

Protection from Arbitrary Arrest and Detention Under International Law

by *Laurent Marcoux, Jr.**

I. INTRODUCTION

Since the adoption of the United Nations Charter in 1945, the international community, in recognition of the vital importance of securing respect for human rights and freedom from fear, has developed an impressive body of international human rights law.¹ Among the most fundamental of all human rights is the right to personal liberty. One significant dimension of this right is freedom from arbitrary arrest and detention.² In recognition of the right to this freedom, the Universal Declaration of Human Rights (Universal Declaration), adopted by the General Assembly of the United Nations in 1948, provides in Article 3 that "[e]veryone has the right to life, liberty and security of person," and in Article 9 that "[n]o one shall be subjected to arbitrary arrest, detention or exile."³ Similarly, Article 9(1) of the International Covenant on Civil and Political Rights (Covenant on Civil and Political Rights) states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."⁴

This article attempts to clarify the extent to which international law protects an individual from arbitrary arrest and detention. Codifying mankind's shared aspirations to human dignity in juridical texts is a difficult task. As a conse-

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1. See generally Premont, *United Nations Procedures for the Protection of All Persons Subjected to Any Form of Detention or Imprisonment*, 20 SANTA CLARA L. REV. 603 (1980); Halderman, *Advancing Human Rights Through the United Nations*, 43 LAW & CONTEMP. PROBS. 275 (1979); Tauberfield & Tauberfield, *Human Rights and the Emerging International Constitution*, 9 HOFSTRA L. REV. 475 (1981).

2. For a detailed discussion of freedom from arbitrary arrest and detention, see United Nations, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No. 8), U.N. Doc. E/CN.4/826/Rev. 1 (1964).

3. Universal Declaration of Human Rights, art. 9, G.A. Res. 217A, 3 U.N. GAOR, pt. I, at 71, U.N. Doc. A/810 (1948) [hereinafter cited as Universal Declaration].

4. International Covenant on Civil and Political Rights, art. 9(1), G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter cited as Covenant on Civil and Political Rights].

quence, the right to freedom from arbitrary arrest and detention, like much of human rights law is imprecise and vague. Concept clarification, therefore, is needed in order for this aspect of international human rights law to be functionally applicable.

Beginning with a brief history of the concept of freedom from arbitrary arrest and detention,⁵ this article focuses, through an analysis of legislative history, on the significance of Article 9 of the Universal Declaration and Article 9(1) of the Covenant on Civil and Political Rights. The author demonstrates that both the Universal Declaration and the Covenant on Civil and Political Rights have established a standard of freedom from arbitrary arrest and detention which includes and extends beyond protection from "unlawful" arrest or detention; the standard is designed to protect individuals from "arbitrary" laws as well as "unlawful" acts, and is a standard to which the very content of national legal systems must conform. The author, therefore, suggests the scope of the standard imposed by the two instruments through an examination of the various criteria that give some content to the standard. In conclusion, the author proposes a methodology for dealing with specific cases by which tribunals and organizations concerned with human rights can determine whether an individual has been arbitrarily arrested or detained by a state. The methodology also provides guidelines for the drafting of legislation and regulations involving the right to personal liberty. The approach is designed to maximize protection of an individual's personal freedom under international law.

II. HISTORICAL ANTECEDENTS

The concept of freedom from arbitrary arrest and detention appeared in several early European documents, such as the Magna Carta, the Habeas Corpus Acts of England, and the French Declaration of the Rights of Man and the Citizen. These texts provided the first definitions of freedom from arbitrary arrest and detention, and form the foundation upon which the Universal Declaration and the Covenant on Civil and Political Rights rest. Article 39 of the Magna Carta states:

No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.⁶

5. The outline is not meant to be comprehensive. It will only deal with some of the more important documents relating to freedom from arbitrary arrest and detention. For an excellent collection of human rights documents, see M. Torrelli & R. Baudoin, *LES DROITS DE L'HOMME ET LES LIBERTÉS PUBLIQUES PAR LES TEXTES* (1972).

6. *MAGNA CARTA*, 1 *STATUTES OF THE REALM* 6-7 (1810).

The protections of Article 39 did not extend to all citizens, however, because the term "Freeman" referred only to the members of the small feudal class.⁷ For that reason, "the crucial clause 39 of the Charter was a partisan instrument extorted from the King for the benefit of the feudal claims and privileges inimical . . . to the growth of really popular liberties."⁸ Nevertheless, the Charter did impose a restriction on regal power,⁹ and subsequently, during the reign of Edward III (1327-77), the protection which the Magna Carta had provided the earls and barons was extended to "all men."¹⁰ Consequently, although the full effect of Article 39 was not immediately apparent, the Magna Carta represented one of the first important steps towards recognition of the right to freedom from arbitrary arrest and detention.¹¹

A second important development in the recognition of the right to personal liberty was the promulgation of the Habeas Corpus Acts of England in 1640¹² and 1679.¹³ The Acts codified to some extent and perfected an ancient remedy.¹⁴ A citizen could employ a habeas corpus proceeding to challenge detention by the King and Council, and Great Britain eventually accepted habeas corpus as the standard procedure by which the legality of any imprisonment could be tested.¹⁵ The remedy of habeas corpus thus became one of the cornerstones of the right to personal liberty in Great Britain.¹⁶

A third significant human rights document is the French Declaration of the Rights of Man and the Citizen of 1789.¹⁷ The Declaration proclaimed a number

7. Brebner, *Magna Carta*, in *GREAT EXPRESSIONS OF HUMAN RIGHTS* 62 (R. MacIver ed. 1950).

8. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 130 (1968).

9. Dr. Lauterpacht later observed that "in the history of fundamental rights, no event ranks higher than that charter of concessions which the nobles wrested from King John." *Id.* at 131.

10. J. VAN DER VYVER, *SEVEN LECTURES ON HUMAN RIGHTS* 83 (1976).

11. After the scope of its protection had been extended, Blackstone commented that the Magna Carta "protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgement of his peers, or the law of the land." 4 W. BLACKSTONE, *COMMENTARIES ON ENGLAND* *423.

12. 16 Car. 1, ch. 10.

13. 31 Car. 2, ch. 2.

14. A. H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (1972) [hereinafter cited as ROBERTSON]. An account of the early history of the writ of habeas corpus can be found in Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CAN. B. REV. 92 (1938); Jenks, *The Story of Habeas Corpus*, 18 L.Q. REV. 64 (1902).

15. The Habeas Corpus Act, 1816, 56 Geo. 3, ch. 100, extended the protection of the Act of 1679 to persons deprived of their liberty other than by a criminal charge, unless they were imprisoned for debt. In 1869, the Debtors Act, 1869, 32 & 33 Vict., ch. 62, further extended protection to debtors.

16. The importance of the remedy led Dicey to declare that "the Habeas Corpus Acts were for practical purposes worth a hundred constitutional articles guaranteeing individual liberty." A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 199 (10th ed. 1965).

17. The Declaration later became the preamble of the French Constitution of 1791. An English translation of the Declaration can be found in G. LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION* 221 (1947) [hereinafter cited as LEFEBVRE]. For the French text, see L. DUGUIT & H. MONNIERS, *LES CONSTITUTIONS ET LES PRINCIPALES LOIS POLITIQUES DE LA FRANCE DEPUIS 1789* (1952).

of the "natural and imprescriptible rights of man," including freedom from arrest and detention except in conformity with the law. Article 7 stated, in part: "No man may be indicted, arrested or detained except in cases determined by law and according to the forms which it has prescribed."¹⁸

Each of these documents was intended to protect citizens from "unlawful" arrest or detention. They did not, however, extend to protection against "arbitrary laws." Both the Universal Declaration and the Covenant on Civil and Political Rights have made a significant contribution to the further development of the concept of freedom from arbitrary arrest and detention by ensuring that individuals receive protection against "arbitrary laws" as well as against "unlawful acts." In this manner, the provisions of these international instruments effectively prohibit states from manipulating their legislative systems to achieve oppressive ends.

III. ARTICLE 9 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The text of Article 9 of the Universal Declaration of Human Rights¹⁹ contains four essential concepts: (a) "arbitrary," (b) "arrest," (c) "detention," and (d) "exile."²⁰ This article focuses on the imposition of restrictions on personal liberty within a state rather than with the expulsion of a person from the country of which he is a national. Therefore, the author will concentrate on an analysis of the first three concepts.

18. LEFEBVRE, *supra* note 17, at 221.

19. The Universal Declaration of Human Rights has now become part of customary international law. See Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, at 4 (1968). The General Assembly of the United Nations, in December 1968, endorsed the Teheran Proclamation as "an important and timely reaffirmation of the principles embodied in the Universal Declaration of Human Rights." G.A. Res. 2442, 23 U.N. GAOR Supp. (No. 18) at 42, U.N. Doc. A/7218 (1968). See also Statement of the Montreal Assembly for Human Rights, (Mar. 22-27, 1968), which provides that the "Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary law." Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 23 U.N. GAOR Supp. (No. 1A) at 13, U.N. Doc. A/7201/Add.1 (1968). McDougal, Lasswell and Chen state that "[w]hat began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the United Nations Charter and as established customary law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights." M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 274 (1980) [hereinafter cited as McDUGAL, LASSWELL & CHEN]. For a discussion of the influence of the Universal Declaration on United Nations practice and on national constitutions, statutes and decisions, see *id.* at 328-30. See also L.B. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518-20 (1973); Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976); Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21-37 (B. Ramcharan ed. 1979) [hereinafter cited as Humphrey, *Declaration*]; Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMM'N JURISTS 17, 26 (1967); Address by William J. Butler to McGill International Law Society (Jan. 20, 1980). Accord Shestack, *The Case of the Disappeared*, 8 HUMAN RIGHTS 24, 27 (1980) [hereinafter cited as Shestack].

20. See text accompanying note 3 *supra*.

The primary functional meanings of the concepts "arrest" and "detention" are provided by the United Nations Committee on the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (United Nations Committee). This Committee has defined "arrest" as:

The act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him.²¹

Two elements are central to this definition: the manner in which the arresting authority effects the restraint on personal liberty, and the length of time for which a suspect may be held in custody on the basis of the arrest. The United Nations Committee has, similarly, defined detention as "[t]he act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities."²² The essence of this definition is confinement and deprivation of personal liberty.²³

A blanket prohibition against arrest and detention would be highly impractical and undesirable. In recognition of the need to qualify the prohibition, both the Universal Declaration and the Covenant on Civil and Political Rights have introduced the concept of "arbitrariness." Because the significance of Article 9 and Article 9(1) depends to a large extent upon the scope of the qualification, the choice of the word "arbitrary" has sparked considerable controversy, and led to many years of debate over its meaning and the exact extent to which it qualified the arrest and detention prohibitions.

A. *The Interpretation of "Arbitrary"*

The central issue in the interpretation of the word "arbitrary" is whether it simply introduces a qualification of lawfulness, or whether it imposes a higher

21. United Nations, Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No. 8) at 5, U.N. Doc. E/CN.4/826/Rev. 1 (1964).

22. *Id.*

23. The definitions of "arrest" and "detention" would also cover the phenomenon of the "disappeared" or "desaparecidos" — individuals abducted through the complicity, consent or conspiracy of governments which later deny that the victim is in their custody or in the custody of their agent. For an analysis of the problem of disappearances, see AMNESTY INTERNATIONAL, *DISAPPEARANCES: A WORKBOOK* (1981).

Article 9 thus imposes not only a negative duty on states to refrain from perpetrating arbitrary arrests and detentions, but also a positive duty to reasonably ensure that their citizens will not be subjected to arbitrary arrests or detentions from any source. Therefore, states must undertake in good faith reasonable measures to prevent such abductions, even if they are not directly involved in effecting the disappearances. Thus, states cannot rely on "disappearance" to excuse their failure to fulfill the legal duty embodied in Article 9. See Shestack, *supra* note 19.

international standard upon the content of domestic laws. If the word "arbitrary" simply means "unlawful," then the prohibition in Articles 9 and 9(1) would not apply to any lawful governmental action, regardless of how oppressive the action, if it conformed with domestic law. Such an approach would essentially allow each state, through its own domestic law, to determine the scope of an individual's right to freedom from arrest or detention. However, the broader interpretation of "arbitrary" imposes a higher international standard on the content of domestic law. Under the latter interpretation, Articles 9 and 9(1) would provide substantive as well as procedural protection.

One must refer to rules of treaty interpretation in order to determine whether the broad or the restricted meaning of "arbitrary" should apply.²⁴ One of the first steps in treaty interpretation is to determine the "ordinary meaning" of the word in question.²⁵ The ordinary meaning of "arbitrary" strongly favors a broad interpretation of the word, since the ordinary dictionary meaning of "arbitrary" is much broader than that of "unlawful"²⁶ or "illegal."²⁷ Webster's Third New International Dictionary defines "arbitrary" as follows:

1: depending on choice or discretion; . . . determinable by decision of a judge or tribunal rather than defined by statute.

2a (1): arising from unrestrained exercise of the will, caprice, or personal preference: given to expressing opinions that arise thus

(2): selected at random or as a typical example

b: based on random or conventional selection or choice rather than on reason or nature

3a: given to willful irrational choices and demands.²⁸

24. Although the Universal Declaration is not a treaty, it is nevertheless an important international instrument to which the rules of treaty interpretation ought generally to apply. Hassan, *The Word "Arbitrary" as Used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"?*, 10 HARV. INT'L L.J. 225, 230 (1969) [hereinafter cited as Hassan, "*Illegal*" or "*Unjust*"].

25. Article 31(1) of the Vienna Convention on the Law of Treaties states: "A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), U.N. Doc. A/Conf. 39/27 (1969) (emphasis added). Also, in *Polish Postal Service*, 1925 P.C.I.J., ser. B, No. 11 (Advisory Opinion of May 16, 1925), the Permanent Court of International Justice noted that the postal service which Poland was allowed to establish in Danzig under treaty was not to be restricted to the interior of the postal building, because "postal service" had to be interpreted in its "*ordinary sense*." *Id.* at 37 (emphasis added).

26. "1: not lawful: contrary to or prohibited by law: not authorized or justified by law: not permitted or warranted by law . . . 2: acting contrary to or in defiance of the law: disobeying or disregarding the law . . . 3: contrary to normal or acceptable procedure: irregular. . . ." 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1126 (P. Gove 3d ed. 1976).

27. [C]ontrary to or violating a law or rule or regulation or something else (as an established custom) having the force of law. . . ." 2 *id.* at 2502.

28. 1 *id.* at 110.

Had the draftsmen intended to provide for arrest and detention only in cases provided by law, they would have used the words "illegal" or "unlawful" instead of "arbitrary" in the prohibition.²⁹ Furthermore, the legislative history³⁰ of Article 9 of the Universal Declaration reveals not only that the draftsmen favored the ordinary meaning of "arbitrary," but also, that when they were confronted with a choice between "lawful" and "arbitrary" they chose the latter word.³¹ Thus, the legislative history of Article 9 strongly favors the broad interpretation of the word "arbitrary."

1. The Legislative History of Article 9

a. *Drafting Process of the Universal Declaration*

The United Nations Secretariat draft Declaration — prepared by Dr. John Humphrey, initial director of The United Nations Division of Human Rights — served as the basis for United Nations work on the Declaration.³² Mr. Rene Cassin, of the Human Rights Commission Drafting Committee, then examined and revised the Secretariat draft.³³ The Drafting Committee,³⁴ followed by the Human Rights Commission, then considered the Cassin revision, and the Human Rights Commission completed its draft Declaration at its third session.³⁵ The Commission draft was the subject of discussion in a general debate at the seventh session of the U.N. Economic and Social Council, which transmitted the Declaration unchanged to the Third Committee of the General Assembly.³⁶

29. One contesting that interpretation would have the burden of proof to demonstrate that the drafters intended that the word "arbitrary" be construed narrowly. I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 607 (2d ed. 1973) [hereinafter cited as BROWNIE].

30. The Vienna Convention on the Law of Treaties concedes the relevance of the legislative history in Article 32, which states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, art. 32, U.N. Doc. A/Conf.39/27 (1969).

31. See notes 39-62 and accompanying text *infra*.

32. Commission on Human Rights, Report of the First Session of the Drafting Committee, U.N. Doc. E/CN/AC. 1/3 (1947). The draft is also reprinted in Annex A, U.N. Doc. E/CN.4/21 (1947). For a list of the various draft documents upon which the Secretariat draft was based, see Humphrey, *Declaration*, *supra* note 19, at 23 n.8. Dr. Humphrey's account of the drafting history of the Declaration offers many unique and interesting insights into the early drafting process.

33. Humphrey, *Declaration*, *supra* note 19, at 24.

34. *Id.* at 25.

35. *Id.* See also Commission on Human Rights, Report of the Third Session, 7 U.N. ESCOR Supp. (No. 2), U.N. Doc. E/800 (1948).

36. Humphrey, *Declaration*, *supra* note 19, at 25-26. See also Hassan, *supra* note 22, at 234; Report of the Economic and Social Council to the General Assembly 1947-48, 3 U.N. GAOR Supp. (No. 3), U.N. Doc. A/625 (1948).

After the Third Committee completed a detailed consideration of the Commission draft,³⁷ the General Assembly finally adopted the Declaration on December 10, 1948, by a vote of forty-eight to zero, with eight abstentions.³⁸

b. *Drafting Process of Article 9*

Two of the earliest drafts of Article 9 of the Universal Declaration, the Cassin and the Drafting Committee drafts, emphasized protection from "unlawful" arrest and detention. The Cassin draft, for example, provided against arrest and detention "save in the cases provided for and in accordance with the procedure prescribed by law."³⁹ Similarly, the Drafting Committee draft contained the words "except in cases prescribed by law and after due process."⁴⁰

Yet, at the second session of the Human Rights Commission, a number of members began to express a concern for protecting citizens from tyrannical laws as well as from unlawful acts. Although the Draft Convention did prohibit arrest and detention except in cases provided by law, these members found fault in the Draft Convention's failure to specify the nature or content of the law.⁴¹ Eventually, the Commission adopted the draft Article 9 with only a few unrelated changes.⁴² The Commission adopted the draft Article, however, with the understanding that the word "law" in the Article was to be qualified.⁴³ The general principles of the United Nations were to be the first qualification.⁴⁴ The second

37. The Committee met 81 times to consider the draft. Humphrey, *Declaration*, *supra* note 19, at 26.

38. Universal Declaration, *supra* note 3, at 71.

39. Commission on Human Rights, Report of the First Session of the Drafting Committee, Annex D, U.N. Doc. E/CN.4/21 (1947). The earlier Secretariat draft, by its use of the words "arbitrary and unauthorized arrest," had made the basic distinction between "arbitrary" and "unlawful." Its provisions would have protected against arbitrary laws as well as "unauthorized" acts. Mr. Cassin, however, chose to use different language. The Secretariat approach eventually prevailed.

40. Commission on Human Rights, Report of First Session of the Drafting Committee, Annex F, U.N. Doc. E/CN.4/21 (1947). The full wording of the Article was: "No one shall be deprived of his personal liberty or kept in custody except in cases prescribed by law and after due process. Everyone placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject." *Id.* This early emphasis on protection from "unlawful" arrest and detention was undoubtedly inspired by earlier documents which had been designed to protect citizens from unlawful arrest and detention. See §II *supra*.

41. Commission on Human Rights, Second Session, Working Group on the Declaration of Human Rights, Summary Record of Third Meeting, U.N. Doc. E/CN.4/AC.2/SR.3 (1947).

42. The text of the draft Article adopted by the Commission can be found in Commission on Human Rights, Report of the Second Session, 6 U.N. ESCOR Supp. (No. 1) at 15, U.N. Doc. E/600 (1948).

43. See Commission on Human Rights, Second Session, Working Group on the Declaration of Human Rights, Summary Record of Third Meeting, E/CN.4/AC.2/SR.3, at 8-10 (1947).

44. Dr. Beinenfeld of the World Jewish Congress had suggested that the word "law" should be defined as "law conforming to the principles of the United Nations." Commission on Human Rights, Second Session, Summary Record of the 36th Meeting, U.N. Doc. E/CN.4/SR.36, at 3 (1947). He received express support from the representatives of China, *id.* at 5, Lebanon, *id.* at 4, and the Philippine Republic, *id.* at 3.

qualification was the obligation set forth in Article 38 of the draft Declaration that states ensure that their laws conform to the principles of the Declaration.⁴⁵ In its insistence that the word "law" be thus qualified, the Commission seems to have dispelled concerns about the possibilities of abuse by tyrannical legal systems.

At its third session, the Commission expressed its preference that the Declaration should consist of brief articles, and that detailed articles would be more appropriate for the future Covenant. The Commission, therefore, accepted the joint Chinese, Indian and British proposal⁴⁶ that the Article simply state: "No one shall be subjected to arbitrary arrest or detention."⁴⁷ One member noted that the joint proposal contained all the essential elements of the more elaborate proposals.⁴⁸ Moreover, another member emphasized that the necessary guarantees of personal safety were in the United Nations Charter.⁴⁹

The Commission debates underline the members' concern with the need to protect individuals from unjust laws and to maximize protection of the right to personal liberty. The Commission sought to achieve this optimum protection by emphasizing the qualified meaning given to the word "law" in the early drafts of Article 9.⁵⁰ However, the members of the Commission had not discussed the significance and meaning of the word "arbitrary" as used in the draft Article.

The Commission, having completed its draft of the Declaration at its third session, forwarded its recommendations to the Economic and Social Council.⁵¹ The U.N. Economic and Social Council discussed the draft Declaration in a brief general debate, and forwarded the draft unchanged to the Third Committee of

45. Mr. Malik of Lebanon stated that "there was no doubt that Article 38 of the Declaration had a direct bearing on Article 8 [early draft of Article 9]." Commission on Human Rights, Second Session, Summary Record of the 36th Meeting, U.N. Doc. E/CN.4/SR.36, at 4 (1947). Mr. Cassin of France, agreed that Article 8 should be interpreted through Article 38. *Id.* at 5. And General Romulo of the Philippine Republic suggested that Article 38 either be introduced before Article 8 or combined with it. *Id.* at 3. Article 38 stated that:

The States Members of the United Nations shall ensure that their Law (statutes, regulations and all administrative acts) is brought into, and maintained in, conformity with the principles of the present Declaration.

A system of effective judicial and administrative appeal shall be organized by each State for the purpose of penalizing violations of these principles.

Commission on Human Rights, Second Session, Report of the Working Group on the Declaration of Human Rights, U.N. Doc. E/CN.4/57, at 17 (1947).

46. Commission on Human Rights, Third Session, Summary Record of the 54th Meeting, U.N. Doc. E/CN.4/SR.54, at 4-8 (1948).

47. *Id.*

48. See Statement by Mr. Malik of Lebanon, *id.* at 4.

49. See Statement by Mr. Loutfi of Egypt, *id.* at 5.

50. See Commission on Human Rights, Second Session, Working Group on the Declaration of Human Rights, Summary Record of 3rd Meeting, E/CN.4/AC.2/SR. 3 (1947).

51. See Commission on Human Rights, Report of the Third Session, 7 U.N. ESCOR Supp. (No. 2), U.N. Doc. E/800 (1948).

the U.N. General Assembly which began an extensive article-by-article consideration of the draft Declaration.⁵²

During the Third Committee debates over Article 9, Mr. Pavlov of the U.S.S.R. opposed the use of the word "arbitrary" because, in his opinion, it allowed for subjective interpretation.⁵³ He supported the amendments, submitted by the representative of Uruguay,⁵⁴ which prohibited arrest and detention "except in the cases and according to the procedure prescribed by prior legislation."⁵⁵ The majority of the Third Committee members did not, however, share Mr. Pavlov's views. A number of representatives objected to Uruguay's attempt to delete the word "arbitrary." The Brazilian representative, for example, argued against the amendment, and noted that "there might be cases in which anti-democratic governments had promulgated undesirable laws."⁵⁶ For many members, "arbitrary" was the most vital word in the Article.⁵⁷ Mr. Davies of the United Kingdom, for example, stated:

"[A]rbitrary" was the key word in the text before the Committee; the article would lose greatly if that word were deleted. There might be certain countries where arbitrary arrest was permitted. The object of the article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights.⁵⁸

Similarly, the Bolivian representative argued that "'arbitrary' referred, in part, to matters of conscience . . . it was not inconceivable that arbitrary laws might be adopted in certain countries."⁵⁹

Because the proposed amendment would have restricted the prohibition to "unlawful" arrest or detention, the majority of the Third Committee rejected this approach to protecting the right to personal liberty. Instead, the Third Committee adopted the Commission Article by a vote of forty-three to zero, with one abstention.⁶⁰ Thus, the text that the Third Committee adopted and trans-

52. See Report of the Economic and Social Council to the General Assembly 1947-48, 3 U.N. GAOR Supp. (No. 3) U.N. Doc. A/625 (1948).

53. General Assembly, Third Session, Summary Records of the 115th Meeting, 3 U.N. GAOR C.3, pt. 1, at 258, U.N. Doc. A/C.3/SR.115 (1948).

54. *Id.* at 257-58.

55. Draft International Declaration of Human Rights, Third Session, Third Committee, Uruguay: Amendments to the Draft Declaration, art. 7, U.N. Doc. A/C.3/268, at 1 (1948).

56. General Assembly, Third Session, Summary Record of the 113th Meeting, 3 U.N. GAOR C.3, pt. 1, at 247, U.N. Doc. A/C.3/SR.113 (1948).

57. Mrs. Roosevelt found retention of the word "arbitrary" vital. "It summed up the meaning of the whole article." *Id.*

58. *Id.* at 248.

59. *Id.* at 257.

60. *Id.* at 252-57.

mitted to the General Assembly read: "No one shall be subjected to arbitrary arrest, detention or exile."⁶¹ The General Assembly unanimously adopted the Article with only eight abstentions.⁶²

The legislative history of Article 9 demonstrates that the draftsmen were concerned not only with protecting individuals from unlawful arrest or detention, but also from arbitrary arrest and detention laws. This concern was clearly demonstrated by the Commission, which sought to qualify the word "law" in its early drafts by the obligation of governments to comply with the principles and purposes of the United Nations Charter and the draft Declaration. The Third Committee did not consider "arbitrary" to be synonymous with "unlawful"; laws, as well as acts, could be arbitrary. This concern was echoed in connection with the discussion of the use of the word "arbitrary" in Articles 12, 15 and 17 of the draft Declaration. These further discussions generated an ever-growing consensus that "arbitrary" was a broader concept than "unlawful," and was designed to provide maximum protection of the right of personal liberty.

B. "Arbitrary" in Articles 12, 15 and 17

During the Third Committee discussions on Article 12,⁶³ the members sought to find an appropriate qualifying word for the Article. From the different proposals, the Third Committee chose the word "arbitrary."⁶⁴ Again, a consensus appeared to exist within the Committee that "arbitrary" was broader than "unlawful." As expressed by Mr. Cassin, of France: "The term 'arbitrary' was used on several occasions in the draft declaration and it was fully understood that it expressed two shades of meaning: that of illegality and that which the United Kingdom representative had sought to define by using the word 'unreasonable.'"⁶⁵ The representatives of China, Haiti, New Zealand and U.S.S.R. supported Mr. Cassin's views.⁶⁶ The members decided by thirty-four votes to two, with five abstentions, to retain the word "arbitrary" in Article 12.⁶⁷

During the discussions on Article 15⁶⁸ in the third session of the Human

61. Draft International Declaration of Human Rights, Third Session, Report of the Third Committee, art. 10, U.N. Doc. A/777, at 538 (1948).

62. Universal Declaration, *supra* note 3, at 11.

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

64. Draft International Declaration of Human Rights, Third Session, Report of the Third Committee, art. 13, U.N. Doc. A/777, at 538 (1948).

65. General Assembly, Third Session, Summary Record of the 176th Meeting, 3 U.N. GAOR C.3, pt. 1, at 864, U.N. Doc. A/C.3/SR.176 (1948).

66. *Id.*

67. *Id.*

68. Article 15 reads: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Commission on Human

Rights Commission, the representatives of the United Kingdom and India suggested the following text: "No one shall be arbitrarily deprived of his nationality."⁶⁹ The representative of the Soviet Union later tried to restrict the meaning of the word "arbitrarily."⁷⁰ However, the representative of the United Kingdom objected, stating that the proposed Soviet amendment would permit a result "perfectly legal but entirely arbitrary."⁷¹ Thereafter, the members rejected the proposed Soviet amendment to the India-United Kingdom text by ten votes to four, with two abstentions.⁷²

Later, during the course of the Third Committee debates, Mr. Malik, who had been Rapporteur of the Commission and was then Chairman of the Committee, stated that "[i]n the understanding of the Commission on Human Rights, the word 'arbitrarily' was not synonymous with 'illegally'; it had a wider scope. The Commission had wished to use a general term suggesting a criterion above and beyond the laws of States, to which those laws should conform."⁷³ Similarly, Mr. Cassin stated that the word "arbitrarily" was susceptible of a dual meaning. "Arbitrary" referred to the notion that no one could be deprived of his nationality except in the cases provided by national laws. The word also signified the idea that the laws themselves could not be arbitrary.⁷⁴ The General Assembly adopted, without change, the India-United Kingdom draft of Article 15.⁷⁵

During the debates on Article 17,⁷⁶ both the Commission and the Third Committee distinguished between the words "unlawfully" and "arbitrarily."⁷⁷ In so doing, the mission rejected the Soviet Union's attempt to again equate "arbitrarily" with "illegally."⁷⁸ The Third Committee upheld the Commission's posi-

Rights, Third Session, India and the United Kingdom: Proposed Amendments to the Draft Declaration on Human Rights, U.N. Doc. E/CN.4/99, at 4 (1948).

69. *Id.*

70. Commission on Human Rights, Third Session Summary Record of the 59th Meeting, U.N. Doc. E/CN.4/SR.59, at 10 (1948).

71. *Id.* at 11.

72. *Id.* at 12.

73. General Assembly, Third Session, Summary Record of the 122nd Meeting, 3 U.N. GAOR C.3, pt. 1, at 348, U.N. Doc. A/C.3/SR.122 (1948).

74. *Id.* at 358.

75. *Id.*

76. Article 17 provides: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." *Id.*

77. See, e.g., Commission on Human Rights, Third Session, Summary Record of the 61st Meeting, U.N. Doc. E/CN.4/SR.61, at 6 (1948); General Assembly, Third Session, Summary Record of the 126th Meeting, 3 U.N. GAOR, C.3, pt. 1, U.N. Doc. A/C.3/SR. 126 (1948). See also Arechaga, *The Background to Article 17 of the Universal Declaration*, 8 J. INT'L COMM'N JURISTS 34 (1967) [hereinafter cited as Arechaga].

78. Commission on Human Rights, Third Session, Summary Record of the 61st Meeting, U.N. Doc. E/CN.4/SR.61, at 6 (1948). Mr. Cassin emphasized that "legality did not necessarily preclude arbitrary action" and stated that "the Commission wanted to combat such action, even if it were given a legal form." *Id.* at 4. Mrs. Roosevelt also pointed out that "the word 'arbitrarily' had the connotation of injustice. The purpose of the Drafting Sub-Committee's text was to protect everyone from being

tion. Several members of the Committee also commented that "arbitrarily" had a broader meaning than "illegally." Mrs. Roosevelt, the U.S. representative on the Commission, for example, stated that "[t]he U.S.S.R. suggestion that 'arbitrarily' should be interpreted as 'illegally' was also unwise. The declaration should use the word 'arbitrarily' which was far wider in its import than 'illegally.'" ⁷⁹

The members of the Commission, in overwhelmingly rejecting all attempts to equate "arbitrary" with "unlawful" expressed their acceptance of the dual interpretation of "arbitrary." Even the U.S.S.R., which had persistently tried to restrict the meaning of "arbitrary" to "unlawful," finally accepted the broader "two shades of meaning" interpretation of "arbitrary" ⁸⁰ which included elements of "unreasonableness." ⁸¹ The legislative history of Articles 9, 12, 15 and 17 thus indicates that the words "arbitrary" and "arbitrarily," as used in the Declaration, were not synonymous with "unlawful" or "unlawfully" but were to be given their far broader "ordinary meaning." Throughout the discussions, the members emphasized the desirability of subjecting the laws of governments to an international standard, and the necessity for giving the greatest possible scope to the right to personal liberty. ⁸² The draftsmen expressed a concern throughout the debates for maximizing protection of the right to personal liberty. ⁸³ In so doing, they manifested their opinion that the freedom from the arbitrary arrest and detention provisions was a means through which they could achieve the goal of optimum protection of the right to personal liberty. Therefore, freedom from arbitrary arrest and detention must be viewed in reference to this goal value if it is to be properly understood. ⁸⁴ Indeed, it is only by reference to the goal value that the imprecision in the concept of freedom from arbitrary arrest and detention can be remedied. ⁸⁵

IV. ARTICLE 9(1) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The United Nations General Assembly adopted the International Covenant on Civil and Political Rights on December 16, 1966. ⁸⁶ The Covenant entered into

unjustly deprived of his property. It was not impossible that governments might sometimes act arbitrarily and it was that possibility that had to be prevented." *Id.* at 6.

79. General Assembly, Third Session, Summary Record of the 126th Meeting, 3 U.N. GAOR C.3, pt. 1, at 382 U.N. Doc. A/C.3/SR.126 (1948). Similarly, Mrs. Corbet of the United Kingdom stated that, as regards the word "arbitrarily," the word "was not synonymous with 'illegally,' since an act that was arbitrary might at the same time be legal." *Id.*

80. For the remarks of Cassin on the "two shades of meaning" interpretation, General Assembly, Third Session, Summary Record of the 176th Meeting, 3 U.N. GAOR C.3, pt. 1, at 864, U.N. Doc. A/C.3/SR.176 (1948).

81. *Id.*

82. *Id.* at 268.

83. *Id.* at 276.

84. *Id.*

85. *Id.*

86. Covenant on Civil and Political Rights, *supra* note 26, at 52.

force on March 23, 1976, three months after the deposit of the thirty-fifth instrument of ratification by Czechoslovakia.⁸⁷ Currently, approximately sixty-one states have ratified the Covenant.⁸⁸

A. *Interpretation of the Text*

The text of Article 9(1)⁸⁹ is ambiguous, allowing for either the broad interpretation of "arbitrary" or the narrow interpretation of "arbitrary" as "unlawful." The third sentence lends support to the narrow interpretation of the word by providing: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Paragraphs 4 and 5 of Article 9⁹⁰ also point to a restrictive interpretation. Under paragraph 4, a person "who is deprived of his liberty by arrest or detention" can take proceedings before a court to have the "lawfulness" of his detention determined. Similarly, under paragraph 5, anyone who has suffered an "unlawful" arrest or detention shall have an enforceable right to compensation. Nevertheless, the argument that "arbitrary" can be interpreted in a broader sense is more cogent.

87. 15 INT'L LEGAL MATS. 217 (1976).

88. 19 INT'L LEGAL MATS. 267 (1980). The Covenant on Civil and Political Rights, together with the Universal Declaration and the Covenant on Economic, Social and Cultural Rights, form what is regarded as the International Bill of Rights.

The first meeting of the Drafting Committee of the Commission on Human Rights was held in February 1947, and was attended by Mrs. Eleanor Roosevelt, Chairman of the Commission on Human Rights, Mr. P. C. Chang, Vice-Chairman, Mr. Charles Malik, Rapporteur, and Dr. John Humphrey, Director of the United Nations Division of Human Rights. In March 1947, after the Soviet delegation protested that the Drafting Committee was not representative, the Committee was expanded to eight members. The eight member Drafting Committee met in June 1947. Humphrey, *The U.N. Charter and the Universal Declaration of Human Rights*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 39, 47-48 (E. Luard ed. 1967); Humphrey, *Declaration*, *supra* note 19, at 23.

Two views concerning the International Bill of Rights emerged during the second meeting of the Drafting Committee. Annotations on the text of the Draft International Covenant on Human Rights, 10 U.N. GAOR, pt. II, Annexes, at 2, U.N. Doc. A/2929 (1955) (prepared by the Secretary-General). One view was that the bill take the form of a declaration. The other view was that the draft bill be in the form of a convention. Eventually, the Drafting Committee decided to prepare two documents: a draft declaration which would set forth general principles of human rights, and a draft convention which would define specific rights and the limitations to those rights. *Id.* at 2. Subsequently, in 1952, the Committee decided to divide the convention into two covenants: one containing civil and political rights, and the other containing economic, social and cultural rights. *Id.* at 3.

The Covenant on Civil and Political Rights, as part of the International Bill of Rights, is therefore closely related to the Universal Declaration. The Covenant essentially provides a more detailed codification of civil and political rights. It also provides for a means of review and supervision and has legal force for the parties to the instrument.

89. See note 4 and accompanying text *supra*.

90. Article 9(4) provides: "4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." International Covenant on Civil and Political Rights, *supra* note 4, art. 9(4). Article 9(5) provides: "5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." *Id.* art. 9(5).

The ordinary meaning of "arbitrary," as previously mentioned, is not "unlawful." Had the draftsmen intended to give a restricted meaning to the word "arbitrary," in Article 9(1) they would have used the word "unlawful." Alternatively, to ensure that "arbitrary" be construed narrowly, the draftsmen could have deleted the second sentence in paragraph 1 — "No one shall be subjected to arbitrary arrest or detention" — which, in view of the third sentence — "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law" — would be redundant if "arbitrary" were to mean "unlawful."⁹¹ The combination of the second and third sentences in the same paragraph strengthens the argument that "arbitrary" is concerned with the content of laws. While the third sentence is designed to emphasize protection from unlawful arrest or detention, the second sentence is designed to emphasize the concern with protection from "arbitrary" laws in addition to unlawful acts.⁹²

Not only does an interpretation of the textual language of Article 9(1) support a broad construction of "arbitrary," the legislative history of Article 9(1) of the Covenant on Civil and Political Rights, like the legislative history of Article 9 of the Universal Declaration, strongly favors the broad interpretation of the word "arbitrary."

B. *The Legislative History of Article 9(1) of the Covenant on Civil and Political Rights*

Despite the eighteen year difference between the adoption of the Universal Declaration in 1948 and the adoption of the Covenant on Civil and Political Rights in 1966, the initial drafting work on the two documents, nevertheless, began at the same time. For this reason, both instruments were not only drafted by the same bodies, but generally by the same draftsmen as well. This identity in authorship supports the argument that the meaning of the word "arbitrary" is similar in both the Universal Declaration and the Covenant on Civil and Political Rights.⁹³ Hence, with regard to the interpretation of "arbitrary," the two documents reinforce each other.

The major issue which arose during the drafting of Article 9(1) was whether to draft Article 9(1) as a brief and general article or as a detailed article setting out exceptions to a "no deprivation of liberty" rule. The United Kingdom was the

91. Hassan, *The International Covenants on Human Rights: An Approach to Interpretation*, 19 BUFFALO L. REV. 35, 39 (1969-1970).

92. See Statements by Sir Samuel Hoare of the United Kingdom that "the second sentence was not merely the same as the third" and that "the third sentence fully covered the whole conception of conformity with law and due process of law, and the second sentence must therefore be concerned with something else." General Assembly, Thirteenth Session, Summary Record of the 864th Meeting, 13 U.N. GAOR C.3, at 142, U.N. Doc. A/C.3/SR.864 (1958).

93. Hassan, "Illegal" or "Unjust," *supra* note 24, at 229.

principal proponent of the detailed approach.⁹⁴ However, the United States, the U.S.S.R., Chile and China favored the brief "generalist" approach.⁹⁵ The generalists argued that the drafters could not, without great difficulty, draft a list of exceptions or limitations that all the parties would accept.⁹⁶ The United Kingdom, on the other hand, argued that the word "arbitrary" was "imprecise, indefinite, and vague" and, as such, of little or no value.⁹⁷ The United Kingdom believed that while the word "arbitrary" may have been appropriately included in the Universal Declaration, inclusion of the word in the Covenant on Civil and Political Rights would cause too many problems of subjective interpretation.⁹⁸ In spite of its protracted efforts, the Drafting Committee of the Human Rights Commission found that it was unable to resolve this problematic issue and was finally forced to refer the problem to the full Commission.⁹⁹

The Commission discussed the same controversial issue during its fifth and sixth sessions. The United States led the argument in favor of a short and general article, arguing that the drafters could never "foresee all possible exceptions" and that no list of exceptions could therefore be complete.¹⁰⁰ The limitationists, on the other hand, continued to argue that Article 9 would remain vague and incomplete unless it had a full list of exceptions.¹⁰¹ After a considerable amount of controversial debate, the Commission finally adopted the pro-

94. *See, e.g.*, Commission on Human Rights, Drafting Committee, Second Session, Summary Record of the 23rd Meeting, U.N. Doc. E/CN.4/AC.1/SR.23, at 4 (1948); Preliminary Comments on the Draft Covenant for Transmission to the Secretary-General of the United Nations, U.N. Doc. E/CN.4/82/Add. 4, at 3 (1948).

95. *See, e.g.*, Commission on Human Rights, Drafting Committee, Second Session, Summary Record of the 23rd Meeting, U.N. Doc. E/CN.4/AC.1/SR.23, at 4-9. Commission on Human Rights, Drafting Committee, Second Session, Summary Record of the 30th Meeting, U.N. Doc. E/CN.4/AC.1/SR.30, at 6-7 (1948); Commission on Human Rights, Drafting Committee, Second Session, Summary Record of the 32nd Meeting, U.N. Doc. E/CN.4/AC.1/SR.32, at 11-13 (1948).

96. *See, e.g.*, Arguments made by the U.S., in Commission on Human Rights, Third Session, Comments from Governments on the Draft International Declaration on Human Rights and the Question of Implementation, U.N. Doc. E/CN.4/82/Rev.1, at 21 (1948).

97. Commission on Human Rights, Drafting Committee, Second Session, Summary Record of the 23rd Meeting, U.N. Doc. E/CN.4/AC.1/SR.23, at 4 (1948).

98. *See* Preliminary Comments on the Draft Covenant for Transmission to the Secretary-General of the United Nations, U.N. Doc. E/CN.4/82/Add. 4, at 3 (1948).

99. Consequently, the Committee forwarded to the Commission on Human Rights the text of Article 9 as proposed at the second session, together with a list of exceptions, proposals and amendments. Commission on Human Rights, Drafting Committee, Second Session, Summary Record of the 32nd Meeting, U.N. Doc. E/CN.4/AC.1/SR.32, at 13 (1948).

100. Commission on Human Rights, Sixth Session, Draft International Covenant on Human Rights, Observation by U.S. Concerning Proposal of the U.K. for Article 9, U.N. Doc. E/CN.4/401, at 2 (1950).

101. *See, e.g.*, Commission on Human Rights, Fifth Session, Summary Record of the 95th Meeting, U.N. Doc. E/CN.4/SR.95 (1949) and 96th Meeting, U.N. Doc. E/CN.4/SR.96 (1949). *See generally* Commission on Human Rights, Sixth Session, Summary Record of the 144th Meeting, U.N. Doc. E/CN.4/SR.144, at 9-17 (1950); Summary Report of the 146th Meeting, U.N. Doc. E/CN.4/SR.146, at 3-5 (1950); Summary Report of the 147th Meeting, U.N. Doc. E/CN.4/SR.147, at 3-12 (1950); Summary Report of the 154th Meeting, U.N. Doc. E/CN.4/SR.154, at 6-7 (1950).

posed "arbitrary arrest" paragraph, thereby adopting the generalist point of view.¹⁰²

While emphasizing the difficulties that would arise in formulating a list of exceptions, the generalists also had pointed out that the word "arbitrary" in paragraph 1 of the proposed text constituted an effective safeguard against abuse.¹⁰³ Many of the generalists had interpreted "arbitrary" to include the notion of injustice and that understanding had influenced their decision to vote for paragraph 1.¹⁰⁴ Mr. Kyrrou, of Greece, for example, expressly stated that he had voted for the text on that basis.¹⁰⁵ Mrs. Roosevelt added that "'arbitrary' . . . actually had a much broader meaning than 'unjustified' or 'illegal.'" ¹⁰⁶ In addition, Mrs. Mehta of India, Messrs. Ordonneau of France and Santa Cruz of Chile also expressed their support of this view.¹⁰⁷ The drafters had specifically chosen "arbitrary" to "cover all possible cases in which an arrest or detention should not take place."¹⁰⁸ Mr. Chang of China noted that:

[t]he word "arbitrary" as used in paragraph one of article 9 meant unjust, unfair, inconsiderate of others [sic]. It was quite right that that paragraph should contain a general exhortation of a moral character and should set a goal of justice and respect for the rights of others which the peoples of the world must strive to attain.¹⁰⁹

In response to criticisms that "arbitrary" was subjective and unclear, Mrs. Roosevelt had suggested that the Commission record its interpretation of the word.¹¹⁰ Unfortunately, the Commission failed to do so, and the debate over "arbitrary" continued.

Nevertheless, the Commission had demonstrated that the drafters preferred the much broader meaning of "arbitrary." Hence, when the Commission adopted the generalist point of view, it did so with the understanding that "arbitrary" was a more expansive concept than "unlawful."

102. Commission on Human Rights, Sixth Session, Summary Record of the 147th Meeting, U.N. Doc. E/CN.4/SR.147, at 10 (1950).

103. Commission on Human Rights, Sixth Session, Summary Record of the 146th Meeting, U.N. Doc. E/CN.4/SR.146, at 12 (1950). *See also* Commission on Human Rights, Sixth Session, Summary Record of the 144th Meeting, U.N. Doc. E/CN.4/SR.144, at 14 (1950).

104. Mrs. Roosevelt, for example, stated that "the word 'arbitrary' included the idea of injustice." Commission on Human Rights, Sixth Session, Summary Record of the 147th Meeting, U.N. Doc. E/CN.4/SR.147, at 9 (1950).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Commission on Human Rights, Sixth Session, Summary Record of the 146th Meeting, U.N. Doc. E/CN.4/SR.146, at 12 (1950).

110. Commission on Human Rights, Sixth Session, Summary Record of the 147th Meeting, U.N. Doc. E/CN.4/SR.147, at 7 (1950). In her opinion, "it should be unambiguously stated that 'arbitrary' referred not only to the conformity or non-conformity of an act with the law, but also to the nature of the law itself." *Id.*

The Economic and Social Council next considered the draft Covenant on Civil and Political Rights. Although the word "arbitrary" still raised some concerns, the Council nevertheless had little criticism of the Article.¹¹¹ The Third Committee, upon receipt of the draft covenant, decided that the first eighteen articles were in need of general improvement and clarification¹¹² and therefore, instructed the Commission on Human Rights to revise the draft articles.¹¹³ However, despite the numerous opportunities for critical comment on the draft arrest and detention article, only a few states opposed "arbitrary" because of its vagueness.¹¹⁴ The lack of a more significant protest indicates that the majority of the Committee implicitly endorsed the Article.¹¹⁵

The debates in the Commission sessions repeated the familiar arguments for and against both the generalist and the limitationist approaches. The majority of members, however, opposed the limitationist approach, pointing out the nearly insurmountable difficulties of drawing up a completely acceptable list of limitations to the right to personal liberty.¹¹⁶ The Commission finally resolved the problem by adopting a Polish amendment to the draft. This amendment combined the first two paragraphs of the draft Article with Article 3 of the Universal Declaration¹¹⁷ to create a new Article 9, paragraph 1.¹¹⁸

During the course of the debates, the Commission voted continually for the retention of "arbitrary," despite arguments that the word was too vague and imprecise.¹¹⁹ The majority of the Commission's members believed that "the rule

111. See generally Economic and Social Council, Social Committee, Eleventh Session, Summary Record of the 146th Meeting, U.N. Doc. E/AC.7/SR.146 (1950); 147th Meeting, U.N. Doc. E/AC.7/SR.147 (1950); 148th Meeting, U.N. Doc. E/AC.7/SR.148 (1950); 149th Meeting, U.N. Doc. E/AC.7/SR.149 (1950); 153rd Meeting, U.N. Doc. E/AC.7/SR.153, at 16-19 (1950).

112. See generally General Assembly, Fifth Session, Summary Records of the 288th-291st Meetings, 5 U.N. GAOR C.3, at 107-31, U.N. Doc. A/C.3/SR.288-291 (1950).

113. G.A. Res. 421B, 5 U.N. GAOR Supp. (No. 20), at 42, U.N. Doc. A/1775 (1950).

114. See Commission on Human Rights, Seventh Session, Draft International Covenant on Human Rights and Measures of Implementation of the First 18 Articles, General Observations on the Adequacy of the Drafting of Parts I and II, U.N. Doc. E/CN.4/528, at 38-42 (1951); General Adequacy of the Provisions Concerning Civil and Political Rights, U.N. Doc. E/CN.4/528/Add. 1, at 14-16, 27-29 (1952) (memorandum prepared by the Secretary-General); Observations and Suggestions by Non-Government Organizations, U.N. Doc. E/CN.4/660, at 9, 11 (1952) (memorandum prepared by the Secretary-General).

115. Hassan, *The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1)*, 3 DEN. J. INT'L L. POL'Y 153, 173 (1973) [hereinafter cited as Hassan, *Background and Perspective*].

116. See Commission on Human Rights, Eighth Session, Summary Record of 313th Meeting, U.N. Doc. E/CN.4/SR.313, at 12-13 (1952); Summary Record of 314th Meeting, U.N. Doc. E/CN.4/SR.314, at 5-14 (1952).

117. See text accompanying note 3 *supra*.

118. Commission on Human Rights, Eighth Session, Draft International Covenants on Human Rights and Measures of Implementation, Poland: Amendment to the U.K. Amendment, U.N. Doc. E/CN.4/L.183 (1952).

119. Commission on Human Rights, Second Session, Summary Record of the 36th Meeting, U.N. Doc. E/CN.4/SR.36, at 8 (1947); Commission on Human Rights, Report of the Fifth Session, 9 ESCOR Supp. (No. 10), Annex I, at 19, U.N. Doc. E/1371 (1949); Commission on Human Rights, Sixth Session,

of law did not provide adequate safeguards against the possible promulgation of unjust laws"¹²⁰ and attempted through the use of the word "arbitrary" to impose an international standard upon the content of domestic laws.¹²¹

The Third Committee concentrated on isolating a satisfactory definition of the word "arbitrary." In so doing, the Committee reinforced the Commission's interpretation of "arbitrary." Significantly, the Committee eventually adopted paragraph 1, as drafted by the Commission, without a single negative vote.¹²²

Of the thirty-six delegates who explicitly stated their views on paragraph 1, twenty-five¹²³ suggested that the paragraph did not refer solely to conformity with the law.¹²⁴ Rather, those delegates repeatedly noted that the paragraph had a far greater import because it introduced concepts of justice and reasonableness, and imposed an international standard on the content of national law.¹²⁵ Accordingly, the delegates viewed a broad interpretation of arbitrary as a means by which to provide maximum protection of the fundamental value of personal liberty.¹²⁶

Summary Record of the 147th Meeting, U.N. Doc. E/CN.4/SR.147, at 9-10 (1950); Commission on Human Rights, Eighth Session, Summary Record of the 314th Meeting, U.N. Doc. E/CN.4/SR.314, at 10-11 (1952).

120. *See, e.g.*, Statement by the representative of the United Kingdom, General Assembly, Thirteenth Session, Summary Record of 861st Meeting, 13 U.N. GAOR C.3, at 129, U.N. Doc. A/C.3/SR.861 (1958).

121. Sir Samuel Hoare, of the United Kingdom, stated: "It was evident from the discussions of the Commission on Human Rights that some delegations, apparently the majority, took the view that the second sentence did not refer to conformity with the law but to the content of the law itself." General Assembly, Thirteenth Session, Summary Record of the 864th Meeting, 13 U.N. GAOR C.3, at 142, U.N. Doc. A/C.3/SR.864 (1958).

122. Report of the Third Committee, 13 U.N. GAOR Annexes (Agenda Item 32) at 6-10, U.N. Doc. A/4045 (1958-59). There were 70 votes in favor, none against, and only 3 abstentions. *Id.*

123. Of the remaining eleven delegates, a number did not deal with the issue and others were ambiguous. *See* General Assembly, Thirteenth Session, Summary Records of 861st-867th meetings, 13 U.N. GAOR C.3, at 128-60, U.N. Doc. A/C.3/SR.861-867 (1958).

124. *See, e.g.*, Comments of Mr. Van Heuven, the U.S. representative:

Arbitrary arrest or detention implied an arrest or detention which was incompatible with the principles of justice or with the dignity of the human person irrespective of whether it had been carried out in conformity with the law. "Arbitrary" was the key word in the first paragraph, and the article would lose much of its force if it was replaced by "illegal" or "unjust." The word "arbitrary" embodied both ideas and indeed went appreciably beyond them.

General Assembly, Thirteenth Session, Summary Record of the 863rd Meeting, 13 U.N. GAOR C.3, at 137, U.N. Doc. A/C.3/SR.863 (1958).

125. Mr. Rossides, the representative of Greece, stated, for example, that he could see no objections at all to the use of the word "arbitrary." He noted that although the word had originally meant "discretionary," it had by then two meanings: it applied, first, to action based on will and not on reasoning or judgment, and, secondly, to the exercise of absolute power in a despotic and a tyrannical way. Arrest or detention might, in his view, be arbitrary in two senses: if it was unjust, and if, although it was in accordance with the law, the law itself was unjust. Both meanings, in his opinion, were covered by the second sentence of paragraph one. General Assembly, Thirteenth Session, Summary Record of the 865th Meeting, 13 U.N. GAOR C.3, at 148, U.N. Doc. A/C.3/SR.863 (1958).

126. *See, e.g.*, Statement of Mr. Morozov, of the Union of Soviet Socialist Republics, that "the laws designed to prevent arbitrary arrest or detention, mentioned in the second sentence . . . have the aim of giving effect to the right to liberty and security of person. . . ." General Assembly, Thirteenth Session, Summary Records of the 863rd Meeting, 13 U.N. GAOR C.3, at 139, U.N. Doc. A/C.3/SR.863 (1958).

In 1966, the General Assembly finally adopted the Covenant, which included the 1958 Third Committee draft of Article 9(1).¹²⁷ Although several other articles were singled out for criticism, Article 9(1) remained free of such criticism.¹²⁸ The fact that the many states, which had joined the United Nations in the eight year period between the Third Committee deliberations and the adoption of the Covenant, refrained from criticizing Article 9(1) suggests that the new states-members also found Article 9(1) acceptable.

C. "Arbitrary" in Articles 6, 12 and 17

An analysis of the process by which the word "arbitrary" was adopted in Articles 6, 12 and 17 underscores the distinction between "arbitrary" and "unlawful."

The Commission on Human Rights, in its discussion of Article 6,¹²⁹ eventually adopted the view that the word "arbitrarily" in paragraph 1 was not confined solely to the application of the law.¹³⁰ Rather, "arbitrarily" permitted the judgment of the content of national laws.¹³¹ In the Third Committee discussions, however, participants expressed a great variety of views, and again voiced limitationist arguments, concerns about the vagueness of "arbitrarily," and statements equating the term "arbitrarily" with "unjustly" or "unlawfully."¹³² Eventu-

127. Covenant on Civil and Political Rights, *supra* note 4, at 54.

128. Generally, the substantive articles of the Covenant received little criticism. *But see* Draft International Covenants on Human Rights, Twenty-First Session, Report of the Third Committee, 21 U.N. GAOR C.3 (1456th mtg.), U.N. Doc. A/C.3/SR.1456, at 482 (1966). The implementation provisions received the brunt of the criticisms. *See id.* at 476, 479-81 (1455th mtg.); 483-86 (1456th mtg.); Draft International Covenants on Human Rights, Twenty-First Session, General Assembly Provisional Verbatim Record of the 1496th Plenary Meeting, U.N. Doc. A/PV.1496, at 3, 43 (1966).

129. Covenant on Civil and Political Rights, *supra* note 4, art. 6(1). Article 6(1) provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.*

130. *See* Remarks of Sir Samuel Hoare of the United Kingdom, General Assembly, Twelfth Session, Summary Record of the 811th Meeting, 12 U.N. GAOR C.3, at 248, U.N. Doc. A/C.3/SR.811 (1957).

131. *Id.*

132. The discussions over the term arbitrary evidence a noticeable trend. Those who discussed Article 6 expressed a variety of opinions as to the meaning of the term. *See, e.g.,* General Assembly, Twelfth Session, Summary Record of the 811th Meeting, 12 U.N. GAOR C.3, at 248, U.N. Doc. A/C.3/SR.811 (1957). The discussions of Articles 9 and 12 show an ever-growing consensus as to the meaning of the word. *See, e.g.,* General Assembly, Twelfth Session, Summary Record of the 820th Meeting, 12 U.N. GAOR C.3, at 290, U.N. Doc. A/C.3/SR.820 (1957); General Assembly, Thirteenth Session, Summary Record of 863rd Meeting, 13 U.N. GAOR C.3, at 137, U.N. Doc. A/C.3/SR.863 (1958); General Assembly, Fourteenth Session, Summary Record of 959th Meeting, 14 U.N. GAOR C.3, at 250, U.N. Doc. A/C.3/SR.959 (1959). Finally, the discussions in relation to Article 17 reveal a nearly unanimous agreement as to the "ordinary meaning" of "arbitrary." *See, e.g.,* General Assembly, Fifteenth Session, Summary Record of the 1015th-1019th Meetings, 15 U.N. GAOR C.3, pt. 1, at 170-71, 175, 178, 180-82, 186, U.N. Doc. A/C.3/SR.1015-1019 (1960).

ally, however, the Committee found the Commission approach to be acceptable and retained the word.¹³³

The reappearance of "arbitrarily" in Article 12¹³⁴ again revived the debates over its suitability. Some members of the Third Committee opposed the use of the word,¹³⁵ and others favored its retention, arguing that it meant both "unjustly" and "illegally."¹³⁶ It was also argued that "arbitrarily" was perfectly acceptable, as it had already been used in Articles 6 and 9 of the draft Covenant.¹³⁷ Upon voting, the Third Committee specifically adopted the word "arbitrarily" in the text.¹³⁸

The use of the words "arbitrary or unlawful interference" in Article 17¹³⁹ best illustrates the distinction between "arbitrary" and the more limited term "unlawful." In the Third Committee, concerns about the use of "arbitrary" were still raised. Nevertheless, the great majority of the members expressing views on the subject indicated that the meaning of "arbitrary" could not be restricted to merely "unlawful"¹⁴⁰ because "the concept of 'arbitrary' was larger and wider than the concept of 'unlawful.'"¹⁴¹ As stated by the representative of Liberia, the Committee reasoned that "the word 'arbitrary' should be retained since the individual was thus protected against tyranny, the whims of others and other manifestations of totalitarianism."¹⁴² The Committee finally adopted Article 17, with seventy nations voting in favor, three nations abstaining, and significantly, no nation casting a negative vote.¹⁴³

133. General Assembly, Twelfth Session, Summary Record of the 820th Meeting, 12 U.N. GAOR C.3, at 290, U.N. Doc. A/C.3/SR.820 (1957).

134. Article 12(4) states: "No one shall be arbitrarily deprived of the right to enter his own country." Covenant on Civil and Political Rights, *supra* note 4, art. 12(4).

135. See, e.g., Statement of the representative of Ireland, General Assembly, Fourteenth Session, Summary Record of the 820th Meeting, 14 U.N. GAOR C.3, at 250, U.N. Doc. A/C.3/SR.820 (1959).

136. See Statement of Mr. Mehta of India, that "the word 'arbitrary' signified 'unjust' and 'illegal' at the same time." *Id.* at 242.

137. *Id.* at 246.

138. *Id.* at 250.

139. Covenant on Civil and Political Rights, *supra* note 4, art. 17 (emphasis added). Article 17 states: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." *Id.*

140. See, e.g., Statements of the representatives of Peru, General Assembly, Fifteenth Session, Summary Record of the 1015th Meeting, 15 U.N. GAOR C.3, pt. 1, at 170, U.N. Doc. A/C.3/SR.1015 (1960); of Cambodia, *id.* at 171 (1016th mtg.); of Afghanistan, *id.* at 171, 180 (1015th & 1017th mtgs.); of Yugoslavia, *id.* at 173 (1016th mtg.); of Iraq, *id.* at 175 (1016th mtg.); of France, *id.* (1016th mtg.); of the Netherlands, *id.* at 178 (1017th mtg.); of Ghana, *id.* at 186 (1019th mtg.).

141. *Id.* at 182 (statement of representative from Ireland).

142. *Id.* at 181.

143. *Id.* at 194.

V. SUBSEQUENT INTERPRETATIONS OF "ARBITRARY"

Subsequent interpretations of the word "arbitrary" further aid in an understanding of the word's meaning.

A. *Interpretations by United Nations Committees*

The United Nations Committee Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile provides one of the most important interpretations of "arbitrary."¹⁴⁴ During the course of its study, the United Nations Committee consulted the preparatory works and legislative history of the Universal Declaration and the Covenant on Civil and Political Rights. The Committee also referred to the reports of the United Nations Seminars on the Protection of Human Rights in Criminal Law or Procedure, and the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955 by the first United Nations Congress for the Prevention of Crime and Treatment of Offenders.¹⁴⁵ In addition, the Committee examined documents of the League of Nations and work undertaken by regional organizations, such as the Organization of American States and the Council of Europe.¹⁴⁶ Finally, the Committee collected information relating to the laws and practices concerning arrest and detention in "as many countries as possible."¹⁴⁷

After this exhaustive survey, the Committee concluded that "'arbitrary' is not synonymous with 'illegal' and . . . the former signifies more than the latter. It seems clear that, while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary."¹⁴⁸ Accordingly, the Committee adopted the following definition of "arbitrary": "Arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person."¹⁴⁹

The Committee's definition specifically relates freedom from arbitrary arrest and detention to the right to personal liberty by defining arbitrary arrest and detention in reference to deprivation of the right to personal liberty. The

144. 34 U.N. ESCOR Supp. (No. 8) at 5, U.N. Doc. E/CN.4/826/Rev. 1 (1964). The Commission on Human Rights initially considered the study at its seventeenth session, and the Committee subsequently revised the study, incorporating corrections and changes in the light of observations received from forty-eight governments.

145. *Id.* at 4.

146. *Id.*

147. *Id.* at 35.

148. *Id.* at 7.

149. *Id.* at 205. See Article 1 of the Draft Principles on Freedom from Arbitrary Arrest and Detention.

Committee's conclusion and definition, buttressed by its extensive research, lend considerable support to the broad interpretation of the word "arbitrary." The Committee also emphasized that Article 29(2) of the Universal Declaration supports its definition.¹⁵⁰ Under this Article,¹⁵¹ human rights are "subject only to such limitations as are determined by law." However, the law itself must be "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Therefore, the Article renders objectionable any law contrary to this purpose.¹⁵² According to one commentator, the paragraph "not only permits the imposition of limitations on the exercise of rights, it also puts limits on these limitations."¹⁵³

Another United Nations group, the Ad Hoc Working Group of Experts, appointed by the Commission on Human Rights to investigate charges of human rights violations in South Africa, also found that the standard imposed by the word "arbitrary" went to the content of national laws. The Group, in its report, concluded that certain South African laws violated the "arbitrary arrest" provision of Article 9 of the Declaration.¹⁵⁴ Similarly, two United Nations Seminars on the Protection of Human Rights in Criminal Law and Procedure recognized the possibility of an arrest which, although legal, would still be "arbitrary."¹⁵⁵

International legal scholars also have generally supported a broad interpretation of "arbitrary." Mr. Jimenez de Arechaga, one of the more active and prominent draftsmen of the Universal Declaration, has argued that the word "arbitrary" introduces the requirement of justice.¹⁵⁶ Similarly, another authority

150. Universal Declaration, *supra* note 3, art. 29(2).

151. *Id.*

152. United Nations Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No. 8) at 8, U.N. Doc. E/CN.4/826/Rev. 1 (1964).

153. Humphrey, *The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society*, in *THE PRACTICE OF FREEDOM* 137, 152 (R. St.J. MacDonald & J. Humphrey eds. 1979).

154. Commission on Human Rights, Twenty-Fourth Session, Report of the Ad Hoc Working Group of Experts, U.N. Doc. E/CN.4/950, at 415 (1967). *Accord* Commission on Human Rights, Twenty-Fourth Session, Study of Apartheid and Racial Discrimination in Southern Africa, Report of the Special Rapporteur, U.N. Doc. E/CN.4/949 (1967-1968).

155. The seminars were held in Baguio City (Philippines), Seminar on the Protection of Human Rights in Criminal Law and Procedure, Feb. 17-28, 1958, U.N. Doc. ST/TAA/HR/2 (1958), and in Santiago (Chile), Seminar on the Protection of Human Rights in Criminal Law and Procedure, May 19-30, 1958, U.N. Doc. ST/TAA/HR/3 (1958). The Baguio seminar adopted the following definitions:

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

Arbitrary arrest: an arrest authorized by a law which fails adequately to protect human rights because either (1) the legal right to arrest has been too widely defined, or (b) the means, circumstances or physical force attendant on the arrest exceed the reasonable requirements of effecting arrest.

U.N. Doc. ST/TAA/HR/2 (1958).

156. Arechaga, *supra* note 77.

has noted that the word "arbitrary," in both the Universal Declaration and the Covenant on Civil and Political Rights, means "unjust," as well as "illegal."¹⁵⁷ Both authors, along with many of their colleagues, acknowledge that the word "arbitrary" introduces a standard which involves more than simply the lawfulness of an act: the law itself, if unjust, is arbitrary.¹⁵⁸

B. *Judicial Interpretation*

There are few court decisions dealing with this issue. Those decisions, however, support the trend in broadly construing "arbitrary." Two Belgian cases, *In re Pietras*¹⁵⁹ and *In re Jacqueline-Marie Bukowicz*¹⁶⁰ held that a Polish statute, which contained certain "arbitrary" provisions, was inconsistent with Article 15 of the Universal Declaration. Similarly, Judge Carneiro of the International Court of Justice, in a separate dissenting opinion in the *Anglo-Iranian Oil Co. case*¹⁶¹ noted the distinction between the words "arbitrarily" and "unlawfully."

157. See Hassan, "Illegal" or "Unjust," *supra* note 24; Hassan, *Background and Perspective*, *supra* note 88. Dr. Hassan's argument is that the word "arbitrary," as used in the Universal Declaration and the Covenant on Civil and Political Rights, has acquired a "special meaning" as a result of the legislative history. This special meaning of the word appears "unjust." See *id.* at 181; Hassan, "Illegal" or "Unjust," *supra* note 24, at 254-62. Such a conclusion, however, faces the difficult problem of trying to clarify what is meant by justice, a tremendously vague and subjective concept. Dr. Hassan's ultimate conclusion is, therefore, of limited assistance.

158. Dr. Albert Verdoodt, author of one of the most comprehensive studies of the legislative history of the Universal Declaration, also has argued that "arbitrary," as used in the Universal Declaration, has a broader meaning than "unlawful." A. VERDOODT, *LA NAISSANCE ET SIGNIFICATION DE LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME* 123-25, 142-43, 159-61, 174-75 (1964); see also P. DE LA CHAPELLE, *LE DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME ET LE CATHOLICISME* 112-13 (1967); McDUGAL, LASSWELL & CHEN, *supra* note 19, at 548.

Dr. J. M. Glenn has developed a similar argument with respect to the Covenant on Civil and Political Rights. *Le Pacte International Relatif aux Droits Civils et Politiques et la Convention Européenne des Droits de l'Homme: Une Étude Comparative* 208-10 (unpublished doctoral thesis, Université de Strasbourg, 1973) (Dr. Glenn is a Professor of Law at McGill University and Member of the National Council of the Canadian Human Rights Foundation).

Judge Alice Desjardins, of the Superior Court of the Province of Quebec, has also noted that legality does not exclude arbitrariness. Paper delivered by A. Desjardins to the Canadian Council on International Law (Oct. 26-27, 1978). (Judge Desjardins is also a member of the Advisory Council of the Canadian Human Rights Foundation.)

The author has found only one scholar who has put forward a restricted meaning of the word "arbitrary." Professor L. Maki, in an attempt to base protection from arbitrary arrest and detention on general principles of law recognized by all nations, has emasculated the United Nations Committee definition of "arbitrary" and apparently largely ignored the work of Hassan and others, as well as the legislative history. See Maki, *General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention*, 10 CAL. W. INT'L L.J. 272 (1980).

159. See *In re Pietras* (Belgium), 1951 Y.B. ON HUMAN RIGHTS 14-15 (United Nations). For a discussion of this case, see Hassan, "Illegal" or "Unjust," *supra* note 24.

160. See *In re Bukowicz*, 1953 Y.B. ON HUMAN RIGHTS 21-22 (United Nations). For a discussion of this case, see Hassan, "Illegal" or "Unjust," *supra* note 24.

161. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 151 (Judgment of July 22, 1952). For a discussion of this case, see Hassan, "Illegal" or "Unjust," *supra* note 24.

In general, subsequent interpretations by United Nations organs, by scholars and by the courts have followed the same approach as the draftsmen of the Universal Declaration and the Covenant on Civil and Political Rights in assigning to "arbitrary" a broader meaning than "unlawful" and in seeking to maximize protection of personal liberty by means of the prohibition against arbitrary arrest and detention.

VI. THE SCOPE OF PROTECTION FROM ARBITRARY ARREST AND DETENTION

Although international legal experts agree that the term "arbitrary" imposes a standard to which national legal norms must conform, they encounter difficulty in delineating the scope of the standard. Most commentators, in trying to define "arbitrary," have referred to several imprecise ethical standards.¹⁶² Thus, the exact scope of protection still remains vague and unclear. In fact, "arbitrary" may not be susceptible of a single, all-encompassing definition. However, several criteria do give content to the standard. In the following discussion, the author reviews these criteria and then suggests a methodology by which the word "arbitrary" may be used to evaluate national legal norms.

A. *Criteria of Arbitrariness*

The Universal Declaration and the Covenant on Civil and Political Rights, themselves, offer guidelines as to the scope of protection from arbitrary arrest and detention. Those documents establish several principles in the area of arrest and detention, including:

1. Everyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest.¹⁶³
2. Everyone who is arrested shall be promptly informed of any charges against him.¹⁶⁴
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or judicial officer.¹⁶⁵
4. Anyone who is deprived of his liberty shall be entitled to take proceedings before a court to have the lawfulness of his detention determined.¹⁶⁶

162. See note 158 *supra*, for comments on Dr. Hassan's work. Similar problems occur in the studies of Mr. Arechaga, see note 158 *supra*; Mr. La Chappelle; see note 158 *supra*; and Dr. Verdoodt, see note 158 *supra*.

163. Covenant on Civil and Political Rights, *supra* note 4, art. 9(2).

164. *Id.*

165. *Id.* art. 9(3).

166. *Id.* art. 9(4).

5. It shall not be the general rule that persons awaiting trial shall be detained in custody.¹⁶⁷
6. Anyone arrested or detained on a criminal charge shall be entitled to a trial within a reasonable time or to release.¹⁶⁸
7. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.¹⁶⁹
8. No one shall be held guilty of any criminal offense on the basis of an act or omission which did not constitute a criminal offense at the time that it was committed.¹⁷⁰
9. No one shall be subjected to a heavier penalty than the one that was applicable at the time when the criminal offense was committed.¹⁷¹
10. No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.¹⁷²

Although these principles are primarily procedural in focus, and thus are of limited assistance in determining the general standard of protection imposed by "arbitrary" on substantive laws, these principles, nevertheless, do provide protection against arbitrary treatment. The safeguards set forth in these principles, which are designed to protect the personal liberty of the individual, emphasize the draftsmen's concern for the importance of maximizing the right to personal liberty.

The scope of the standard of protection afforded by the term "arbitrary," as used in both the Universal Declaration and the Covenant on Civil and Political Rights, also can be evaluated through an examination of the ordinary, dictionary definition of the word "arbitrary." From a reading of the definition previously discussed in this article,¹⁷³ "arbitrary" imposes the following standards:

1. a law would be arbitrary if it gave absolute discretion to a single authority (even absolute discretion as to the manner of arrest, regarding the amount of force to be used, for example, and the length of detention would be arbitrary);
2. a discriminatory arrest and detention law would be arbitrary;

167. *Id.* art. 9(3).

168. *Id.*

169. *Id.* art. 9(5).

170. Universal Declaration, *supra* note 3, art. 11(2); Covenant on Civil and Political Rights, *supra* note 4, art. 15(1).

171. Universal Declaration, *supra* note 3, art. 11(2); Covenant on Civil and Political Rights, *supra* note 4, art. 15(1).

172. Covenant on Civil and Political Rights, *supra* note 4, art. 11. Articles 10, 14 and 15 of the Covenant also contain other important provisions relating to detention and to procedure before the courts in criminal matters.

173. 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 110 (P. Gove 3d ed. 1976).

3. a despotic or tyrannical provision would fall within the meaning of "arbitrary."

The legislative histories of the Universal Declaration and the Covenant on Civil and Political Rights also offer guidance. Those engaging in the preparatory work of the Declaration and the Covenant frequently suggested that justice and reasonableness be the criteria for evaluation of national laws.¹⁷⁴ Unfortunately, both criteria are themselves vague and imprecise. Commentators have also suggested other criteria, including the notion of justice;¹⁷⁵ the incompatibility of the law with human dignity or with the right to liberty and security of persons;¹⁷⁶ the breadth of the definition of the right to arrest;¹⁷⁷ and the means by which officials effect an arrest, looking particularly to whether those means exceed reasonable requirements.¹⁷⁸ Again, however, most of the suggested standards are vague or merely refer to specific situations in which certain laws would be arbitrary.

The European Convention on Human Rights¹⁷⁹ is, unfortunately, also of little assistance in clarifying the scope of the standard of protection implied in the word "arbitrary." The Convention has followed a "limitationist" approach, in contrast to the broader approach of the Universal Declaration and the Covenant on Civil and Political Rights. As a result, the word "arbitrary" does not even appear in the Convention's "right to liberty" provision — Article 5(1).¹⁸⁰ By its

174. See, e.g., Commission on Human Rights, Sixth Session, Summary Record of the 144th Meeting, U.N. Doc. E/CN.4/SR.144, at 14 (1950); Summary Record of the 146th Meeting, U.N. Doc. E/CN.4/SR.146, at 10 (1950); Summary Record of the 147th Meeting, U.N. Doc. E/CN.4/SR.147, at 24-25 (1950); General Assembly, Thirteenth Session, Summary Records of the 861st-867th Meetings, 13 U.N. GAOR C.3, at 128-60, U.N. Doc. A/C.3/SR.861-867 (1958).

175. Arechaga, *supra* note 77. Hassan, "Illegal" or "Unjust," *supra* note 24, at 225; Hassan, *Background and Perspective*, *supra* note 88, at 153.

176. See Article 1 of the Draft Principles on Freedom from Arbitrary Arrest and Detention, in United Nations, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No. 8), U.N. Doc. E/CN.4/826/Rev. 1 (1964).

177. Seminar on the Protection of Human Rights in Criminal Law and Procedure, Feb. 17-28, 1958, U.N. Doc. ST/TAA/HR/2 (1958).

178. *Id.*

179. The European Convention on Human Rights was signed on November 4, 1950 and came into force on September 3, 1953. Five Protocols to the Convention have since been adopted. The Convention is reprinted in the following sources: COUNCIL OF EUROPE, DIRECTORATE OF PRESS AND INFORMATION, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1978) [hereinafter cited as EUROPEAN CONVENTION]; J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1969) [hereinafter cited as FAWCETT]; ROBERTSON, *supra* note 12.

180. EUROPEAN CONVENTION, *supra* note 179. Article 5(1) of the European Convention on Human Rights provides as follows:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

(a) The lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

limitationist approach, the European Convention provides a substantially lower standard of protection than do the Universal Declaration and the Covenant on Civil and Political Rights¹⁸¹ because the word "lawful" qualifies all the limitations to the right to personal liberty found in Article 5. To the extent, therefore, that "arbitrary" should protect against arbitrary laws, the United Nations prohibitions provide a higher standard of protection than does the European Convention. The usefulness of the Convention in regard to the Universal Declaration and the Covenant on Civil and Political Rights lies primarily in the jurisprudence which it has generated. Specifically, the interpretations of various paragraphs of Article 5 may provide guidance in determining the meaning and scope of the principles found in the Universal Declaration and the Covenant on Civil and Political Rights. The Convention also provides a set of criteria of arbitrariness.¹⁸²

The American Convention on Human Rights which recently entered into force¹⁸³ does, on the other hand, have an arbitrary arrest provision. Article 7 of the Convention reads, in part:

1. Everyone has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.¹⁸⁴

The Article links the fundamental goal value — the right to personal liberty — with the right to freedom from arbitrary arrest and detention by placing both concepts into one article.

Article 7 also emphasizes the difference between "arbitrary" and "unlawful." If "arbitrary" were to mean simply "unlawful," the third paragraph would be

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Id.

181. FAWCETT, *supra* note 179, at 57.

182. See EUROPEAN CONVENTION, *supra* note 170, arts. 5-7; ROBERTSON, *supra* note 12.

183. American Convention on Human Rights, *reprinted in* 19 INT'L LEGAL MATS. 634 (1980). The Convention entered into force on July 18, 1978.

184. 9 INT'L LEGAL MATS. 673 (1970). Unfortunately, the legislative history of the American Convention on Human Rights were not available to the author. A note indicating the most important documents of the legislative history is found in L.B. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1373 (1973).

wholly unnecessary, since protection from unlawful arrest and detention is provided for in the second paragraph. The fact that "arbitrary" goes much further than merely "unlawful," therefore seems clear. The Convention is also of some value in that, like the European Convention, it sets out various criteria of arbitrariness.¹⁸⁵

Unfortunately, however, the above criteria do not cover the full scope of the standard of "arbitrary," and thus their usefulness is restricted. The more abstract criteria, on the other hand, are vague and imprecise. The author therefore suggests a methodology or procedure, by which tribunals and organizations concerned with human rights can determine whether a state has arbitrarily arrested or detained an individual. Further, the methodology provides guidelines for drafting domestic legislation and regulations to ensure that they conform to the standard imposed by the Universal Declaration and the Covenant on Civil and Political Rights.

B. *A Methodology for Applying the Term "Arbitrary"*

The ultimate objective of any attempt to clarify the scope of the "arbitrary arrest and detention" standard is to assist in the functional application of that standard. A methodology for applying the term "arbitrary" may, therefore, prove to be more helpful than an imprecise ethical standard, such as the concept of justice.

In employing such a methodology, one must first determine the basic goal value which the international community has sought to protect. This article has emphasized the concerns expressed by the draftsmen of the Universal Declaration and the Covenant on Civil and Political Rights with regard to ensuring maximum protection for the right to personal liberty. The legislative history showed that the draftsmen were deeply concerned, throughout the entire drafting process, with ensuring optimum respect for the right to personal liberty. Another indication of this deep concern is reflected by the objects and purposes of the two instruments.

The concern with the international bill of rights arose as a direct consequence of, and reaction against, the fascism and totalitarianism of a number of pre-1945 European states. The fascist ideology did not hold in high esteem the right to personal liberty and thus the state was relatively free to encroach upon that right.¹⁸⁶ Thus, undeniably, the post-1945 concern with maximizing respect for personal liberty strongly motivated the drafting of the international bill of rights.

185. See American Convention on Human Rights, arts. 7(4)-(7), 8, 9, *reprinted in* 9 INT'L LEGAL MATS. 673 (1970).

186. The following comments highlight this dominant trait of fascism: "Fascist ideology is thus characterized by an emphasis on essentially irrational concepts such as authority, obedience, honour, duty, the fatherland or race. Fascists proclaim the existence of a true community, based on blind

With that goal clearly understood, one may then proceed to analyze the standard through the following approach. The more a law operates to deprive individuals of the right to personal liberty, the more such a law becomes arbitrary. At the same time, the state has a correspondingly greater duty to justify its actions. In this manner, "arbitrary" is not an absolute concept with a single, ascertainable meaning. Rather, it is as a relative concept; a law may be more or less arbitrary as it more or less derogates from the fundamental right to personal liberty. "Arbitrary" may thus be conceptualized as a continuum, at one end of which is complete maximization of the right to personal liberty, and at the other, complete minimization of the right to personal liberty. According to this analysis, one may judge a law or proposed law by the greater or lesser extent to which it places a restriction upon the right to personal liberty. The state may be able to justify impositions on the right to personal liberty by referring to other universally recognized goal values, and by arguing that factors such as necessity and proportionality justify its action. However, the state has the burden of justifying its derogation. This burden becomes greater as infringement upon the personal liberty value increases.

Through the above approach, one could remedy the imprecision of the "arbitrary arrest" prescription by reference to the basic goal value of personal liberty. One could employ the various criteria of arbitrariness to evaluate a norm. However, these procedural criteria would not be the sole means of evaluation; other substantive elements could also be considered.¹⁸⁷ For example, an evaluation of a substantive law effecting a deprivation of personal liberty could also consider such features as:

- (a) the temporal features of the norm, i.e., the duration of the deprivation;
- (b) the degree and extent of the deprivation;
- (c) the scope of the authorities' discretion, e.g., as to the manner of arrest (degree of force to be used) and as to the length of detention;
- (d) the discriminatory features of the norm.

The relevance of the criteria of discrimination can be illustrated through an examination of the following two hypothetical rules: (1) Drunken drivers will be incarcerated for 24 hours, and (2) Drunken drivers will be incarcerated for 24 hours unless they are white, in which case they will be incarcerated for 12 hours. Rule 1 restricts personal liberty more than rule 2. Yet, before one can determine whether either rule is an arbitrary rule, one must first realize that the sug-

obedience and the leadership principle." M. KITCHEN, *FASCISM* 86 (1976). Fascism has also been characterized as "the submergence of self in an emotionally perceived and satisfying integral fellowship. Therein, the democracy of belonging was allied to absolute obedience to a creed and its high priests." A. CASSELS, *FASCISM* 348 (1975).

187. The distinction between procedural and substantive denial of justice is enunciated in, Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 CAN. Y.B. INT'L L. 73, 86 (1976).

gested methodology does not entail the comparison of one rule to another in the attempt to determine the arbitrariness of either rule. Rather, one evaluates each rule by considering (a) the extent to which it maximizes or minimizes the right to personal liberty with (b) the justificatory arguments of the state. The state could develop a reasonably plausible argument to justify Rule 1. Rule 2, however, is tainted by its discriminatory element. The Rule, as formulated, violates the internationally accepted goal value of freedom from discrimination. An attempt at justification of Rule 2 by reference to the justificatory argument of Rule 1 is therefore considerably weakened.

The above example also illustrates that the state's ability to justify its behavior qualifies the continuum. The state may justify relatively severe measures of restriction on the right to personal liberty in order to protect certain other universally recognized individual human rights. Murder and rape, for example, conflict with the humane and civilized requirements of mutual individual respect; thus, relatively severe deprivations of personal liberty may be appropriate. The greater the intrusion upon the value of personal liberty, the heavier the burden that the state must meet to demonstrate the non-arbitrariness of its action.

In essence, the suggested methodology allows for a far greater number of criteria to evaluate a given norm, with the burden of justification always remaining upon the state. This approach should assist in the specific application of the standard of arbitrary by providing a clearer process by which to evaluate that standard.

VII. CONCLUSION

The concept of freedom from arbitrary arrest and detention has been expanded by Article 9 of the Universal Declaration of Human Rights and Article 9(1) of the International Covenant on Civil and Political Rights. By expanding this freedom, the drafters of these international instruments have broadened the meaning that historical predecessors gave to the concept. Although the Magna Carta, the Habeas Corpus Acts of England and the French Declaration of the Rights of Man and the Citizen attempted to protect against "unlawful" arrest or detention, those documents did not afford protection against "arbitrary laws." The standard established by the Universal Declaration and the Covenant on Civil and Political Rights, on the other hand, not only includes, but also goes beyond, protection from "unlawful" arrest or detention. It encompasses protection against arbitrary laws in addition to protection against unlawful acts. In this manner, these instruments establish an international standard to which the content of national legal systems must conform.

Analysis of the preparatory works and debates preceding the adoption of these documents demonstrates that the draftsmen of both the Universal Declaration and the Covenant on Civil and Political Rights were concerned with

protecting individuals from arbitrary arrest and detention laws in addition to unlawful arrest or detention. The debates on Article 9 of the Universal Declaration demonstrate that the draftsmen were committed to providing the greatest possible degree of protection of the right to personal liberty. The draftsmen further echoed this concern during the discussions on Article 9(1) of the Covenant on Civil and Political Rights. They drew a distinction between "arbitrary" and "unlawful" interpretation stressing the notion that rules of law do not provide adequate safeguards against the possible promulgation of unjust laws. In their efforts to maximize personal liberty, the draftsmen of both Articles 9 of the Universal Declaration and 9(1) of the Covenant on Civil and Political Rights illustrated the relationship between the optimum personal liberty and the freedom from arbitrary arrest and detention provisions. The United Nations Committee Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention or Exile, as well as Article 7 of the American Convention on Human Rights, also underscore that relationship.

However, authorities, in equating the broad interpretation of "arbitrary" with imprecise ethical standards such as "justice," have not succeeded in clarifying the concept. The imprecision resulting from the broad interpretation of "arbitrary" may be remedied by reference to the goal of maximizing personal liberty.

"Arbitrary" is not an absolute concept with a single ascertainable meaning. Therefore, various criteria of arbitrariness can be extrapolated from the Universal Declaration and the Covenant on Civil and Political Rights, and from doctrinal writings. However, although such criteria are helpful, they are either vague, or limited in scope to either procedural considerations or examples of specific situations where certain laws would be "arbitrary." The author, therefore, suggested an alternative approach which may serve as a guideline to courts and legislatures, as well as to organizations concerned with the protection of human rights. According to this approach, the more a law allows, or provides for, the deprivation of the right to personal liberty, the more arbitrary that law becomes. This methodology recognizes that "arbitrary" is a relative concept. One measures the "arbitrariness" of a law in reference to the degree to which it impinges on the fundamental right to personal liberty. As the degree of impingement increases, the state's burden to justify the law, and to demonstrate its non-arbitrariness becomes greater. The methodology also uses the concept of "arbitrariness" to introduce, into specific argumentation, a wide range of interests and values. The suggested approach is intended to help ensure maximum protection against arbitrary arrest and detention.