition sometimes think that the term can only describe *their* version of the remedy.<sup>33</sup> The process guaranteed by international instruments is fairly simple, while domestic varieties of habeas corpus may be much broader in their scope or might be employed for particular purposes.<sup>34</sup> The term can also be understood specifically to mean the writ of habeas corpus, the judicial decree used to accomplish detention review, as opposed to the right of review. A 1993 U.N. report noted that the International Covenant “does not specifically guarantee the right to habeas corpus . . . because those precise procedures are not available in some countries.”<sup>35</sup>

Acknowledging these limitations, compelling reasons exist to use this term to describe the international guarantees. Although it is historically associated with a particular legal tradition, the term is widely used in a generic sense by international institutions to describe the right to have a court review the lawfulness of a person’s detention. The U.N. General Assembly has indicated that Article 9(4) is fulfilled by “*amparo*, *habeas corpus* or other legal remedies to the same effect.”<sup>36</sup> *Amparo* is a

<sup>30</sup> Comm’n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 8 (May 10, 1948) (remarks of China’s representative).

<sup>31</sup> ICCPR, art. 9(4).

<sup>32</sup> European Convention, art. 5(4); American Convention, art. 7(6).

<sup>33</sup> “There is currently no right to habeas corpus in international law,” Eric Posner, “Global Justice and Due Process” by Larry May” (2011) 25 *Ethics & International Affairs* 481, 482.

<sup>34</sup> In the U.S.A., for example, habeas corpus is often thought of primarily as a post-conviction remedy.

<sup>35</sup> The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Fourth Report Prepared by Mr. Stanislav Chernichenko and Mr. William Treat, U.N. Doc. E/CN.4/Sub.2/1993/24, ¶103 (June 29, 1993).

<sup>36</sup> U.N.G.A. Res. 34/178, U.N. Doc. A/RES/34/178 (Dec. 17, 1979).

general remedy to enforce constitutional rights common in Latin American domestic legal systems.<sup>37</sup> In some states, *amparo* encompasses the review of detention, while in others it enforces all rights except for the judicial review of detention, which is exclusively conducted through habeas corpus. Habeas corpus, then, tends to be specifically associated with the review of detention, while *amparo* is much broader.<sup>38</sup> In a 1992 resolution, *Habeas Corpus*, the U.N. Commission on Human Rights called on states to “establish a procedure such as habeas corpus by which” a person can have a court determine the lawfulness of his or her detention.<sup>39</sup> In 2008, the Inter-American Court of Human Rights wrote:

In situations of deprivation of liberty, such as those of the instant case, among the essential judicial guarantees, *habeas corpus* represents the appropriate means for guaranteeing the liberty and controlling respect for the life and integrity of the person, and also for protecting the personal integrity of the individual. Obviously the name, procedure, regulation and scope of the domestic recourses that allow the lawfulness of a deprivation of liberty to be reviewed may vary from one State to another.<sup>40</sup>

In these situations, the Commission and the Court used the term habeas corpus in a generic sense to refer to the various domestic procedures available to provide judicial review of the legality of a person’s detention.

The term also conveys a certain gravitas. It has long been known as the “Great Writ” in the Anglo-American system.<sup>41</sup> It has been described as the “stable bulwark of our liberties.”<sup>42</sup> During the drafting of the International Covenant, Charles Malik, the delegate from Lebanon, argued for use of the specific term precisely because it was “a milestone in the history of human liberty.”<sup>43</sup>

Finally, and not insignificantly, the term habeas corpus is succinct. It is less cumbersome than repeating the full text of the international guarantees, or even an abbreviated version. For the purposes of this book, then, the term habeas corpus is used in a generic manner to describe the right of a detained person to take proceedings before a court to determine the lawfulness of his or her detention and to order his or her release if it is unlawful.

<sup>37</sup> See below, § 1.2.1 (discussing the relationship between *amparo* and habeas corpus).

<sup>38</sup> The Inter-American Court of Human Rights has explained that *amparo* consists of a wide series of remedies, of which habeas corpus is one component. *Habeas Corpus in Emergency Situations*, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶34 (Jan. 30, 1987).

<sup>39</sup> Comm’n on Hum. Rts. Res. 1992/35, U.N. Doc. E/CN.4/RES/1992/35 (Feb. 28, 1992).

<sup>40</sup> *Neptune v. Haiti*, Merits, Reparations, and Costs, 2008 Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 115 (May 6, 2008).

<sup>41</sup> *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869).

<sup>42</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69), vol. 1, p. 133.

<sup>43</sup> Comm’n on Hum. Rts. Drafting Comm., 2nd Sess., 23rd mtg., U.N. Doc. E/CN.4/AC.1/SR.23 at 8 (May 10, 1948).

In its classic form, the habeas corpus process is initiated by the person deprived of his or her liberty, or someone acting on his or her behalf, petitioning a court to review the lawfulness of his or her detention.<sup>44</sup> The petition must demonstrate, on its face, cause to believe that the detention is unlawful, or it will be dismissed by the court.<sup>45</sup> If the petition meets this standard, the court issues a judicial decree (known as a “writ of habeas corpus”) ordering the custodian to bring the petitioner physically before the court and to explain the lawfulness of his or her detention.<sup>46</sup> If the court determines that the petitioner is not lawfully held, the court can order his or her release.<sup>47</sup>

As this process requires the personal appearance of each detainee, an alternative intermediate step was developed and was in use by the early nineteenth century.<sup>48</sup> Known as the “show-cause procedure,” it allows the court considering the habeas corpus petition to order the custodian to show in writing why the detention is legal.<sup>49</sup> The custodian’s written response, known as the “return,” is then examined by the court to determine whether the writ of habeas corpus should issue.<sup>50</sup> Essentially, show-cause procedures provide a way for courts to rule on legal issues about the basis for detention without holding a full, in-person hearing. Based on its examination of the petition and return, the court may dismiss the petition, order the custodian to bring the detainee before the court for a hearing, or order the release of the detainee based on the written pleadings alone.

#### OBJECTIVES

“The writ of habeas corpus has long been the sword and shield in the long struggle for freedom and constitutional government. It is a potent weapon against tyranny in every form and guise.”<sup>51</sup> The right to habeas corpus is an important right, and much has been written about its place in domestic law, dating back to William Blackstone’s *Commentaries* in the eighteenth century.<sup>52</sup> More recent monographs examine the history and use of the remedy within particular domestic systems in the

<sup>44</sup> Donald Wilkes, “The Writ of Habeas Corpus,” in Herbert M. Kritzer (ed.), *Legal Systems of the World: A Political, Cultural, and Social Encyclopedia* (Santa Barbara, Calif.: ABC-CLIO, 2002), vol. 2, pp. 645–47.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*; *Habeas Corpus in Emergency Situations*, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶33 (Jan. 30, 1987).

<sup>47</sup> Wilkes, “The Writ of Habeas Corpus,” p. 645; *Habeas Corpus*, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶33.

<sup>48</sup> George F. Longsdorf, “Habeas Corpus – A Protection Writ and Remedy” (1949) 10 *Ohio State Law Journal* 301, 310–11.

<sup>49</sup> *Ibid.*; Halliday, *England to Empire*, pp. 46–49; Wilkes, “The Writ of Habeas Corpus,” pp. 645–46.

<sup>50</sup> Longsdorf, “Protection Writ,” 310–11.

<sup>51</sup> *Montgomery v. Regan*, 86 F. Supp. 382, 288 (N.D. Ill. 1949).

<sup>52</sup> Blackstone, *Commentaries on the Laws of England*, vol. 3, pp. 129–37.

Anglo-American tradition. William Duker traces the history of habeas corpus in England as the basis for his discussion of habeas corpus in contemporary American law.<sup>53</sup> Likewise, Judith Farbey, R. J. Sharpe, and Simon Atrill, detail the origins of the right as they examine its place in modern English, Australian, Canadian, and New Zealand law.<sup>54</sup> David Clark and Gerard McCoy engage the topic through an examination of habeas corpus guarantees and case law throughout the Commonwealth.<sup>55</sup> Eric Freedman traces the development of habeas corpus in the American legal system.<sup>56</sup> Most recently, Paul Halliday provides a fresh look at the historical development of habeas corpus in English law.<sup>57</sup> There have been studies of the right to judicial determination of the legality of detention in other legal traditions, most notably those by Hector Fix Zamudio concentrating on Latin America.<sup>58</sup> Although not specifically focused on habeas corpus, works by authors such as Giorgio Agamben,<sup>59</sup> Kim Lane Scheppele,<sup>60</sup> Tom Bingham,<sup>61</sup> and Brian Tamanaha<sup>62</sup> provide important context for understanding its importance.

Much less has been written about habeas corpus as a right guaranteed by international law. Articles that examine habeas corpus tend to focus on the application of the right in particular circumstances. Marco Sassòli<sup>63</sup> and Robert Goldman<sup>64</sup> both look at the interplay between human rights guarantees and international

<sup>53</sup> William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, Conn.: Greenwood Press, 1980).

<sup>54</sup> Judith Farbey, R. J. Sharpe, and Simon Atrill, *The Law of Habeas Corpus*, 3rd edn (New York: Oxford University Press, 2011).

<sup>55</sup> David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (New York: Oxford University Press, 2000).

<sup>56</sup> Eric Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* (New York: New York University Press, 2003).

<sup>57</sup> Halliday, *England to Empire*.

<sup>58</sup> Hector Fix Zamudio, "The Writ of Amparo in Latin America" (1981) 13 *Lawyer of the Americas* 361–91; Hector Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo" (1979) 9 *California Western International Law Journal* 306–48.

<sup>59</sup> Giorgio Agamben, *State of Exception*, Kevin Attell (trans.) (Chicago: University of Chicago Press, 2005).

<sup>60</sup> Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11" (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 1001–83.

<sup>61</sup> Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010).

<sup>62</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

<sup>63</sup> Marco Sassòli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts," in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (New York: Oxford University Press, 2011); Marco Sassòli and Laura Olson, "The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts" (2008) 90 *International Review of the Red Cross* 599–627.

<sup>64</sup> Robert Goldman, "Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict," in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing Limited, 2013).

humanitarian law detention review provisions during situations of armed conflict. In addition to this question, Fiona de Londras emphasizes the extraterritorial application and derogability of habeas corpus in the “war on terror.”<sup>65</sup> Doug Cassel examines the role of habeas corpus in regulating preventative detention, particularly in the context of the Guantánamo Bay facility.<sup>66</sup> Habeas corpus has also been addressed as one aspect of the protection of detainees or the protection of fair trial rights in institutional reports such as a major 1994 U.N. report by Stanislav Chernichenko and William Treat.<sup>67</sup>

While some larger works address international habeas corpus guarantees in the context of fair trial rights or the prohibition on arbitrary detention, or look at it as part of a survey of a particular international or regional instrument,<sup>68</sup> their treatment is limited and habeas corpus is not a primary focus. The bookshelf of monographs concentrating primarily on the right to habeas corpus in international law is a small one indeed. The foremost of these is Luis Kutner’s *World Habeas Corpus*, an ambitious effort that lays out the plan for an international treaty establishing courts which will provide habeas corpus review when domestic courts fail to do so.<sup>69</sup> Kutner provides important insights into the specific importance of *international* habeas corpus guarantees, and a detailed framework for achieving his goal. His book, however, was published in 1962 and therefore pre-dates the treaty-based habeas corpus provisions of the International Covenant and the American Convention, and the cases interpreting the European Convention. While Kutner’s ideas and arguments are in many ways still fresh, his examination was superseded by the adoption of human rights treaties and was likely fading from memory until being revisited by Vicki Jackson in her examination of contemporary international and domestic habeas corpus protection.<sup>70</sup>

Also of note is Larry May’s *Global Justice and Due Process*, published in 2011.<sup>71</sup> This work provides a philosophical understanding of the importance of habeas corpus and argues that the right should be considered a rule of *jus cogens* in

<sup>65</sup> Fiona de Londras, “The Right to Challenge the Lawfulness of Detention: An International Perspective of US Detention of Suspected Terrorists” (2007) 12 *Journal of Conflict & Security Law* 223–60.

<sup>66</sup> Douglass Cassel, “International Human Rights Law and Security Detention” (2009) 40 *Case Western Reserve Journal International Law* 383; Douglass Cassel, “Liberty, Judicial Review, and the Rule of Law at Guantánamo: A Battle Half Won” (2003) 43 *New England Law Review* 37–59; Douglass Cassel, “Pretrial and Preventative Detention of Suspected Terrorists: Options and Constraints Under International Law” (2008) 98 *Journal of Criminal Law and Criminology* 811–52.

<sup>67</sup> Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994).

<sup>68</sup> David Weissbrodt and R. Wolfrum (eds.), *The Right to a Fair Trial* (Berlin: Springer, 1998).

<sup>69</sup> Luis Kutner, *World Habeas Corpus* (Dobbs Ferry, N.Y.: Oceana Publications, 1962).

<sup>70</sup> Vicki C. Jackson, “World Habeas Corpus” (2006) 91 *Cornell Law Review* 303–67.

<sup>71</sup> Larry May, *Global Justice and Due Process* (Cambridge: Cambridge University Press, 2011).



international law. While May argues for this elevated status in international law, his justifications are largely based on the importance of habeas corpus within the Anglo-American legal tradition. His work is a valuable contribution to understanding the importance of an international habeas corpus guarantee and builds on Kutner's view of using international institutions to provide review, but it does not engage in a significant way with current international and regional guarantees. It is, in essence, a philosophical argument about what international law *should* do, with little attention to its current scope or application.

Although these works are important contributions to understanding various aspects of habeas corpus, no definitive work exists examining the location, scope, application, and significance of the right to habeas corpus as guaranteed by international law, a lacuna that this book endeavors to fill. In a 1994 report, two U.N. Special Rapporteurs recommended action to “amplify and further define the international meaning of the right to habeas corpus.”<sup>72</sup> While this clarification has occurred piecemeal in General Comments of the Human Rights Committee and the decisions of international courts, it has generally not been approached in a comprehensive and systematic manner, with the exception of recent efforts by the United Nations Working Group on Arbitrary Detention.<sup>73</sup> One goal of this book is to identify the parameters of the guarantees of access to domestic habeas corpus in the Universal Declaration, the International Covenant, the European Convention, the American Declaration, and the American Convention.

Habeas corpus has received renewed attention in the post-2001 world. These experiences have revealed the serious challenges that exist to the availability of effective domestic habeas corpus review as guaranteed by international law. Restrictive interpretations or applications of these international guarantees have been addressed as they occur by courts and scholars in many cases. Synthesis of these experiences is needed to provide a more holistic look at the form that these challenges to international habeas corpus guarantees have taken and to assess their legality. Anticipation of future challenges will allow a more proactive approach to ensuring protection. It is also important to understand why habeas corpus is so critical, in terms of both protection to the individual and the role of habeas corpus in regulating government action. By understanding the parameters of current law,

<sup>72</sup> Report of Mr. Chernichenko and Mr. Treat to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1994/24, ¶165 (June 3, 1994).

<sup>73</sup> For example, see Working Group on Arbitrary Detention, Background Paper on State Practice of Implementation of the Right (Sept. 1–2, 2014); Report of the Working Group on Arbitrary Detention, A Compilation of National, Regional and International Laws, Regulations and Practices on the Right to Challenge the Lawfulness of Detention before Court, U.N. Doc. A/HRC/27/47 (June 30, 2014); Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, U.N. Doc. WGAD/CRP.1/2015 (May 4, 2015).

analyzing the challenges faced by habeas corpus, and understanding the importance of the international law guarantees of habeas corpus, it is possible to consider how habeas corpus might be strengthened. Such an effort has the potential to promote the goals expressed in the U.N. Charter<sup>74</sup> and the Universal Declaration of Human Rights<sup>75</sup> of achieving peace and security through the rule of law. As Kutner wrote half a century ago, “On those occasions in which Man must be saved from his rulers, and equally when he must be saved from himself and his unreasoning explosions of passion or prejudice, resort to Law is the only alternative to revolution.”<sup>76</sup>

#### OVERVIEW

The history of habeas corpus provides a useful foundation to understanding its importance in law today. An examination of its history shows how the writ of habeas corpus was transformed by judges from a tool to exert state authority to one that would be used to regulate government power. While proceedings similar to habeas corpus existed prior to its development in England, the English form of the remedy emerged as the most prominent of these remedies and the basis on which international guarantees would be developed. Therefore, the development of habeas corpus in English law is important to understanding its place in international law. Chapter 1 traces the history of habeas corpus from its origins in England through its status across the globe in 1945. Section 1.1 examines the origin and development of habeas corpus in the English legal system. Section 1.2 looks at the proliferation of the English remedy, the development of habeas corpus in other jurisdictions, and its status in domestic law at the end of World War II.

As with many fundamental rights, the movement of habeas corpus from the exclusive province of domestic law to the realm of international law began in the years following World War II. The events of the war altered the previously accepted view that a state’s relationship with its citizens was beyond the concern of international law. A new post-war regime emerged, driven by democratic ideals and a common desire to prevent the abuses perpetrated by the defeated fascist states in the future. Central to this new regime was the recognition and protection of human rights at the international level. Chapter 2 examines the place of habeas corpus in the human rights discourse following World War II and its treatment in the Universal Declaration of Human Rights, adopted in 1948. Section 2.1 details the post-war development of international law, most notably with the adoption of the Charter of the U.N. Section 2.2 tells how the right to habeas corpus was initially included during the drafting of the Universal Declaration, then removed, and finally reintroduced as part of a broader guarantee in the General Assembly.

<sup>74</sup> U.N. Charter preamble.

<sup>75</sup> UDHR preamble.

<sup>76</sup> Kutner, *World Habeas Corpus*, p. 35.