GENERAL PRINCIPLES OF HUMAN RIGHTS LAW RECOGNIZED BY ALL NATIONS: FREEDOM FROM ARBITRARY ARREST AND DETENTION

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The international legal community has failed to prevent human rights violations with its traditional responses — ineffective complaint procedures and noble proclamations of the human rights of mankind.[1] Concerned response has generally manifested itself in the form of studies, conventions, and declarations by international organizations.[2] A more realistic approach[3] to the develop-

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1. *See* G. DA FONSECA, HOW TO FILE COMPLAINTS OF HUMAN RIGHTS VIOLATIONS (1976) (text in Spanish) (this is one of the first publications to compile information and procedures on investigations of Human Rights violations by international organizations such as the United Nations Commission on Human Rights). Da Fonseca realistically points out that, in spite of the judicial appearance of complaint procedures, they are basically political in nature. The most drastic action the Commission can take is to perform an investigation of the complaint, and the investigation may only be done with the expressed consent of the nation concerned. *Id.*

2. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948); Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, 18 U.N. GAOR, Supp. (No. 15) 35, U.N. Doc. A/5515 (1963); Declaration on the Elimination of Discrimination against Women, G.A. Res. 2263, 22 U.N. GAOR, Supp. (No. 16) 35, U.N. Doc. A/6716 (1967); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950); Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, 70, *reprinted in* H. DEVRIES & J. RODRIGUEZ-NOVAS, THE LAW OF THE AMERICAS 222 (1965) [hereinafter cited as O.A.S. CHARTER].

3. *See Introduction* to I CASE STUDIES ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS at xix (W. Veenhoven ed. 1975) [hereinafter cited as Veenhoven]. John Scali, former United States Representative to the United Nations, compared human rights discussions in the United Nations to discussions on other topics and found that "in no other area was the contrast between what nations say and what they do so stark and so vivid [and] on no other issue was the gap between the ideally desirable and practically attainable so frustratingly wide." *Id.* A specific example of this lack of implementation of human rights declared in the Charter is the continued existence of racial discrimination. In subscribing to the Charter, all members pledged themselves to take joint and separate action for the achievement of

ment of international protection for human rights may be to ascertain general principles of law, recognized by all nations, that protect human rights.

General principles of law recognized by all nations have traditionally been considered an important source of international law.[4] Although general principles have often been referred to by international tribunals,[5] scholars have done little to define the scope and content of such principles. This article attempts to define general principles among those recognized by all nations, focusing on human rights, where the variety of international claims and declarations makes human rights law an area of extreme uncertainty.

Identifying general principles on which there is universal agreement may help to settle this uncertain area of international law. Because some countries incorporate international law into their own legal systems, general principles of human rights recognized by all nations, once identified, become applicable in local courts as well as international tribunals.[6] A codification of general principles of human rights law recognized by all nations could establish a foundation upon which human rights law can further develop.

This article searches for general principles of human rights law by examining the municipal law of states. Dual state interests — the collective responsibility of promoting human rights on an international level versus a state's interest in preserving its exclusive jurisdiction over local affairs — is discussed as an obstacle to the international development of human rights. This article then examines and compares procedural municipal laws of several countries to discern common denominators that might be among those

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universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. U.N. CHARTER art. 1, para. 3. Yet, racial discrimination is still widely practiced. It was pointed out at a meeting of the United Nations Commission on Human Rights that

> [racial discrimination] exists everywhere in one form or another — and this applies to North and South America, Europe (East and West), all of Africa and Asia. No continent, country or people is free from some form of racial discrimination not only of Whites against Blacks but Blacks against Whites, Whites against Whites, and Blacks against Blacks.

Veenhoven, *supra*, at xviii.

4. I L. OPPENHEIM, INTERNATIONAL LAW 29-30 (8th ed. 1955).

5. *See, e.g.*, North Sea Continental Shelf Cases, [1969] I.C.J. 3, 42-43; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. 4, 10.

6. An excellent example of a municipal court's application of international law is West Rand Central Gold Mining Co. v. The King, [1905] 2 K.B. 391.

general principles of human rights law recognized by all nations. This article concludes by suggesting that this approach to ascertaining general principles be employed in the future to further the development and codification of international law.

I. SEARCHING FOR GENERAL PRINCIPLES OF LAW RECOGNIZED BY ALL NATIONS

A. Municipal Law as a Source of General Principles

General principles of law recognized by all nations are an important source of international law.[7] A high regard for general principles of law was in evidence when the drafters of the Permanent Court of International Justice (PCIJ) Statute included a provision calling for the Court to apply "the general principles of law recognized by civilized nations."[8] Today, similar provisions are found in the International Court of Justice (ICJ) Statute.[9] Yet, international tribunals have invoked general principles of law infrequently. General principles of law have been viewed as a safety valve to be applied by the courts only when no applicable international convention or custom can be found.[10] Courts are reluctant to apply general principles of law, because the exact contents of such principles have yet to be defined.[11]

Numerous writers have explored the sources of general principles of law and there has been considerable controversy among international lawyers regarding the scope and exact meaning of such

7. OPPENHEIM, *supra* note 4, at 29-30.

8. B. CHENG, GENERAL PRINCIPLES OF LAW at xiii (1953).

9. Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1, 59 Stat. 1055, 1060, T.S. No. 993 [hereinafter cited as ICJ STATUTE]. The inclusion of general principles of law as a source of law to be used by the Court constitutes an important landmark in the history of international law. States, therefore, expressly recognize the existence of a source of international law independent of treaties and custom. OPPENHEIM, *supra* note 4, at 29-30.

10. H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 165-67 (rev. ed. 1958).

11. *See* I G. SCHWARZENBERGER, INTERNATIONAL LAW 43 (3d ed. 1957). For an example of the confusion arising in the application of general principles, *see generally* Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Iraq and Turkey), [1925] P.C.I.J., ser. B, No. 12. Before this opinion, the Court had repeatedly upheld the principle that no one can be the judge in his own cause. LAUTERPACHT, *supra* note 10, at 158-59. Yet, one of the principles embodied in the Covenant of the League of Nations was the overriding requirement of unanimity on decisions. *Id.* at 159. Accordingly, when a dispute arose between Great Britain and Turkey, the Court had to decide whether it could vote other than unanimously. *Id.* The Court, by reference to the principle that no one can be the judge in his own cause, overrode the rigid provisions of Article 5 of the Covenant relating to absolute unanimity. *Id.* at 159-60.

principles.[12] Some writers consider general principles of law to refer primarily to principles of international law founded upon custom and express agreements.[13] However, neither scholars nor the drafters of the PCIJ Statute have suggested that municipal law, the law of individual nations, is not a source of general principles of law.[14] On the contrary, while some writers place emphasis on international law as a source of general principles of law, *all* studies consider municipal law as one source of such principles.[15] Furthermore, even scholars who emphasize international law and international tribunal decisions as sources of general principles of law conclude:

> Since the essence of general principles of law is the fact of their being common to all legal systems, it is . . . hoped . . . such studies of international tribunal decisions . . . may also be of interest to municipal and comparative lawyers who themselves have much to contribute . . . [to the study of general principles of law].[16]

It therefore "remains for comparative lawyers to elaborate the exact contents of such general principles of law."[17]

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12. CHENG, *supra* note 8, at 2.

13. OPPENHEIM, *supra* note 4, at 96. A contrary argument can be made by scrutinizing the ICJ Statute. Because other sections of the ICJ Statute call for the application of international law found in conventions and custom, it would be redundant to interpret the general principles of law section as the same law. CHENG, *supra* note 8, at 2-3. Therefore, these proponents claim that the general principles of law provision can only be meant to refer to principles found in municipal law. H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 71 (1927). According to their view, general principles of law "are for the most practical purposes identical with general principles of private law." *Id.*

14. *See* CHENG, *supra* note 8, at 1-26.

15. *Id.*

16. *Id.* at xv.

17. SCHWARZENBERGER, *supra* note 11, at 43. "The comparative method of studying the legal systems of different nations is no doubt a valuable and even conclusive test [of] whether a given principle represents a general truth . . . ." CHENG, *supra* note 8, at 392. Comparative law in this area is valuable in the interpretation of multinational agreements by aiding in construing terms such as "misuse of power" as grounds for the annulment of administrative acts. This term is found in Article 3 of the European Coal and Steel Community Treaty, Apr. 18, 1951, 261 U.N.T.S. 141; Article 173 of the Treaty of Rome, *entered into force* Jan. 1, 1958, 298 U.N.T.S. 11; and Article 146 of the Euratom (European Atomic Energy Community) Treaty, *done* Apr. 17, 1957, 298 U.N.T.S. 167. In arriving at the proper meaning of this term, the Court of Justice for the European Economic Community has based its holdings on comparative law discussions of the Advocate General, and has searched for a common principle in the laws of the individual members of the Community. *Id.* Similarly, comparative law methods can be used to find the exact content of general principles of law by ascertaining the common core of principles recognized by all nations.

"The Advocates General have frequently submitted that the [Euratom] Treaty can be taken in particular fields to have borrowed or adopted concepts developed in the legal systems of Member States." 1 A. CAMPBELL, COMMON MARKET LAW 530 (1969). Where a

Municipal law should be included as a source of general principles of law, because "[i]nternational law has recruited and continues to recruit many of its rules and institutions from private systems of law."[18] Yet, if international law borrowed from municipal laws "lock, stock and barrel," it would be difficult to envision any application of general principles of law.[19] It is therefore more reasonable to regard "the rules and institutions of private law as an indication of policy and principles rather than . . . directly importing these rules and institutions."[20]

The notion of general principles of law as those laws common to all municipal systems is supported by a comparison of the application of custom and general principles of law under the ICJ Statute. Article 38 provides in part for the following:

> 1. The Court whose function is to decide in accordance with international law such disputes as are submitted to it shall apply . . .
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> . . . .
>
> (b) international custom, as evidence of a general practice accepted as law,
>
> (c) the general principles of law recognized by civilized nations.[21]

The ICJ Statute requires the Court to apply "custom," meaning a general practice among states accepted by them as law. Accordingly, a general practice among states, as well as the recognition of the legal character of such practice, is required for customary law to be applicable.[22]

In contrast, application of general principles of law does not require any such general practice among states. Rather, this source of international law consists of "general principles of that social phenomenon common to all civilized societies which is called law."[23] One drafter of the ICJ Statute summarized general principles of law by stating that "general principles of law [are] the basis

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treaty contains no solution in regard to a particular point, "the Court, to avoid being guilty of a denial of justice, is thus obliged to resolve the problem [using] rules recognized by the legislation and jurisprudence of Member States." *Id.* at 530 (quoting Algeria and Others v. Common Assembly, 3 RECUEIL 114-15 (1957)).

18. SCHWARZENBERGER, *supra* note 11, at 46.
19. *Id.*
20. *Id.*
21. ICJ STATUTE art. 38, para. 1.
22. CHENG, *supra* note 8, at 24.
23. *Id.*

of the municipal law of all or nearly all states."[24]

This interpretation of general principles of law suggests that among legal systems there exists a common denominator of principles that are necessary for the existence of any municipal system. This approach to general principles of law is a basis upon which to begin a search for general principles of law among municipal systems that might be said to be recognized by all nations.

II. An Obstacle to Advancing Human Rights: Dual State Interests

International concern for human rights must confront the problem of dual state interests.[25] Human rights must be given collective recognition by states, because such recognition is essential to the existence and protection of rights promoting human dignity. Simultaneously, individual state interests demand exclusive control over predominantly local affairs.[26] Unfortunately, such control can affect human rights development internationally. In addition, "how a nation-state controls its people . . . and organizes its . . . [institutions] may well affect the general practices of other nation-states and their willingness or unwillingness to engage in particular measures of cooperation" for the promotion of human rights.[27]

McDougal summarizes state perspectives in regard to human rights and international law by stating:

> The most general interest of all states and peoples, adhering to the values of human dignity, is . . . a world public order which achieves that balance between the inclusive competence of the general community of states and the exclusive competence of particular states which best promotes the greatest total production, at least cost, of their shared values.[28]

The advancement of human rights brings into opposition competing state interests. States recognize that in today's world of interdependence, the responsibility for promoting human dignity must be collectively shared on an international level. Simultaneously, there is a state's interest in protecting its exclusive jurisdiction over predominantly local affairs. These two interests have qualities that contradict each other. One demands subordinating sovereign interests to promote the international protection of human rights; the

24. *Id.* at 25.
25. *See* M. McDougal, Studies in World Public Order 157-59 (1960).
26. *Id.*
27. *Id.* at 159.
28. *Id.* at 159.

other calls for exclusive national jurisdiction over local matters. General principles of law in the area of human rights must, therefore, satisfy *both* interests if they are to be universally accepted.

In examining these contradictory state interests, it is apparent that in order to promote human rights, national interests must give way to collective responsibility. It has become clear that

> no nation can any longer cope unaided with the probabilities and possibilities, as well as with the certainties, of modern existence. Yet the state invariably claims its own interests to be the center of its moral universe.
>
> . . . [A]s long as the assertion of the interests of the national community is regarded as the highest good, nationalism will remain an armed doctrine and national sovereignty an aggressive force.[29]

Consequently, the concept of shared responsibility for promoting human rights must be considered to be of national interest.[30]

A state's claim of exclusive jurisdiction over local transactions presents a formidable obstacle to the international development of human rights. An individual's mere *presence* within a state may be deemed sufficient grounds for characterizing his treatment as a local matter, leaving the application of any human rights to individual state discretion.

Under these circumstances, prospects for international human rights development appear grim. McDougal, however, combines the dual state interest concept with his description of international law and suggests a solution to this dilemma. He describes international law as a body of flexible prescriptions related to community policies.[31] Under his theory, international law is a system that is sufficiently flexible to include individual community policies.[32] Furthermore, McDougal suggests that agreement on common values in the international community can be attained by a "creative balance" between dual state interests.[33]

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29. M. MOSKOWITZ, THE POLITICS AND DYNAMICS OF HUMAN RIGHTS 5 (1968).
30. MCDOUGAL, *supra* note 25, at 159.
31. *Id.* at 170.
32. *Id.*
33. *Id.* The view of international law as a flexible body of policies has been held by many legal scholars. Professor Hoffmann states: "A vigorous discussion is taking place, among international lawyers and political scientists, about the proper place and possibilities of international law." Hoffmann, *International Law and the Control of Force*, in THE RELEVANCE OF INTERNATIONAL LAW 34, 34 (K. Deutsch & S. Hoffmann eds. 1971). "[W]e must look at international law from the viewpoint of the policy makers: where and when does the respect and application of rules fit in their constellation of policies?" *Id.* at 36. Scholars of international law agree that there is a need to develop "tools and concepts to study and

Applying his suggestion to the international development of human rights, this creative balance will satisfy both state interests. A first step toward the international recognition of human rights is to distinguish procedural from substantive rights. Under this approach, universal recognition of procedural rights is sought first, leaving substantive rights to the discretion of individual state law. Thus, a creative balance can be attained and both state interests can be upheld. There would be shared responsibility in promoting human rights by the international recognition of basic procedural rights, but there would also be the recognition of a state's exclusive jurisdiction to apply its substantive laws within its borders. Because recognition of universal procedural principles would not unduly interfere with other state interests, they are a realistic starting point in the development of international human rights.

III. PROCEDURAL MUNICIPAL LAW AS A SOURCE OF GENERAL PRINCIPLES IN HUMAN RIGHTS LAW

In examining the municipal law of states in search of common denominators, it is necessary to ascertain the laws that are essential in any legal system for the development of human rights. If such laws can be identified, then legal systems recognizing *any* human rights must at a minimum recognize these prerequisite laws. Because all nations claim to recognize *some* human rights (despite the lack of agreement on the specific rights recognized), logically all nations must recognize the laws prerequisite to the existence of *any* human rights. A search for common denominators in state municipal law should therefore attempt to find and identify the prerequisite laws necessary for the existence and development of human rights.

Historically, the starting point on the path toward human rights development has been the existence of a single background condition — a secure and procedurally regularized legal system.[34]

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explain the dynamic aspects of [the international] legal process." *Introduction* to I THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: TRENDS AND PATTERNS AT ix-x (C. Black & R. Falk eds. 1969).

34. Claude, *The Classical Model of Human Rights Development*, in COMPARATIVE HUMAN RIGHTS 6, 7 (R. Claude ed. 1976). One view of human rights is that they exist as a matter of convention. *See generally* Edel, *Some Reflections on the Concept of Human Rights*, in HUMAN RIGHTS 1, 1 (E. Pollack ed. 1971). John Locke describes freedom in terms of the safety and security found in a civil society, which offers procedural safeguards against the actions of those who step outside the bounds of civilized behavior. *See* Locke, *The Second Treatise of Civil Government*, in THE TRADITION OF FREEDOM, pt. II, at 1, 23-27 (M. Mayer ed. 1957). Such procedural safeguards establish a sphere of special protection for individual

There is nothing idealistic about this requirement; it merely calls for an operative legal system that securely establishes some fundamental rights which are recognized by society. The existence of human rights requires two major developments — agreement between members of society on the rights to be enforced and a system of enforcement.[35] Where the government enforces human rights, "the strength of the state can alone secure the liberty of its members."[36] This freedom, *political freedom*, can be defined as the "condition of not being subject to the inconsistent, uncertain, unknown, arbitrary will of another . . . ."[37] This freedom is dependent upon establishing limits to the domination of an individual by his government.[38]

Scholars emphasize that without regularized procedures, the individual is subject to the uncertain and arbitrary will of another;[39] under such circumstances, no human rights can exist. However, once regularized legal procedures exist, limitations are placed on the domination of others, and the fundamental human right — freedom from arbitrary treatment — is born.

Regularized legal procedures have long been recognized as an important prerequisite to the existence and development of human rights.[40] Any municipal system purporting to recognize human

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rights. "Very prominent in the modern tradition of rights is the notion that rights should protect . . . freedom from excessive interference on the part of the state." R. FLATHMAN, THE PRACTICE OF RIGHTS 154 (1976).

35. The system of enforcement of rights has been characterized as coercion; however, here the term coercion is used as "an expression of liberty." Cervera, *Natural Law Restated: An Analysis of Liberty*, in HUMAN RIGHTS 55, 60-61 (E. Pollack ed. 1971).

36. J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 52 (G. Cole trans. 1950).

37. Claude, *supra* note 34, at 10.

38. *Id.*

39. Charles de Secondat claims that liberty is a condition where there is no abuse of power by government:

> To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government [should] be constituted [so that] no man shall be compelled to do things to which the law does not oblige him, nor force to abstain from that which the law permits.

C. de Secondat & C. de Montesquieu, *The Spirit of Laws*, in THE TRADITION OF FREEDOM, pt. I, at 1, 81 (M. Mayer ed. 1957).

40. This connection between procedural rules and human rights was emphasized by Max Weber, who stated that procedural rules of law are fundamental to human rights development. He stated that the demands for such basic human rights as " 'legal equality' and . . . guaranties against arbitrariness require formal rational objectivity in [the] administration [of justice] in contrast to personal free choice . . . ." M. WEBER, MAX WEBER ON LAW AND ECONOMY 355 (1954).

Professor Colliva of Bologna, in an historical study of the late medieval constitutions of Bologna in search of antecedents of modern human rights, emphasizes the importance of procedurally regularized legal institutions to the development of human rights. Colliva, *Die*

rights must, therefore, also recognize certain regularized legal procedures necessary for their existence. Because all nations purport to recognize some human rights, recognition of the prerequisite procedural rules must be universal. Following this logic, regularized procedural rules common to all municipal systems are a fruitful source of general principles of law recognized by all nations.

Comparative law scholars have encountered difficulty in comparing these procedural rules and their historical development.[41] Although certain procedural laws are a prerequisite for human rights development, the development and form of these procedures vary greatly and are often difficult to compare. Ironically, beginning human rights development by placing procedural limits on governmental domination of the individual marks the discovery of procedural differences between legal systems.[42] If agreement on procedural rules exists at all, it must be found in the prerequisite

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Rechtsstaatlichheit im Mittelalter, INTERNATIONALES COLLOQUIUM UBER MENSCHENRECHT ASSOCIATION FOR THE UNITED NATIONS 1-20 (W. Bruxenstein ed. 1968). Colliva underscores the importance of the development of regularized and rationalized legal procedures under Italian free-community constitutions; such procedures set the stage for the development of publicly defined legal rights. *Id.*

41. *See* G. MUELLER & F. LE POOLE-GRIFFITHS, COMPARATIVE CRIMINAL PROCEDURE 3-6 (1969). The substance and procedures of the rule of law will always be concerned with relations between authority and the individual. H. EHRMANN, COMPARATIVE LEGAL CULTURES 49 (1976).

> The question of where conflicts between public authorities and individuals should be decided has long divided Anglo-American and civil law systems. In the former, the view has been that the equality of all before the law and thereby the rule of law itself would be violated if suits involving government and administration were not tried in the "common" courts. On the European continent and in Latin America a more or less elaborate hierarchy of administrative tribunals has been developed to decide this kind of controversy.

Id.

42. An example of this divergence in procedural development is clearly shown in a comparison of human rights development in the administration of criminal justice in the Anglo-Saxon and Continental systems. An analysis of these systems approximately 760 years ago would have shown the two systems to be identical. For several centuries, until 1215, the nature and conduct of criminal proceedings was actually indistinguishable on the European continent and in England.

> The predominant mode of accusation was private, and trial was by ordeal during church ceremonies. Superstition and arbitrary wills of sovereigns reigned virtually supreme until 1215 when the nobles forced King John to sign the Magna Charta, the document which . . . laid down the basis for a system of rational guilt determinations.

MUELLER & LE POOLE-GRIFFITHS, *supra* note 41, at 3-4.

The new system, prohibiting clergy from officiating at trial by ordeal, sparked new developments in guilt determinations: "The English . . . were forced to seek alternate . . . more rational modes of determining guilt or innocence of suspected persons. But the choice of [the] English . . . and the Continentals . . . was to be rather different, ultimately making for a radically different position of the defendant in the criminal process." *Id.* at 4.

rules necessary for the development of human rights — rules preventing arbitrary decision within the legal system. The historical development of these prerequisite rules has been anything but uniform, which has led to the adoption of widely differing procedures by the various legal systems.

While acknowledging the diverse development of these procedures, it remains possible to find procedural principles that are universally recognized — namely, the *purpose* of such procedural laws. The fundamental purpose of these procedural rules is to protect the individual from arbitrary domination by placing limits on the activities of governing bodies. In other words, it is not a specific description of the limits themselves that is important, but the fact that their existence accomplishes the same result — protecting the individual from arbitrary domination. Under this approach, such procedures, although different in detail, agree in principle. Accordingly, among these procedures there must exist general principles of law upon which all nations agree.

IV. Difficulties in Comparing Municipal Law

Determining general principles of law by examining various national laws, even when limited to basic procedural principles, is a difficult undertaking. If the comparisons are to be relevant and useful, both doctrine and practice must be compared.[43] An example of the need to compare both doctrine and practice is found "in countries that came under the sway of Confucian thought, such as traditional China and Japan, [where] ritual and not law was the foundation of the social order. Neither lawmaking nor the judicial process was looked upon as the normal means of maintaining or restoring harmony among these societies."[44] An examination of only the lawmaking process in such systems would be meaningless. Comparative law scholars emphasize that

> [m]ere formal collocation of the laws to be compared is not adequate; account must be taken of the interpretive doctrines and their illuminating applications by the courts . . . as well as of the differing structures of ideas, the historical background, and the specific . . . practical aspects relating to each question.[45]

Another problem with comparative analysis is the dearth of

43. Hug & Ireland, *The Progress of Comparative Law*, 6 TUL. L. REV. 68, 73 (1931).

44. EHRMANN, *supra* note 41, at 18.

45. Yntema, *Research in Inter-American Law at the University of Michigan*, 43 MICH. L. REV. 549, 557 (1944).

reliable information in such developing areas of law as human rights.[46] Narrowing the scope of the investigation to the study of specific procedural rules diminishes this problem, because these rules are often found in provisions of procedural codes and statutes. However, the student of comparative law is still faced with the problem of interpreting these provisions in their unfamiliar legal system context.

Because of these difficulties, the search, in this article, for general principles of law found in municipal law is limited to the use of three reasonably reliable sources. The first two sources are compilations of statements made by individual countries regarding the laws and practices of their respective legal systems. These declarations were made in response to a United Nations solicitation of world opinion on specific topics.[47]

When no first-hand information is available, national constitutions provide a third source of information. This source is important because of its availability; translations of all national constitutions are available in English. However, because examining constitutions could lead to errors in the interpretation of municipal laws and their practice in unfamiliar systems, areas of possible uncertainty will be so indicated.

V. Use of United Nations Studies as a Primary Source of Research Material

As discussed above, the search for general principles of law has focused on the procedural rights considered prerequisite to the further development of other human rights. Studies by the United Nations Commission on Human Rights support the premise that certain prerequisite rules exist.[48] In particular, the Commission has focused on an important right crucial to the advancement of other human rights — the right to be free from arbitrary arrest and detention.[49] The Universal Declaration of Human Rights and the Commission both recognize that this right must exist before other

46. *See* Claude, *supra* note 34, at 72.

47. The statements proved useful, because they eliminated some of the dangers of erroneous interpretation of municipal laws — representatives of the countries explained how various procedures were implemented under their respective systems. The statements were valuable in examining various municipal systems in search of common principles. *See* notes 58 & 123 *infra*.

48. *See generally* Study of the Right 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).

49. The Universal Declaration of Human Rights, *supra* note 2, art. 9.

human rights can be developed.[50] The Declaration gives international recognition to human rights during criminal proceedings by proclaiming that everyone has the right to "liberty and security of person."[51] More specifically, the Declaration safeguards this right by providing that "no one shall be subjected to arbitrary arrest, detention, or exile."[52] The Commission has stressed the crucial importance of this safeguard, because most of the remaining rights enumerated in the Declaration cannot be enjoyed or exercised if a person is not "free."[53]

The right to be free from arbitrary arrest and detention provides an answer to the paradox arising from attempts to implement the important principle that "[e]veryone charged with a penal offense has the right to be presumed innocent until proved guilty according to law . . . ."[54] The paradox arises in presuming a person innocent, yet holding him in prison before his guilt has been established. If the arrest and detention are in accordance with specific provisions of law, the presumption of innocence is given more effect. The key to implementing the presumption of innocence and the right to be free from arbitrary arrest is the requirement that the suspect be held only in accordance with legal procedures. Accordingly, the Commission chose as its first subject for study the right to be free from arbitrary arrest and detention.[55]

The Commission thoroughly examined the various arrest and detention procedures reported to them by countries participating in the study and produced a report of the procedural similarities and differences between legal systems. Finally, the Commission prepared "Draft Articles" on the right to be free from arbitrary arrest and detention. The Commission's goal was to have the Draft Articles adopted by the United Nations General Assembly as proce-

50. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on December 10, 1948, by a vote of 48 to zero. *Id.* Although there were no dissenting votes, the following states abstained: Byelorussia, Czechoslovakia, Poland, Saudi Arabia, Ukrainian S.S.R., the Soviet Union, the Union of South Africa, and Yugoslavia.

51. The Universal Declaration of Human Rights, *supra* note 2, art. 3.

52. *Id.* art. 9.

53. The Commission has pointed out that arbitrary arrest impairs the specific rights in Articles 12, 13, and 16 of the Declaration. Arrest and detention destroy privacy, curtail freedom of movement, require separation of family, and deny the opportunity to enjoy the political and economic rights promulgated by the Declaration. U.N. Doc. E/CN. 4/826/Rev. 1, at 208 (1964).

54. The Universal Declaration of Human Rights, *supra* note 2, art. 11.

55. U.N. Doc. E/CN. 4/826/Rev. 1, at 1-5 (1964).

dures to which all law and practice should conform.[56] The Draft Articles were a compilation of selected laws from various countries, which rendered the fullest protection of the right to liberty and security of person in regard to arrest and detention. The Draft Articles represent the highest standards for individual protection as determined by the Commission; they represent those standards to which laws and practice *should* conform.

At its eighteenth session, the Commission decided to transmit the Draft Articles to members of the United Nations and to request those states to submit comments on them.[57] The comments received were individual state assessments of the Draft Articles *vis-à-vis* each state's own existing legal system. The comments indicate similarities between the Draft Articles and existing municipal law and point out municipal variations from the Draft Articles, whether on minor details or on fundamental concepts.[58]

Forty-eight governments submitted comments to the Draft Articles.[59] These countries, representing a wide diversity of legal sys-

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56. The first step taken by the Commission was the preparation of a summary on the arrest and detention laws of as many countries as possible. *Id.* at 4-5. These summaries were then sent to their respective countries for comments and corrections so that the final summaries provided an accurate basis for the Commission's study. *Id.* at 5. Accordingly, the attention given to the preparation of these summaries was crucial in achieving a true description of each country's criminal system with regard to arrest and detention.

During the preparation of summaries, the Commission at no time attempted to attribute principles to a legal system in contradiction to its existing law. Rather, the summary preparation period was strictly an information-gathering service upon which the Commission could later base its report. *Id.*

From the 91 summaries prepared and the comments furnished by various countries, the Commission was able to study a wide variety of criminal procedures used by diverse systems. *See id.* at 218-19. The draft principles were framed from a comparison of the legal procedures used to enforce the right to be free from arbitrary arrest and detention. The Commission patterned the draft principles after the procedures they felt best protected an individual from arbitrary arrest and detention.

57. *Id.* at 205.

58. A statement typical of the kind received by the Commission was that of El Salvador. *See* Comments of Governments on the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, and Draft Principles on the Freedom from Arbitrary Arrest and Detention, 35-36 U.N. ESCOR, Supp. (No. 8), U.N. Doc. E/CN. 4/835 (1963). El Salvador stated: "Most of the . . . draft principles are already laid down in our Political Constitution and in ordinary legislation. Reference is made below to the [draft] articles which contain these principles and to those of the draft principles which would involve amendments to our legislation." U.N. Doc. E/CN. 4/835/Add. 9, at 1 (1964). El Salvador then discusses each draft principle, indicating where that principle is found under the law of El Salvador, or where the law of El Salvador would need to be amended to comply with a principle. *See id.* at 1-10.

59. *See generally* U.N. Doc. E/CN. 4/835/1963; U.N. Doc. E/CN. 4/835/Adds. 1-11 (1963-1966). The following countries submitted comments on the draft principles:

tems, were in surprising agreement with the Draft Articles.[60]

VI. DEVELOPING PRINCIPLES

A. Development and Recognition of the First Summarized Principle

A careful examination of the comments to the Draft Articles indicates that certain provisions of the Draft Articles can be summarized into principles upon which all commenting countries can agree. In summarizing these provisions, the comments of each country were consulted. Where disagreement was expressed, the Draft Articles were either modified pursuant to suggestions found in the comments, or the objectionable articles were omitted. The summaries are meant to include only those principles of the Draft Articles which are totally acceptable to the countries submitting comments.

Summarization of the Draft Articles indicates total agreement on several "summarized principles," the first of which is the following:

> 1. No one shall be subjected to arbitrary arrest or detention. Arrest or detention is arbitrary if it is on grounds or in accordance with procedures other than those established by law. The terms "arrest" and "detention" shall be defined by law.

This first summarized principle describes the basic right to be free from arbitrary arrest and detention. It was derived from Article I(a) of the Draft Articles, which states: "No one shall be subjected to arbitrary arrest or detention. Arrest or detention is arbitrary if it is . . . on grounds or in accordance with procedures other than those established by law . . . ."[61]

All of the forty-eight countries submitting comments agreed in principle with this statement; many countries indicated that Article I(a) duplicated their municipal laws.[62] Additionally, many coun-

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Argentina, Australia, Cambodia, Canada, Ceylon (Sri Lanka), Czechoslovakia, San Marino, Spain, Ukrainian S.S.R., the United Arab Republic, Great Britain, Northern Ireland, Denmark, Morocco, Poland, Finland, India, Japan, Mexico, the United States, the Soviet Union, Yugoslavia, the Netherlands, the Federal Republic of Germany, Israel, Brazil, Byelorussia, Chad, Cyprus, Ivory Coast, Norway, Sierra Leone, Somalia, Sweden, Turkey, El Salvador, Malaysia, Switzerland, Ireland, Romania, and Jamaica. U.N. Doc. E/CN. 4/835/Add. 9, at 1 (1964).

60. For further indication of this agreement, *see* appendix, tables I & II, *infra*.

61. U.N. Doc. E/CN. 4/826/Rev. 1, at 205 (1964).

62. France stated that the principle was in exact agreement with its constitution; Mexico, Brazil, Chad, El Salvador, and Romania indicated agreement between their constitutional provisions and Article I(a). U.N. Doc. E/CN. 4/835, at 27 (1963) (France); U.N.

tries mentioned that Article I(a) was in agreement with their penal and procedural codes.[63] Argentina, Iran, Mauritania, and Sierra Leone unequivocally accepted all of the Draft Articles, including Article I(a).[64]

No country submitting comments on the Draft Articles disagreed with the basic principle that an individual has the right to be free from arbitrary arrest and detention, nor with the definition of arbitrary as stated in Article I(a). In fact, many countries were in agreement with an even stronger version of this right. Iraq, in reference to its laws and constitution, stated that it "not only observed the fundamental principles embodied in the Draft but . . . had gone further by considering the violation of [these] Individual Freedoms a crime punishable with a criminal penalty."[65] Morocco also supported a stronger version of the right and cited provisions of the Moroccan penal code as evidence of its support.[66]

The agreement upon Article I(a) deserves emphasis, because other Draft Articles were not as widely accepted.[67] Examination of comments in opposition to various Draft provisions indicates that countries emphatically articulated any disagreement between the Draft Articles and their state law or practice and described in depth their reasons for disapproval.[68] Most comments began with a supporting statement of Article I(a) and its principles.[69] Countries

Doc. E/CN. 4/835/Add. 2, at 14 (1963) (Mexico); U.N. Doc. E/CN. 4/835/Add. 8, at 1-2 (1963) (Brazil); *id.* at 8 (Chad); U.N. Doc. E/CN. 4/835/Add. 9, at 2 (1964) (El Salvador); U.N. Doc. E/CN. 4/835/Add. 10, at 7 (1964) (Romania).

63. Morocco, for example, stated that these principles are all found in the Moroccan penal code. U.N. Doc. E/CN. 4/835/Add. 1, at 15 (1963).

64. U.N. Doc. E/CN. 4/835, at 2 (1963) (Argentina); *id.* at 39 (Iran); *id.* at 48 (Mauritania); U.N. Doc. E/CN. 4/835/Add. 8, at 25 (1963) (Sierra Leone).

65. U.N. Doc. E/CN. 4/835, at 40 (1963) (Iraq).

66. U.N. Doc. E/CN. 4/835/Add. 10, at 15 (1964) (Morocco).

67. For example, the Austrian Federal Government suggested "that the provision concerning review of detention at any time upon the request of the detainee should be omitted since, in any case, the detention is to be reviewed *ex officio* at short intervals to be specified by law." U.N. Doc. E/CN. 4/835, at 6 (1963) (Austria). Canada also criticized this particular Draft Article, indicating that although *habeas corpus* procedures would be available to a detainee, detention would not always be reviewed at regular intervals. *Id.* at 20 (Canada). France, in criticizing Article 33, stated that exceptions should be made in regard to detention of persons of unsound mind; in an emergency, an insane person must be hospitalized without delay. *Id.* at 32 (France).

68. *Id.*

69. Countries that criticized certain Draft Articles spoke of the general principles of the Draft favorably. The Austrian Federal Government described the Draft as constituting "a further step towards the strengthening of the fundamental rights of the individual the vital importance of which is recognized in modern international law." *Id.* at 3. Canada stated: "In broad terms the law of Canada is in accordance with this principle [Article I]." *Id.* at 8.

then commented in detail on other provisions found in the Draft Articles. Some countries addressed only those articles which disagreed with their existing laws; other countries commented on all Draft Articles.

Most disagreement was based not upon specific conflicts between state law and the provisions of the Draft Articles, but upon the *detail* of the Articles.[70] Japan's comment aptly summarizes this common criticism:

> It is very significant for the protection of fundamental human rights . . . that the United Nations intends to establish standard principles to which law and practice should conform . . . . However, it must be pointed out that in every country the procedures concerning criminal trials . . . originate from its history, national and social requirements and people's legal feelings, and are inseparably connected with the provisions of the constitution, penal code and other relevant laws . . . and functions of . . . the court [and] the police. . . . Therefore, it is deemed advisable that the said standard principles should not go so far as to set forth detail and concrete restrictions or regulations in connection with the system and procedures of arrest and detention.[71]

The above criticism, voiced by many countries, suggests that the detailed regulation of the Draft Articles be deleted, but that its *principles* be kept.[72]

Japan's comment addresses the problems that arise when attempts are made to establish international procedural standards when there exist vast differences among legal systems.[73] These pro-

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France commented: "[T]he broad principles underlying this text coincide with those on which the recent French Code of Criminal Procedure is based." *Id.* at 27 (France).

70. For example, Draft Article 26 requires: "The arrested person shall not be kept in police custody after he is brought before a competent [judicial] authority . . . [and] officials responsible for his custody shall be independent of the authorities conducting the investigation." U.N. Doc. E/CN. 4/826/Rev. 1, at 212 (1964).

Malaysia found the whole article unacceptable and suggested total deletion. Israel stated that the article would require "alterations [in its existing system] and expenses which go far beyond what the state of Israel is at present able to undertake." U.N. Doc. E/CN. 4/835/Add. 9, at 14 (1964) (Malaysia); U.N. Doc. E/CN. 4/835/Add. 7, at 6 (1963) (Israel).

Canada also found the principle unacceptable and stated that "in outlying parts of northern Canada where such place of custody is unavailable, the arrested person may be kept in detachment of the Royal Canadian Mounted Police . . . [under the Canadian system]." U.N. Doc. E/CN. 4/835, at 18 (1963) (Canada).

71. U.N. Doc. E/CN. 4/835/Add. 2, at 11 (1963) (Japan).

72. Support for the fundamental principles of the Draft was found in the comments of many countries. *See, e.g.*, U.N. Doc. E/CN. 4/835, at 26 (1963) (Dominican Republic); *id.* at 40 (Iraq); *id.* at 46-47 (Luxembourg); *id.* at 48 (Mauritania); *id.* at 71 (United Kingdom).

73. Other countries noted the difficulties in comparing procedures. Austria argued that some provisions of the Draft Articles ignore the special features of the legal system in force

cedural differences are the result of divergent cultural and social values, as well as unique historical development. Considering the vast differences among legal systems and the basis for their differences, general agreement upon procedural rules would appear to be unattainable.

Japan provides a solution to this dilemma, suggesting that international standards be developed as *principles*, rather than as detailed regulations.[74] A variety of procedures offer — in principle — the same protection of human rights; therefore, agreement among nations can be reached on the "principles" that will protect human rights, leaving to state discretion the choice of "procedure."[75]

A summarization of the detailed regulations of the Draft Articles can define principles which, in turn, can serve as guidelines for the establishment of procedures in the various legal systems. This method of summarizing Draft Articles was suggested by some of the countries objecting to the detailed regulation of the Draft Articles.[76]

B. Development and Recognition of the Second and Third Summarized Principles

An initial summarization of Draft Article 38 reads:

> Anyone who is arrested or detained shall be entitled to initiate proceedings before an authority in order to challenge the legality of his arrest or detention and obtain his release from that authority without delay if it is unlawful.

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on the continent, particularly the institution of the examining judge (*Utersuchungsrichter*). *Id.* at 4 (Austria). Romania stated that its procedure for safeguarding arbitrary arrest and detention is in the form of the procurator's office, a feature not specifically considered by the Draft Articles. U.N. Doc. E/CN. 4/835/Add. 10, at 16 (1964) (Romania).

74. U.N. Doc. E/CN. 4/835/Add. 2, at 11 (1963).

75. *See id.* Austria and Romania describe different procedures which, they state, fully guarantee the right of an individual to be free from arbitrary arrest and detention. U.N. Doc. E/CN. 4/835, at 3-6 (1963) (Austria); U.N. Doc. E/CN. 4/835/Add. 10, at 7-11 (1964) (Romania).

76. An example of this summarizing method was suggested by Romania in its comments regarding Article 13 which requires that a detention order contain specific details. Romania, in sharing Japan's criticism of detail, suggested that this article be revised as follows: "The written order authorizing the detention must contain all the particulars necessary for the detained person to be adequately informed of the reasons for the measure. The law shall specify the requisite particulars." U.N. Doc. E/CN. 4/835/Add. 10, at 16 (1964) (Romania).

Following this example, the article would still express the principle requiring a detention order to adequately inform the detainee of the ground of his detention; yet, the specific detention order requirements would not be designated by the Draft Article, but rather by individual state law.

> The authority before which the proceedings take place shall be an impartial authority independent of the prosecution and police.[77]

These provisions were widely accepted by the countries submitting comments to the Draft Articles. Some countries expressed a willingness to accept the specific procedures of Article 38 even though such precise procedures were not found in their state laws.[78]

Sweden suggested adoption of Article 38 procedures by countries lacking such laws or similar practices. Sweden stated that its objection to the details of the Article that conflicted with Swedish law did not imply "that the Swedish government is blind to the fact that the . . . [Draft Articles], if practiced in places lacking traditions of . . . [this kind], would serve as a valuable protection of the right of the individual . . . ."[79]

Some countries objected to the detailed provisions of Article 38, but supported its principles.[80] England complained that Article 38 was too detailed and proposed that it "be limited to a require-

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77. This summary was derived from Draft Article 38 which declares similar rights in the following manner:

> 1. Anyone who is arrested or detained contrary to the provisions set forth in the foregoing articles or is in imminent danger thereof or who is denied any of the basic rights and guarantees set forth in these Articles shall be entitled to take proceedings immediately before a judicial authority in order to challenge the legality of his arrest or detention and obtain his release without delay if it is unlawful or to prevent the threatened injury or enforcement of his rights.
>
> 2. The proceedings before such authority shall be simple, expeditious and free of charge. The aggrieved party, if in custody, must be produced without delay by the official or other person detaining him before a judicial authority before which recourse is taken. The onus shall be upon the detaining official or other person to establish affirmatively the legality of his act.

U.N. Doc. E/CN. 4/826/Rev. 1, at 216 (1964).

78. For example, Ivory Coast stated that it "has no equivalent to these procedures in such concise form. However, if a number of scattered texts are taken in conjunction . . . it may be said that the provisions of Article 38 . . . of the draft are also found in Ivory Coast law." U.N. Doc. E/CN. 4/835/Add. 8, at 11-12 (1963).

79. *Id.* at 28.

80. *See* appendix, table 2, *infra*. Countries that objected to the detail of the Draft Articles are designated by "E." This code is used to indicate the countries that stated specific disagreement with the article relevant to the summarized principles. In such cases, the summarized principles modified the article so it could be acceptable to the objecting country.

For example, various countries disagreed with that part of Article 38 calling for the use of the remedy by persons "in imminent danger" of arbitrary arrest or detention. France felt that "in practice it may be difficult to take the proposed measures in favor of persons 'in imminent danger' of arrest." U.N. Doc. E/CN. 4/835, at 33 (1963) (France).

Spain indicated the reasons behind this objection:

> There is no objection to . . . [Article 38], except that it is unreasonable to entitle a person who has not been arrested but is 'in imminent danger' of arrest to take proceedings before a judicial authority in order to challenge the legality of his arrest. What conclusive evidence can be advanced to demonstrate objectively that the danger of illegal arrest is "imminent"? It is practically impossible to furnish it.

ment that there . . . be a procedure available under which an arrested or detained person has a means of challenging the legality of his detention."[81] This suggestion embodies the principle of Article 38 — to provide a detained person with a remedy to challenge the legality of his arrest or detention.[82] This fundamental principle, found in the first section of Article 38, lacks the objectionable detail found in other sections.[83] Comments criticizing Article 38 were directed at sections other than section one.[84]

In developing summarized principles from Article 38 upon which all nations might agree, it is necessary to delete sections calling for detailed procedures. Deleting the detail expands the scope of the principle to include additional procedures that accomplish the same purpose and make the article more acceptable to countries employing these other procedures. The result is a clearer understanding of generally agreed upon principles; objectional, distracting details are deleted.

The validity of this approach was tested by reexamining the countries' comments on the first section of Article 38. Not surprisingly, forty-two of the forty-eight countries submitting comments either specifically agreed with Article 38(1) or at least did not spe-

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Logically there can be recourse against unjust action only *a posteriore*, after the action appealed against has been carried out.

Id. at 61 (Spain).

Omitting the provision regarding those "in imminent danger," would eliminate the objection to Article 38 based on this provision. Accordingly, the summarized principles, seeking universal acceptance, have omitted this provision regarding those "in imminent danger."

81. *Id.* at 79 (United Kingdom).

82. In summarizing Article 38 to omit objectionable details, England's suggestion was used as a statement of the Article's principle.

83. In accordance with England's suggestion, the first section merely calls for proceedings before a judicial authority to challenge the legality of an arrest or detention. Predictably, many of the countries objecting to the details of the other sections of Article 38 agreed with this section. Specific agreement between Article 38(1) and state constitutions was mentioned by Canada, Brazil, El Salvador, and Jamaica. *Id.* at 22 (Canada); U.N. Doc. E/CN. 4/835/Add. 8, at 4 (1963) (Brazil); U.N. Doc. E/CN. 4/835/Add. 9, at 9-10 (1964) (El Salvador).

84. Yugoslavia and the Netherlands objected to the procedural details of Article 38, because, in their opinion, the right of appeal offered to a detained person under their laws is very effective and offers adequate safeguards. U.N. Doc. E/CN. 4/835/Add. 4, at 5 (1963) (Yugoslavia). The Netherlands stated that, under such procedures, the arrested person is given every opportunity to lodge an appeal questioning his detention and that a judicial authority would then rule on that appeal. U.N. Doc. E/CN. 4/835/Add. 5, at 5-6 (1963) (the Netherlands).

Although the procedure of regular appeal differs somewhat from the specific procedures required by the other sections of Article 38, it agrees with the first section of the article. Both the procedure of regular appeal and the first section of Article 38 grant the detained person the right to challenge the legality of his detention before a judicial authority.

cifically object to it.[85] Many of the countries supporting Article 38(1) pointed to provisions in their own laws allowing for judicial procedure to challenge the legality of detention.[86]

There was, however, further criticism of that part of Article 38(1) calling for *judicial* proceedings to challenge the legality of arrest or detention. Poland, Finland, Byelorussia, and Romania objected to this provision, because their laws provide for various "administrative" proceedings to deal with a detainee's complaint.[87]

Due to this criticism, any summarized principle derived from Article 38 must include these procedures. It is possible, however, that modifications to include administrative procedures may make the article an ineffective safeguard of the rights of the detainee. Principles of human rights must embrace "specific" rights if they are to be a meaningful contribution to human rights development. Broad generalizations that merely summarize common denominators of municipal laws might lack the specificity necessary to identify human rights violations. Broad general statements would then be no more effective in advancing human rights than the numerous existing international declarations which have had no effect on state practice.[88] Accordingly, the real question presented is whether the judicial nature of the authority described in Article 38(1) is essential to the detainee's right to challenge his detention.

The rationale behind the requirement of a "judicial authority" in Article 38(1) is unclear. No explanation of this requirement was given in the Commission's report on its development of the Draft Articles, but some conclusions can be drawn from the Commission's study. Among the remedies studied were *habeas corpus, amparo*, and regular appeal; all require judicial proceedings to challenge the legality of an arrest or detention. Accordingly, because three of the most important remedies studied provide for a judicial authority, it is likely that the Commission developed Article 38(1) as a summary of these remedies. Yet, it is not evident that a judicial procedure is essential to the functions performed by these remedies. An historical examination of the development of *habeas corpus* and its broader derivative, *amparo*, indicates that the purpose of these remedies could be achieved using a variety of proce-

85. *See* appendix, table 2, *infra*. Countries that agreed with Article 38(1) but objected to other provisions irrelevant to this discussion are designated by "C" and "D."

86. *See id.*

87. For examples of this criticism, see U.N. Doc. E/CN. 4/835/Add. 2, at 5-6 (1963) (Finland); U.N. Doc. E/CN. 4/835/Add. 10, at 7 (1964) (Romania).

88. *See* note 2 *supra*.

dures.[89]

The protection offered by *habeas corpus*, *amparo*, and regular appeal is dependent upon the detained person's ability to challenge the legality of his detention before an authority independent of the prosecution and the police.[90] The fundamental requirement is that the authority reviewing the complaint be independent, *but not necessarily judicial* in nature.[91] It seems, therefore, that another tribunal having the same qualities of responsibility, independence, and impartiality could protect the rights of the detainee and accomplish the same objective as the other remedies.

Countries that lack remedies requiring judicial proceedings submitted comments on Article 38(1) indicating that they have remedies that accomplish the same function through different procedures. Hungary's comments detailed the procedures followed by four of the five countries criticizing the Article 38(1) requirement of a judicial authority[92] — procedures that provide full and in many cases more guarantees against arbitrary arrest and detention than

89. Historically, the purpose of the writ of *habeas corpus* was to prevent royal power from manufacturing offenses and detaining a person indefinitely without trial. *See generally* 1 W. BAILEY, A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES 2-6 (1913). The remedy was considered related to the Magna Charta which prohibited arrest and imprisonment without due process of law. Regardless of its origins, the continued use of *habeas corpus* brought extended recognition of the procedure as a speedy and effective remedy for securing the freedom of the subject from illegal imprisonment. *United Kingdom of Great Britain and Northern Ireland: The Writ of Habeas Corpus*, [1949] Y.B. ON HUMAN RIGHTS 229-30 (United Nations). Today, the essence of the procedure is to subject "arbitrary executive imprisonment to the check of scrutiny by independent judges guided by the principles of the law of the land." *Id.*

90. *Id.*

91. Support for this characterization is found in statements on human rights made by the American Law Institute. In describing the procedural right of *habeas corpus* and its requirement of a judicial reviewing authority, the Institute states that "whatever the character of the tribunal may be, it is indispensable that the determination be 'judicial' in the sense of the judicial tradition of responsibility, independence and impartiality." Committee of the American Law Institute, *Essential Human Rights*, 243 ANNALS 21-22 (1946).

92. In Hungary, either the detained person or the procurator may challenge the legality of his detention. U.N. Doc. E/CN. 4/835, at 36 (1963) (Hungary). Hungary further explained:

> The Government . . . adheres to the principle that the detention shall be ordered, or other related measures taken, only by an organ proceeding independently of the administrative organs of the state, the local organs of state power, and the judicial authorities. These powers belong to the procurator's office exercising general legality control and proceeding independently of the administrative and judicial authorities as well as of the local organs of state power.

Id. at 37 (Hungary). Similar to the remedies of *habeas corpus, amparo*, and regular appeal, the procedures outlined by Hungary require a reviewing authority which is responsible, independent, and impartial. *Id.* at 36 (Hungary).

those offered in the Draft Articles.[93] Based on this Hungarian description, one may conclude that other remedies meet the fundamental requirement of judicial review of a detainee's complaint.[94]

Hungarian-type remedies were discussed by the Commission in its report of the Draft Articles. In analyzing these remedies, the Commission described the procedures as follows:

> In certain systems, complaints against wrongful custody are dealt with by special supervisory authorities usually called "*procurators*". The Procurator-General is appointed by the legislative organ . . . . The laws of all the countries concerned stress that the Procurator-General is independent of all other authorities . . . .
>
> . . . The procurator must release wrongfully detained persons either *ex officio* or upon complaint by the person concerned . . . .
>
> . . . Provisions concerning complaints to the procurators do not exclude recourses to the courts . . . . Thus, it is provided that appeals may be made to the courts against negative decisions of the procurator . . . .[95]

Hungary and the Commission's report agree that this procedure, as well as judicial remedies, requires an independent, impartial, and responsible reviewing authority. Because of this agreement, Article 38(1) could be modified to include procedures that do not technically fulfill the article's requirement for a judicial reviewing authority.[96]

Finland, also a critic of the judicial requirement of Article 38(1), described another procedure that must be included if total

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93. *Id.* at 37 (Hungary).

94. THE CRIMINAL JUSTICE SYSTEM OF THE USSR (M. Bassiouni & V. Savitski eds. 1979) details protection of detained persons similar to that offered in Hungary. Here the institution of Procurator-General is described as the office responsible for protecting the rights of detained persons. *See* Savitski, *Institutions for the Administration of Criminal Justice*, in THE CRIMINAL JUSTICE SYSTEM OF THE USSR 19-26 (M. Bassiouni & V. Savitski eds. 1979). The Soviet Constitution states that the Procurator's Office is independent of local authorities. КОНСТИТУЦИЯ (Constitution) art. 168 (Soviet Union), *reprinted in* XIV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. 1978) [hereinafter cited as CONSTITUTIONS]. One of the fundamentals of criminal procedure is found in Article 54, which states: "No one may be arrested except by a court decision or on the warrant of a procurator." КОНСТИТУЦИЯ (Constitution) art. 54 (Soviet Union). These provisions, read together, support the Hungarian conclusion that such criminal procedures require a reviewing authority that is responsible, independent, and impartial. *See* note 92 *supra*.

95. U.N. Doc. E/CN. 4/826/Rev. 1, at 124-25 (1964).

96. It seems, therefore, that there is agreement in principle among the procedures of *habeas corpus, amparo*, regular appeal, and administrative proceedings that are independent of the prosecution and the police. U.N. Doc. E/CN. 4/835/Add. 2, at 5-6 (1963) (Finland).

agreement upon Article 38(1) is to be reached. In discussing the judicial safeguards of the freedom from arbitrary arrest and detention, Finland stated: "It should be noticed . . . that in some countries an administrative procedure can be resorted to, as well, for the same purpose."[97] Consequently, Article 38(1) should be modified to include these administrative proceedings.

Modification of Article 38(1) to include the procedures discussed above produces the following two summarized principles:

> 2. Anyone who is arrested or detained shall be entitled to initiate proceedings before an authority in order to challenge the legality of his arrest or detention and obtain his release from that authority without delay if it is unlawful.
>
> 3. The authority before which these proceedings take place must be an impartial authority independent of the prosecution and the police.

It is significant that none of the countries submitting comments to the Draft Articles suggested that the result of the proceeding be anything but the detainee's release, if the arrest or detention is unlawful. Many countries stated that their laws provide for compensation to the detainee and criminal sanctions for those responsible for the unlawful detention.[98] There was not agreement regarding the procedures and scope of these additional remedies; therefore, they were not included in the summarized principles.

A final detail which met with universal acceptance was the provision, found in both Article 38(1) and summarized principle 2, that the detainee has the right to initiate proceedings to challenge the legality of his detention. The Commission's report on the Draft Articles summarizes this principle, noting that in all countries on which material is available, complaints may be lodged by the person deprived of his liberty, and sometimes also by an official acting in the interest of the detainee.[99]

In countries using *habeas corpus* and *amparo*, a number of other persons can also challenge the detention.[100] However, be-

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97. *Id.* at 5. Finland mentioned that under its system both the Chancellor of Justice and the Parliamentary Commissioner for the control of the judiciary and the administration play an important role in preserving this freedom. *Id.* at 5-6. Again, these offices appear to operate independently of the prosecution and police to fulfill the basic requirements of the other remedies included in Article 38(1).

98. For the Soviet description of its own provision, see U.N. Doc. E/CN. 4/835/Add. 3, at 1-2 (1963). *See also* U.N. Doc. E/CN. 4/835, at 33 (1963) (France); *id.* at 61 (Spain); *id.* at 67 (Ukrainian S.S.R.).

99. U.N. Doc. E/CN. 4/826 Rev. 1, at 132-33 (1964).

100. *Id.*

cause the summarized principles include only principles where there was total agreement, only the narrowest scope of the right is used; therefore, the initiation right was limited to the detainee.

C. Development and Recognition of the Fourth Summarized Principle

> 4. Anyone who is arrested or detained shall be entitled to initiate proceedings within a relatively short time period as prescribed by law.

This summarized principle is a modification of the time requirement found in Article 38(1) of the Draft Articles, requiring that proceedings challenging the legality of detention take place immediately.[101] A time requirement was included in the Draft Articles, because the Commission wanted to emphasize the characteristic of prompt determination found in the remedies of *habeas corpus, amparo*, and regular appeal.[102] None of the countries submitting comments specifically objected to the requirement of immediate proceedings. This is noteworthy, because other articles providing for time requirements generated severe criticism.[103]

Although there were no specific objections to the Article 38(1) time requirements, Romania's general proposal to redraft the article indicates that the procedure did not receive total acceptance.[104] Romania's comments indicate it would only accept summarized principle 4 if the time requirement were left to specific state legislation.[105] The general acceptance of Article 38(1) and the absence of any specific objections by Romania or other countries indicate a

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101. *Id.* at 216.

102. *Id.*

103. Article 10, for example, requires that an arrested person be brought before a judicial authority within 24 hours. *Id.* at 208. Eighteen countries specifically objected to the 24-hour time provision. *See, e.g.*, U.N. Doc. E/CN. 4/835, at 5 (1963) (Austria).

104. Romania did not specifically object to the time requirement of Article 38(1), yet it proposed that it be redrafted as follows: "Any person who has been detained or who is liable to detention shall be entitled, if he considers that he is being wrongfully detained or that his detention has been wrongfully ordered, to apply to the . . . authority with a request that the wrongful detention be discontinued or prevented." U.N. Doc. E/CN. 4/835/Add. 10, at 19 (1964).

Romania further suggested that any additional regulations clearly indicate "that each state shall institute and specify its own regulations regarding the procedure of reviewing detentions and the right of the detained person to complain, in keeping with its own legal system . . . ." *Id.*

105. This assumption is based upon Romania's comments, her proposal that the Draft Article be redrafted to exclude specific time requirements, and her suggestion "that each state . . . institute . . . its own regulations . . . ." *Id.*

general consensus that the detainee's complaint proceedings should take place *within a relatively short time*. Accordingly, it is reasonable to expect total agreement with the fourth summarized principle given above.

D. State Emergency Powers May Suspend the Summarized Principles

A caveat to the summarized principles can be stated as follows:

> If a state faced with a national emergency decides that it is appropriate, it may put aside the usual regulations regarding arrest and detention, but only to the extent found necessary by that state. In such situations, the emergency must be officially proclaimed in accordance with law and the extraordinary authority which is to exercise emergency powers must be regulated by law.[106]

This caveat was derived by summarizing Draft Articles 34 through 37.[107] These articles give a state limited rights to suspend regular

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106. *See*. U.N. Doc. E/CN. 4/835/Add. 8, at 23 (1963) (Norway).

107. The Draft provisions dealing with this exception are:

IV. Arrest and Detention Under Emergency Powers

Article 34

When an emergency which threatens the life of the nation exists and has been officially proclaimed and it becomes necessary to provide for powers of arrest and detention, such powers shall be granted only for the duration of the emergency and to the extent strictly required by the exigencies of the situation. The conditions under which and the procedures according to which these powers may be exercised must clearly be defined by law.

Article 35

1. Arrest and detention under emergency powers shall take place only upon written order from the competent authority indicating the reasons for the order and the facts in support thereof.

2. A copy of the order shall be given to the person at the time of his arrest and he shall be informed at the same time of his right to make a representation against the order and to have legal counsel.

Article 36

1. The order of detention shall be submitted within twenty-four hours of the arrest to a competent court or other body established by law at least half of whose members are drawn from the judiciary for the purpose of deciding whether or not there is sufficient cause for the detention. The reviewing authority shall hear the detained person and his counsel. It shall be furnished with such information by detaining authorities or other persons as it may require.

2. If the reviewing authority decides that there is sufficient cause for the detention, it may be continued subject to periodic examination by the reviewing authority.

3. If the reviewing authority decides that the detention is not justified, the order shall be revoked and the detained person released forthwith.

4. The reviewing authority shall inform the detained person of all his rights and shall inquire into the treatment accorded to him in custody.

Article 37

Any person who has been detained under the special powers shall have the right even after the termination of the emergency to obtain compensation from public funds for any material or moral damages which he may have suffered on

arrest and detention procedures.[108] The articles were acceptable to most countries submitting comments. Some countries stated that although their municipal laws contained no provisions for emergency powers, the principles were acceptable.[109] Article 34, which states the general principle of the caveat, was more acceptable to the commenting countries than were other articles that addressed the caveat more specifically. Many countries, including Mexico and Brazil, enumerated provisions in their constitutions that duplicated Article 34 provisions.[110] In contrast to the general acceptance of Article 34, several countries found other articles describing detailed emergency powers to be objectionable.[111] Norway's comments provide a solution to these objections:

> It is doubtful whether general agreement can be obtained regarding detailed rules to come into effect under such emergency conditions described in this Division. A declaration of principle should in this connection probably be restricted to a general rule stipulating that usual regulations regarding arrest and detention may under such conditions be put aside to the extent found necessary, and that the extraordinary authority which is to exercise emergency powers must be regulated by law.[112]

The Netherlands felt these articles were insufficiently flexible to deal with the different kinds of situations arising in a national emergency.[113] Norway's suggestions provide the solution to this inflexibility — they lack the detail objectionable to the Netherlands. Norway's solution provides that state law prescribe the details in these matters as well as the extent and scope of the measures to be

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account of any abuse of their powers by the authorities detaining him or any excess or unreasonable exercise thereof.

U.N. Doc. E/CN. 4/826/Rev. 1, at 215-16 (1964).

108. Also included in the Draft Articles were detailed procedures to be followed upon such suspension. *See generally id.*

109. *See, e.g.*, U.N. Doc. E/CN. 4/835/Add. 1, at 13 (1963) (Denmark).

110. U.N. Doc. E/CN. 4/835/Add. 2, at 35 (1963) (Mexico); U.N. Doc. E/CN. 4/835/Add. 8, at 3 (1963) (Brazil).

111. The Federal Republic of Germany, while fully supporting Article 34, stated: "It seems doubtful . . . whether it would in fact always be possible to keep within the time-limit of twenty-four hours provided for in article 36, . . ." U.N. Doc. E/CN. 4/835/Add. 6, at 13 (1963). Germany's suggestion that the time limit be replaced by a more flexible arrangement was also found in the comments by Israel. U.N. Doc. E/CN. 4/835/Add. 7, at 2, 7 (1963) (Israel).

112. U.N. Doc. E/CN. 4/835/Add. 8, at 23 (1963) (Norway).

113. This preference of principle over detail was shared by the Netherlands, which, in commenting on Articles 34 through 37, stated: "One gets the impression that these articles do not take due account of the kind of situations that can arise in a national emergency." U.N. Doc. E/CN. 4/835/Add. 5, at 5 (1963). *See generally* CONSTITUCIÓN art. 29 (Mexico); CONSTITUICAO arts. 155-59 (Brazil).

taken.[114] Under these provisions, the state can assess the emergency at the time it occurs and prescribe the measures to be taken. Accordingly, these provisions allow the state to take "due account" of the different types of emergency situations, as suggested by the Netherlands.[115]

Surprisingly, some of the general criticism of the emergency power articles was based not on their failure to account for state interests, but on their failure to fully protect individual rights under such circumstances.[116] The reservations of many countries indicate that their own municipal laws went further in the protection of the detainee's rights than did the Draft Articles.[117]

These laws, although favoring police investigations, are not without limitations; most regulations have specific limitations on police action, which are aimed at preventing arbitrary activity.[118] There can be abuse of the rights of an individual under such circumstances, but serious national disturbances have often been the motivation for enacting such legislation.[119] Furthermore, states like South Africa, which extensively utilize their emergency powers, have still seen fit to limit police powers by specific provisions for detention.[120] In other words, the emergency laws are not so broad

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114. U.N. Doc. E/CN. 4/835/Add. 8, at 23 (1963) (Norway).

115. Following these considerations, the caveat to this discussion is limited to a generalized statement of Article 34 which had been suggested by Norway. Although this is not another proposed principle on which all nations agree, some general statement should be made as to the exception many states recognize in regard to arrest and detention rights.

116. U.N. Doc. E/CN. 4/835/Add. 3, at 5 (1963) (Soviet Union); U.N. Doc. E/CN. 4/835/Add. 8, at 7 (1963) (Byelorussia).

117. It should be noted that such procedures are often used by states in times of civil unrest. A. SACHS, JUSTICE IN SOUTH AFRICA 249-50 (1973). In South Africa, for example, civil unrest prompted some changes in the rights of detained persons. The South African courts had historically been praised for their vigilant protection of human rights through the use of remedies such as *habeas corpus*. Since 1963, however, the judiciary has favorably interpreted statutes suspending *habeas corpus* under the state's emergency powers. These statutes and decisions drastically curtail the rights of the individual and strongly favor the security police. The motivation for this shift in policy was not the arbitrary preference of lawmakers and judges; rather, episodes of sabotage led to the enactment of these special security laws giving police the power to detain suspects *incommunicado* for interrogation. *Id.*

118. One such law allows police to detain for 90 days persons *suspected* of having information about the commission of security offenses. Retention beyond that period can be justified only by producing fresh information supporting the original grounds or new grounds for detention. *Id.* Therefore, this law cannot be used as a basis for arbitrary detention; the specific limitations requiring the production of new evidence would check arbitrary police action.

119. *See generally id.* at 240-50. Sachs discusses how acts of terrorism lead to the curtailment of arrest and detention rights.

120. *See* note 118 *supra*.

as to make any arbitrary police acts lawful, even in regard to persons suspected of security offenses.

VII. FURTHER TESTING OF THE PRINCIPLES

A. Implied Acceptance of the Summarized Principles by the Examination of "Statements Made by States" to the United Nations Commission on Human Rights

In August 1950, the United Nations Economic and Social Council decided that additional information should be compiled in the Secretary General's annual publication of the *Yearbook on Human Rights*.[121] This information was to include national developments concerning the application and evolution of one of the rights, or a group of closely related rights, set forth in the Universal Declaration of Human Rights.[122] The 1959 *Yearbook on Human Rights* includes statements regarding the application and evolution of the right set forth in Article 9 of the Declaration: no one shall be subject to arbitrary arrest, detention, or exile.[123]

These statements proved to be a useful source of information on municipal laws. Each country described its own state law and practice concerning arrest and detention.[124] Furthermore, most of the countries submitting comments compared their procedures to those used in other systems. Accordingly, this information offers an invaluable tool for the comparative analysis of municipal procedures.

In contrast to the Draft Articles, these statements are directed at the much broader declaration that everyone has the right to be free from arbitrary arrest and detention. These statements are even more varied in style and content than the Draft Articles comments. Regardless of the variety of methods countries employed to describe their municipal law, agreement among countries was evi-

121. U.N. Doc. E/CN. 4/826/Rev. 1, at 1-3 (1964).

122. *Id.* at 1.

123. 11 U.N. ESCOR, Supp. (No. 6) 4-5, U.N. Doc. E/2731 (1955); *see generally Freedom from Arbitrary Arrest, Detention and Exile*, [1959] Y.B. ON HUMAN RIGHTS: FIRST SUPPLEMENTARY VOLUME (United Nations) [hereinafter cited as HUMAN RIGHTS].

124. The Dominican Republic safeguards individual liberty in its Habeas Corpus Act. HUMAN RIGHTS, *supra* note 123, at 82-86. The Byelorussian Code of Criminal Procedure at Article 5 guarantees: "No person may be deprived of liberty and placed in custody except in the cases specified by statute and in accordance with the statutory procedure." *Id.* at 32. Belgium goes one step further and provides in Article 7 of the Belgian constitution that "[t]he findings are subject to appeal to the arraignment chamber . . . ." *Id.* at 21.

dent.[125] Many of the rights and remedies emphasized are the same rights and remedies included in the summarized principles. Therefore, where such rights and remedies are found, it can be *implied* that the countries recognizing these rights and remedies also accept the summarized principles.

Reviewing the statements, all of the countries examined impliedly accepted summarized principle 1 by indicating similar principles in their own municipal systems.[126] In addition, of the twenty-three countries examined, seventeen impliedly agreed with the summarized principles 2 through 4; the other countries failed to give sufficient information on which to base a comparison.[127]

The synopsis of these statements is illustrated in tables I and II of the appendix. It supports the assertion that the summarized principles are general principles of law recognized by all nations.

B. Acceptance of the Summarized Principles Implied by the Existence of Similar Rights and Remedies in "Municipal Constitutions"

The last source of municipal law examined in searching for evidence of agreement with the summarized principles was municipal constitutions.[128] If a nation grants constitutional rights and remedies similar to the summarized principles, it should accept the summarized principles.

Unlike the municipal law sources previously studied, the constitutions lacked accompanying explanations of the system; they merely state the various rights and remedies for which they provide.[129] Thus, the use of constitutions presents strong possibilities of error in interpreting foreign legal systems.[130]

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125. For indication of agreement, *see* appendix *infra*.

126. *See, e.g.*, note 124 *supra*.

127. An example of insufficient information is found in the statement by Greece. The Greek government agreed with the principle that an individual has the right to be free from arbitrary arrest and detention. Yet, Greece did not detail the procedures used to safeguard this right in its constitution. *See generally* HUMAN RIGHTS, *supra* note 123, at 112-17.

128. *See generally* CONSTITUTIONS, *supra* note 94, vols. I-XV.

129. In comparing national constitutions, patterns were noticed. The Honduras constitution, which recognizes the remedy of *habeas corpus* and *amparo* to safeguard freedom from arbitrary arrest and detention, exemplifies many Central and South American constitutions. CONSTITUCIÓN art. 58 (Honduras), *reprinted in* CONSTITUTIONS, *supra* note 94, vol. VI. Likewise, Sierra Leone's constitution which recognizes the right to "automatic review," is similar to the constitutions of many African nations. SIERRA LEONE CONST. ch. 2, § 7, *reprinted in id.*, vol. XII. Nepal, reflecting common law traditions, has adopted the remedy of *habeas corpus*. NEPAL CONST. art. 11, *reprinted in id.*, vol. X.

130. To combat such errors, comparisons were drawn only when the rights and remedies

In examining the constitutions for provisions similar to the summarized principles, it is found that, like the statements and comments previously examined, the constitutions vary in form and substance. In some constitutions, a right summarized in the principles is specifically declared in the constitution.[131] In other constitutions, the declaration of adherence to the Universal Declaration of Human Rights implies agreement with the summarized principles.[132] There are, however, constitutions like Lebanon's that enumerate rights and remedies in such vague terms that there is insufficient information on which to base any comparison.[133]

Nearly all constitutions specifically provide for the right to complain to a government instrumentality regarding violations of the law by public officials. It is unclear in some instances whether this right of complaint includes the right to complain to a judicial authority. If the judiciary is an instrumentality of the state (a probable interpretation), then there is agreement between this right of complaint and summarized principles 2 and 3, based on the requirement of summarized principle 3 that review of arbitrary detention be made by an independent authority. If, under these constitutional remedies, review of the complaint can be done by the judiciary, the reviewing authority is independent.

All constitutions providing for this remedy of complaint specifically mention that the judiciary is an independent authority.[134] Accordingly, if these remedies of complaint include judicial review, there is agreement between these remedies and summarized principles 2 and 3. Because there is some question in regard to these

found in constitutions were clearly stated. Where it was found that the constitutional provisions were too vague to accurately describe a system's procedures regarding arrest and detention, no comparison was drawn. Where it was felt that only some comparison would accurately be drawn, any assumptions used in this study were clearly stated. A further safeguard against such errors was to limit the use of constitutions to situations where no statements or comments by the countries themselves were available. Where such other sources were available, they were used as more accurate descriptions of municipal law.

131. *See* note 129 *supra*.

132. The Universal Declaration of Human Rights states that no one shall be subjected to arbitrary arrest, detention, or exile. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

133. Article 8 of the Lebanese constitution reads simply: "Personal freedom shall be guaranteed and protected. No person may be arrested or kept in custody except in accordance with the law. No offense may be established or penalty imposed except in accordance with the law." LEBANON CONST. art. 8, *reprinted in* CONSTITUTIONS, *supra* note 94, vol. VIII.

134. *See, e.g.*, VERFASSUNG art. 96 (East Germany), *reprinted in id.*, vol. V; KONSTITUTSIIA (Constitution) art. 129 (Bulgaria), *reprinted in id.*, vol. II; KUSHTETUI (Constitution) art. 107 (Albania), *reprinted in id.*, vol. I; CONSTITUTION art. 88 (Monaco), *reprinted in id.*, vol. IX.

proceedings, implied agreement with the principles must be conditioned on this interpretation of the right of complaint.

VIII. CONCLUSION

This article has set forth evidence supporting the assertion that general principles of law recognized by all nations are an important source of international law which can be realistically identified and defined. Based on the traditional view that municipal law is one source of general principles of law, this study has shown that by examining and comparing the municipal laws of various countries some common denominators among municipal systems might well be among those general principles of law recognized by all nations. If such general principles of law can be defined, it follows that they can be enforceable as part of international as well as domestic law.

Such possibilities are particularly attractive in the area of human rights law where a variety of claims and declarations make international human rights an area of extreme uncertainty. The identification of some general principles of human rights law recognized by all nations could provide a starting point for a more realistic development of international human rights.

The scope of this article focuses on some limited descriptions of municipal law. For the most part, these sources are statements made by individual countries describing their own legal systems; therefore, some of the pitfalls of interpreting foreign laws are avoided. Yet, even with these imposed limitations, a surprising amount of agreement is found between a wide variety of legal systems. This indicates that there exist common denominators among legal systems which can be considered general principles of law recognized by all nations. It is hoped the approach to finding such principles used in this study will be employed in the future to further the development and codification of international law.

APPENDIX

I. Tabular Representation of Acceptance of Summarized Principles 1 through 4: Explanation of Tables I and II

The four summarized principles[1] were derived from the Draft Articles. Therefore, it is assumed that a country accepting a specific Draft Article would also accept the summarized principle(s) derived therefrom. The following two tables (I & II) demonstrate that there would be total acceptance of the summarized principles by countries that commented on the Draft Articles. To diagram this agreement, the summarized principles are divided into two tables.

Table I designates the acceptance of summarized principle 1. This principle embodies the right upon which the remedies of the other summarized sprinciples are based. Therefore, if a country does not accept this principle, it is doubtful it will accept the other three; further investigation of such a country is therefore considered useless.

Table II designates the acceptance of summarized principles 2 through 4. These principles are combined, because all of the remedies in the preparation of the Draft Articles embody these three principles in a single remedy. Similarly, it is assumed that other municipal systems would also combine these principles into a single remedy. Therefore, any comparison of these other remedies to the principles is facilitated.

A. Express Acceptance of Principles 1 through 4

Those countries which expressly accept (by assumption) either summarized principle 1 or summarized principles 2 through 4 use one of various methods to designate their acceptance. In the first column of Tables I and II, a capital letter is used to indicate the method of express acceptance used by the respective country:

A — Specific acceptance of all the Draft Articles.

B — Specific acceptance of the pertinent (derived) Draft Article(s).

C — Specific acceptance of the pertinent Draft Article(s), with criticism directed at Draft Articles irrelevant to the present discussion.

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1. Summarized principle 1 is found in the text, *supra*, at 286; summarized principles 2 & 3 are found in the text, *supra*, at 295; summarized principle 4 is found in the text, *supra*, at 296.

D — General acceptance of the Draft Articles, with criticism directed at Draft Articles irrelevant to the present discussion.

Where there was specific disagreement with a Draft Article pertinent to the summarized principle(s), the principle(s) was (were) modified to be acceptable to the objecting country:

E — Specific disagreement with a Draft Article; the summarized principle(s) derived therefrom reconciles the disagreement.

B. Implied Acceptance: Municipal Law

1. *Table I.* Acceptance of summary principle 1, implied by the municipal law of a country, is indicated in the second column. These entries are based on statements by countries to the United Nations Commission on Human Rights. The statements are considered to be a source of information inferior to the more specific Draft Articles comments, and were only consulted when Draft Articles comments were unavailable. The nature of the law and the source of the information are designated by either (1) or (2):

(1) The specific right stated in the summary principle has been described by the country as one of its own constitutional rights.

(2) The specific right stated in the summary principle has been described by the country as one recognized by its municipal law.

2. *Table II.* Acceptance of summary principles 2 through 4, implied by the municipal law of a country, is also indicated in the second column. The nature of the law and the source of the information are indicated by the following:

(1) The country, in an earlier statement, described a municipal remedy included in the summarized principles.

(2) The country referred to an earlier statement made to the Commission, which described a municipal remedy included in the summarized principles.

(3) The country, while not specifically describing the rights of the detainee under its system, has stated that its laws follow the traditional English system, which system includes the procedure of *habeas corpus*, included in the summarized principles.

(4) The country has not detailed the detainee's rights under its system, but the vague description given of the rights to automatic review (included in the summarized

principles) seems to fulfill the requirements of the summarized principles. This implication is weaker than the three above.

(5) The country has not sufficiently detailed the rights of a detainee under its system necessary for any comparison to the summarized principles.

C. Implied Acceptance: Constitutional Provisions

1. *Table I.* Acceptance of summary principle 1, implied by the provisions of a country's constitution, is indicated in the third column. The lower case letters in parentheses signify the following:

(a) The specific right stated in the summary principle was declared in the country's constitution.

(b) The constitution declares adherence to the Universal Declaration of Human Rights, which specifically recognizes the principles stated in summarized principle 1.

(c) The constitution declares rights sufficiently similar to those found in summarized principle 1 to infer agreement. This is weaker than the implication in (a).

(d) There is insufficient information to infer agreement: The constitution does not enumerate human rights.

(e) There is insufficient information to infer agreement: The constitution is unavailable.

These letters are followed by numerals in parentheses, which indicate the article(s) of the country's constitution that provides the basis for implication.

2. *Table II.* Acceptance of summary principles 2 through 4, implied by the provisions of a country's constitution, is also indicated in the third column. The first set of parentheses is interpreted according to the following:

(1) The constitution provides for remedies which are specifically included in the summarized principles:
  (1a) *Habeas Corpus*
  (1b) Regular Appeal
  (1c) Complaint with Independent Supervision
  (1d) *Amparo*

(2) The constitution provides for remedies which appear to be sufficiently similar to the remedies included in the summarized principles:
  (2a) Similar to *Habeas Corpus*
  (2b) Similar to Regular Appeal
  (2c) Similar to Complaint with Independent Supervision
  This is weaker than the implication of (1) above.

(3) The constitution specifically recognizes the right to be free from arbitrary arrest and detention, and generally provides for the right to complain to any government instrumentality regarding violations of the law by public officials.
(4) The constitution specifically recognizes the right to be free from arbitrary arrest and detention and designates the judiciary as the guardian of this and other constitutional rights. In addition, the constitution declares adherence to the Universal Declaration of Human Rights.
  (4a) The constitution specifically recognizes the right to be free from arbitrary arrest and detention and also adheres to the Universal Declaration (but no designation of judicial guardian).
  (4b) The constitution only mentions these principles by implication through its declared adherence to the Universal Declaration.
(5) The constitution enumerates rights and remedies in such vague terms that there is insufficient information on which to base any comparison.
(6) The constitution does not enumerate human rights at all; therefore, information is insufficient for any comparison.
(7) The constitution is unavailable for study; no comparison can be made.

The second set of parentheses contains the article(s) of the constitution that provides the basis for the implication.

II. ACCEPTANCE OF SUMMARIZED PRINCIPLE 1:

TABLE I

Country	Express Acceptance	Implied Acceptance: Municipal Law	Implied Acceptance: Constitutional Provisions
EUROPE			
Albania	———	———	(a)(22)
Austria	C	———	———
Belgium	———	(1)	———
Bulgaria	———	———	(a)(82)
Byelorussia	C	———	———
Cyprus	———	———	(a)(2-3)
Czechoslovakia	D	———	———
Denmark	C	———	———
Finland	C	———	———
France	D	———	———
Germany (G.D.R.)	———	———	(a)(136-38)
Germany (F.R.G.)	D	———	———
Greece	———	(1)	———
Hungary	C	———	———
Iceland	———	———	(a)(65)
Ireland	C	———	———
Italy	———	(1)	———
Liechtenstein	———	(1)	———
Luxembourg	C	———	———
Malta	———	———	(a)(35)
Monaco	———	(1)	———
Netherlands	C	———	———
Norway	C	———	———
Poland	D	———	———
Portugal	———	(1)	———
Romania	C	———	———
San Marino	C	———	———
Soviet Union	C	———	———
Spain	E	———	———
Sweden	E	———	———
Switzerland	C	———	———
Turkey	C	———	———
Ukrainian S.S.R.	C	———	———
United Kingdom	D	———	———
Yugoslavia	C	———	———
NORTH & CENTRAL AMERICA			
Barbados	———	———	(a)(13)
Canada	D	———	———
Costa Rica	———	(1)	———
Cuba	———	(1)	———
Dominican Republic	C	———	———
El Salvador	C	———	———
Guatemala	———	———	(a)(46)

TABLE I (continued)

Country	Express Acceptance	Implied Acceptance: Municipal Law	Implied Acceptance: Constitutional Provisions
Haiti	———	———	(a)(17)
Honduras	———	(1)	———
Jamaica	D	———	———
Mexico	C	———	———
Nicaragua	———	———	(a)(39)
Panama	———	———	(a)(22)
Trinidad & Tobago	———	———	(a)(28)
United States	D	———	———
SOUTH AMERICA			
Argentina	A	———	———
Bolivia	———	(1)	———
Brazil	C	———	———
Chile	———	(2)	———
Colombia	———	(1)	———
Ecuador	———	(2)	———
Guyana	———	———	(a)(5)
Paraguay	———	———	(a)(59)
Peru	———	———	(a)(56)
Uruguay	———	———	(a)(12-15)
Venezuela	———	———	(a)(60)
ASIA			
Afghanistan	———	———	(c)(26)
Burma	———	(1)	———
Cambodia (Kampuchea)	C	———	———
Ceylon (Sri Lanka)	C	———	———
China (P.R.C.)	———	———	(a)(89)
India	C	———	———
Indonesia	———	———	(d)
Iran	A	———	———
Iraq	C	———	———
Israel	C	———	———
Japan	D	———	———
Jordan	———	———	(a)(8)
Korea (North)	———	———	(a)(10)
Korea (South)	———	———	(a)(34)
Kuwait	———	———	(a)(31)
Laos	———	———	(d)
Lebanon	———	———	(a)(8)
Malaya	C	———	———
Maldive	———	———	(e)
Mongolia	———	———	(a)(88)
Nepal	———	———	(a)(11)
Oman	———	———	(e)
Pakistan	———	(2)	———
Philippines	———	(1)	———
Qatar	———	———	(e)

TABLE I (continued)

Country	Express Acceptance	Implied Acceptance: Municipal Law	Implied Acceptance: Constitutional Provisions
Saudi Arabia	———	———	(d)
Singapore	———	———	(d)
Syria	———	———	(a)(9-10)
Taiwan	———	(1)	———
Thailand	———	(1)	———
Vietnam (South)	———	———	(a)(27)
Yemen	———	———	(a)(25)
SOUTH PACIFIC			
Australia	———	(2)	———
New Zealand	———	(2)	———
Western Samoa	———	———	(a)(6)
AFRICA			
Algeria	———	———	(a)(15) &(b)(11)
Burundi	———	———	(a)(7) & (b)(preamble)
Cameroon	———	———	(b)(1)
Central African Republic	———	———	(c)(preamble)
Chad	C	———	———
Dahomey (Benin)	———	———	(a)(10) & (b)(preamble)
Ethiopa	———	(1&2)	———
Gabon	———	———	(a)(58) & (b)(preamble)
Ivory Coast	C	———	———
Kenya	———	———	(a)(16)
Liberia	———	———	(a)(7-9)
Libya	———	(1)	———
Madagascar	———	———	(a)(preamble) & (b)(preamble)
Malawi	———	———	(a)(13)
Mali	———	———	(b)(preamble)
Mauritania	A	———	———
Morocco	C	———	———
Niger	———	———	(a)(62) & (b)(preamble)
Nigeria	———	———	(a)(21)
Rwanda	———	———	(a)(13) & (b)(preamble)
Senegal	———	———	(a)(83) & (b)(preamble)
Sierra Leone	A	———	———
Somalia	C	———	———
South Africa	———	(2)	———
Sudan	———	———	(d)
Tanzania	C	———	———
Togo	———	———	(a)(7) & (b)(preamble)
Uganda	———	———	(a)(19)
United Arab Rebublic	(C)	———	———
Upper Volta	———	———	(a)(62) & (b)(preamble)
Zambia	———	———	(a)(15)

III. ACCEPTANCE OF SUMMARIZED PRINCIPLES 2 THROUGH 4: TABLE II

Country	Express Acceptance	Implied Acceptance: Municipal Law	Implied Acceptance: Constitutional Provisions
EUROPE			
Albania	———	———	(lc)(22, 32, 88)
Austria	C	———	———
Belgium	———	(1)	———
Bulgaria	———	———	(lc)(82, 89, 62-64)
Byelorussia	E	———	———
Cyprus	———	———	———
Czechoslovakia	C	———	———
Denmark	E	———	———
Finland	E	———	———
France	C&E	———	———
Germany (G.D.R.)	———	———	(2c)(136-38)
Germany (F.R.G.)	E	———	———
Greece	———	(5)	———
Hungary	E	———	———
Iceland	———	———	(1b)(65)
Ireland	B	———	———
Italy	———	(1)	———
Liechtenstein	———	(5)	(3)(32, 43)
Luxembourg	C	———	———
Malta	———	———	(2b)(35, 47)
Monaco	———	(5)	(3)(19, 31)
Netherlands	E	———	———
Norway	C	———	———
Poland	E	———	———
Portugal	———	(1)	———
Romania	E	———	———
San Marino	C	———	———
Soviet Union	D	———	———
Spain	E	———	———
Sweden	D	———	———
Switzerland	E	———	———
Turkey	C	———	———
Ukrainian S.S.R.	C	———	———
United Kingdom	E	———	———
Yugoslavia	E	———	———
NORTH & CENTRAL AMERICA			
Barbados	———	———	(2b)(35, 47)
Canada	C	———	———
Costa Rica	———	(1)	———
Cuba	———	(1)	———
Dominican Republic	C	———	———
El Salvador	C	———	———
Guatemala	———	———	(1d)(62)

TABLE II (continued)

Country	Express Acceptance	Implied Acceptance: Municipal Law	Implied Acceptance: Constitutional Provisions
Haiti	———	———	(1b)(17)
Honduras	———	(1)	———
Jamaica	D	———	———
Mexico	C	———	———
Nicaragua	———	———	(1a)(41)
Panama	———	———	(1a)(24)
Trinidad & Tobago	———	———	(1a)(2)
United States	D	———	———
SOUTH AMERICA			
Argentina	A	———	———
Bolivia	———	(1)	———
Brazil	C	———	———
Chile	———	(1)	———
Colombia	———	(5)	(3)(23, 45)
Ecuador	———	(1)	———
Guyana	———	———	(2b)(5, 19)
Paraguay	———	———	(1a)(78)
Peru	———	———	(1a)(69)
Uruguay	———	———	(1a)(17)
Venezuela	———	———	(2c)(60, 218-22)
ASIA			
Afghanistan	———	———	(5)
Burma	———	(1)	———
Cambodia (Kampuchea)	C	———	———
Ceylon (Sri Lanka)	C	———	———
China (P.R.C.)	———	———	(1c)(89, 97, 81-84)
India	C	———	———
Indonesia	———	———	(5)
Iran	A	———	———
Iraq	C	———	———
Israel	E	———	———
Japan	E	———	———
Jordan	———	———	(3)(8, 17)
Korea (North)	———	———	(2a)(10)
Korea (South)	———	———	(1c)(24-25, 90-94)
Kuwait	———	———	(3)(31, 45)
Laos	———	———	(5)
Lebanon	———	———	(5)
Malaya	C	———	———
Maldive	———	———	(7)
Mongolia	———	———	(1c)(85, 88, 72-75)
Nepal	———	———	(1a)(71)
Oman	———	———	(7)
Pakistan	———	(1)	———
Philippines	———	(1)	———
Qatar	———	———	(7)

TABLE II (continued)

Country	Express Acceptance	Implied Acceptance: Municipal Law	Implied Acceptance: Constitutional Provisions
Saudi Arabia	———	———	(6)
Singapore	———	———	(6)
Syria	———	———	(5)
Taiwan	———	(1)	———
Thailand	———	(1)	———
Vietnam (South)	———	———	(1c)(27, 29, 105-08)
Yemen	———	———	(3)(25, 44)
SOUTH PACIFIC			
Australia	———	(1)	———
New Zealand	———	(3)	———
Western Samoa	———	———	(2a)(6)
AFRICA			
Algeria	———	———	(4)(15) & (4)(11)
Burundi	———	———	(4)(7, 19) & (4)(preamble)
Cameroon	———	———	(4b)(I)
Central African Republic	———	———	(5)
Chad	D	———	———
Dahomey (Benin)	———	———	(4)(10) &(4)(preamble)
Ethiopa	———	(4)	(3)(51, 62)
Gabon	———	———	(4)(58) (4)(preamble)
Ivory Coast	C	———	———
Kenya	———	———	(2b)(16, 28)
Liberia	———	———	(1a)(I 20)
Libya	———	(5)	(3)(16, 27)
Madagascar	———	———	(4a)(preamble)
Malawi	———	———	(2b)(13, 25)
Mali	———	———	(4b)(preamble)
Mauritania	A	———	———
Morocco	D	———	———
Niger	———	———	(4)(62)
Nigeria	———	———	(2b)(21, 32)
Rwanda	———	———	(4)(13, 101) & (4)(preamble)
Senegal	———	———	(4)(81, 83) & (4)(preamble
Sierra Leone	A	———	———
Somalia	D	———	———
South Africa	———	(2)	———
Sudan	———	———	(6)
Tanzania	C	———	———
Togo	———	———	(4)(7, 81) & (4)(preamble)
Uganda	———	———	(2b)(19, 32)
United Arab Republic	C	———	———
Upper Volta	———	———	(4)(62) & (4)(preamble)
Zambia	———	———	(2b)(15, 28)