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# JUSTICE IN DIRE STRAITS: UNLAWFUL PRETRIAL DETAINEES, FAMILY MEMBERS AND LEGAL REMEDIES

Danushka S. Medawatte†

## INTRODUCTION

The U.S. criminal justice system has been under attack for its overuse of pretrial detention and its indifference to the presumption of innocence in recent decades. The judiciary is often critiqued for its discriminatory practices in this regard and this Article highlights how certain detentions can become ‘unlawful’ due to, *inter alia*, judicial biases. While academic literature pertaining to legal rights of detainees abound, there is a dearth of literature which ascertains the rights and remedies of the family members who are affected. The definitional scope of a family member is analyzed with reference to the circumstances in which they can be regarded as ‘indirect’ victims possessing *locus standi* to claim rights and remedies for the illegality of the detention that is suffered by the detained individual.

This Article argues that, during the interim period when the legality of the detention remains questionable, it is imperative that family members be granted the right to conjugal visits and the right to spend recreational time with the detainee. The immediacy of the granting of these rights is demanded due to the irreparability of loss that would arise in cases of unlawful pretrial detention. I also argue that, in addition to the detainee, family members should be entitled to compensation in the event the court determines the detention to be unlawful. I explore the further possibility of extending the right of compensation to family members who reside outside the

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territorial boundaries of the U.S. The jurisprudential basis for these arguments is drawn from the decisions of national courts, the Human Rights Committee and the Inter-American Court of Human Rights.

## I. OVERVIEW AND SCOPE OF THIS ARTICLE

### A. Overview

The contemporary ideology of international human rights law (IHRL) requires every individual to be treated with dignity.<sup>1</sup> Yet norms such as the presumption of innocence and justice seem to have lost their historical glory in light of laws pertaining to pretrial detention.<sup>2</sup> The legal systems of many countries have turned the proverbial blind eye especially to the societal impact created by unduly long periods of pretrial detention advocated for by their respective criminal justice systems.<sup>3</sup> In this Article, I analyze pretrial detentions that take place in the United States of America and their effects on the family members of the detainee. Primarily, I question whether pretrial detention becomes unlawful in certain circumstances and, if answered in the affirmative, I identify whether such circumstances give rise to (a) violation(s) of rights of family members of the detainee. For the purposes of this Article, I adopt a narrow definition of family members and argue that they can be regarded as indirect victims of unlawful pretrial detentions. I also argue that the State can be held responsible within the international

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1. See, e.g., Universal Declaration of Human Rights, pmbl., G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, pmbl., Dec. 10, 1984, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, pmbl., Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, pmbl., Dec. 16, 1966, 993 U.N.T.S. 3.

2. OPEN SOC'Y FOUNDS., PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION 95 (2014).

3. On a comparative note, if the ECHR is referred to for its jurisprudence on pretrial detention, it is evident that 'unduly' long periods of pretrial detentions are generally considered as violations of both the rights of the detainee and the family members of the detainee. However, in *Erezen v. Germany*, the court unanimously held that a 5-year duration of pretrial detention on grounds of suspicion for the detainee's connection with regard to terrorist offences committed in Turkey, possession of forged identity papers and his risk of collusion and absconding was not a violation of liberty. This decision was reached on the ground that the delays were "primarily caused by the difficulties of gathering evidence. . ." and that the "continued detention was subject to repeated review," and therefore the State party could not be held liable. 67522/09 Eur. Ct. H.R. at 12, 13 (2014).

human rights framework to provide remedies to the family members who are adversely affected by unlawful pretrial detentions.

While literature on pretrial detention abounds, there is a dearth of scholarship pertaining to the rights of individuals, other than the detainee, which are affected directly by pretrial detention.<sup>4</sup> This Article does not analyze preventive detention resulting from national security concerns. Even if the pretrial detentions that I analyze are drawn from the criminal justice system of the U.S., I explore the possibility of drawing from IHRL principles to substantiate my claim that family members of the detainees are entitled to rights and remedies.

In anticipation of the criticism that provision of rights to family members of the detainee may undermine the latter's rights, I refer to publications such as 'Inside Looking Out',<sup>5</sup> 'The Socioeconomic Impact of Pretrial Detention',<sup>6</sup> 'Presumption of Guilt: The Global Overuse of Pretrial Detention'<sup>7</sup> and 'The Presumption of Innocence: Evidential and Human Rights Perspectives'.<sup>8</sup> All of these publications evidence the fact that detainees consider constant interaction with their family members necessary for two reasons: (a) to maintain mental stability and mental health of the detainee, and (b) to lessen the impact on the family members, especially the impact on children. I argue that the spouse/partner of the detainee should have the right to con-

4. See generally Andre T. Guzman, *Human Rights Backsliding*, 102 CAL. L. REV. 603 (2014); Pollina Levina, *Links between Criminal Justice Procedure and Torture: Learning from Russia*, 16 New Crim. L. Rev. 104 (2013); Megan Schuba, *The Fourth or Fourteenth? Untangling Constitutional Rights in Pretrial Detention Excessive Force Claims*, 78 U. CIN. L. REV. 1159 (2010); Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

5. JAMIE S. MARTIN, *INSIDE LOOKING OUT: JAILED FATHERS' PERCEPTIONS ABOUT SEPARATION FROM THEIR CHILDREN* (2001). In this book, the author has included excerpts from interviews that he conducted with convicted inmates. Although this article is on pretrial detainees, the emotions and difficulties that one experiences when parted from families cannot be said to be drastically different merely because the method of detention differs. Martin's research shows how the absence of the father has had a negative impact on the children as well as how the lack of interaction or minimum interaction with the children have led to immense psychological pressure on the detainees. Therefore, to argue that the family members should be allowed to interact more with the pretrial detainees is not to be interpreted as a sidelining of the rights of the detainee but to be regarded as being complimentary to the other rights that are provided to pretrial detainees in general.

6. OPEN SOC'Y FOUNDS., *THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION* (2011).

7. OPEN SOC'Y FOUNDS., *supra* note 2.

8. ANDREW STUMER, *THE PRESUMPTION OF INNOCENCE: EVIDENTIAL AND HUMAN RIGHTS PERSPECTIVES* (2010).

judicial visitation; the right to spend time in recreational activities with the pretrial detainee; and be eligible in addition to the detainee, to receive compensation from the State when a pretrial detention has been determined by a court to be unlawful. Other than the right to compensation, the other two rights that I propose in the Article are to be conferred on the pretrial detainee and the family members during the interim period when a case has been filed questioning the legality of the pretrial detention. These rights are to be provided in addition to other rights that pretrial detainees are eligible for and none of these rights are to be interpreted in a manner detrimental to the rights that are already made available to pretrial detainees.

In order to substantiate my claim that family members are entitled to various rights and remedies when a related individual has been taken into pretrial detention that is determined to be unlawful, I examine various other aspects pertaining to criminal justice and IHRL. In the characterization of the rights of family members of the detainee, varying perceptions towards the presumption of innocence and IHRL are important. Particularly the works of Shima Baradaran<sup>9</sup> and the Open Society Foundation<sup>10</sup> indicate the connection of the presumption of innocence with due process, resultant impacts of the global overuse of pretrial detention and human rights violations linked thereto. Stumer's *The Presumption of Innocence*<sup>11</sup> indicates how the very existence of the concept of presumption of innocence in the criminal justice system has created an imbalance between the requirements of protecting the defendants and protecting the community interests. He argues that the inability of states to strike a balance between presumption of innocence in favor of *unconvicted* detainees and requirements of society have led to the narrowing of the presumption of innocence to the detriment of the pretrial detainees.<sup>12</sup> To the extent that this Article attempts to establish the notion that non-consideration of the presumption of innocence in any singular case results in the violation of family member rights, I disregard the broad vernacular meaning attached to the phrase presumption of innocence by international human rights advocates in favor of the narrow meaning attributed to the phrase in U.S. Constitutional Law.<sup>13</sup>

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9. Shima Baradaran, *The Presumption of Punishment*, 8 CRIM. L. & PHILO. 391, 391 – 406 (2014).

10. See generally OPEN SOC'Y FOUNDS., *supra* note 2.

11. STUMER, *supra* note 8.

12. *Id.*

13. I am thankful to Professor G. L. Neuman for drawing my attention to this argument.

## B. *Scope of the Article*

This Article treats the issue of unlawful detention as a ground to justify the search for remedial measures to compensate any human rights violation suffered by family members of a detainee. Although I define the term ‘family members’ narrowly, I do not foreclose the possibility of the rights advocated for in this Article to be applied to ‘other’ categories of family members that transcend the traditional definitions of family. Moreover, I do not rule out other rights that the family members should be entitled to, although I limit my analysis to three chosen basic rights.

There are many reasons that cause a detention to be unlawful. Delaying trial is one mechanism through which a detention could convert to an unlawful detention. One goal of this Article is to emphasize the aspiration of achieving liberal legality through the implementation of existing laws to shorten the duration of pretrial detention.<sup>14</sup> I argue, with reference to case law, existing literature and comparative practices of other states and the decisions of international bodies that altering the period of pretrial detention can contribute to the protection of the rights of the family members as well. Such changes are possible if the state adopts measures to incorporate IHR into domestic law. However, such incorporation does not come easily and there are factors that affect such incorporation. Risse, Ropp and Sikkink name that possibility the ‘spiral model of human rights.’<sup>15</sup> Using the spiral model, they propound that states will transform into more human rights-friendly jurisdictions with the passing of time.<sup>16</sup> This model indicates the possibility of achieving policy changes pertaining to pretrial detention, which creates the possibility of reimagining the whole framework.<sup>17</sup> By adopting a measure similar to the spiral – model of human rights, a state can effectively address the inefficiencies of its criminal justice system.<sup>18</sup> Using this approach, I argue it is possible to provide remedies to family members of the detainee even though they are *indirect* victims and the criminal justice system has no precedent in providing human rights reme-

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14. Although the duration of the detention is insufficient to convert it into an unlawful pretrial detention, there is a common understanding, also shared by the HRC, that it is safer to have a cap on the maximum duration of pretrial detention. See Hum. Rts. Comm., List of issues in relation to the fourth periodic report of the United States of America, U.N. Doc. CCPR/C/USA/Q/4 (Jul. 5, 2013).

15. See generally, THOMAS RISSE, STEPHEN C. ROPP & KATHRYN SIKKINK, *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* (2013).

16. THOMAS RISSE, STEPHEN C. ROPP & KATHRYN SIKKINK, *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 10 (1999).

17. This model is analyzed in further detail in Section III.D.1. of this Article.

18. RISSE ET AL., *supra* note 15, at 8.

dies in such circumstances. Consequently, I further propose that the state should be held liable to provide the rights advocated for in this Article immediately pursuant to the legality of the detention being questioned in a court of law.<sup>19</sup> In the segments that follow, I analyze at length the underlying reasons for such a proposition.

This Article further argues that criminal justice system overlaps economic, social, cultural, civil and political rights of the individuals involved. As a result, the state should consider such impacts when determining the 'reasonability' of pretrial detention. While this Article acknowledges pretrial detention is necessary to ensure justice, it moves beyond conventional parameters by propounding that the state should apply IHRL to ascertain the rights of family members.

A transition from Criminal Justice to IHRL results when the law requires state to consider the above-mentioned impacts. This is one form of transformation of law. However, when the law demands that a state should consider the impact on the family members as well, a different transformation occurs. This transformation is the law's ability to encapsulate larger frameworks within reach. This transformative possibility of law holds significance in the context of the Article as the arguments are tendered on the hypothesis that the legal system does not necessarily have to be limited to the alleged victim and the offender/violator of rights/or responsible institution. The long arms of justice could reach the family members of the detainees and provide them the remedies that they deserve for the unaccounted loss they suffered due to unlawful pretrial detention.

The rights and remedies that I argue for in this Article are based on the presumption that the family members of the detainee possess *locus standi* to raise claims regarding the legality of pretrial detention. The presumption further identifies that the family members are entitled to raise claims regarding the individual suffering they have experienced. One limitation concerning the aforementioned presumption is that I will not delve into academic debates as to whether family members should or should not have *locus standi* to bring such claims while the detainee is also entitled to bring similar claims. For purposes of analysis it is sufficient to assume that the family members retain a right to bring a claim before the courts. Such a right can be defended on the basis that the family members should have an independent claim they can resort to in the event that conditions of detention prevent the direct victim from effectively pursuing his or her rights.

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19. The immediacy is necessary as the non-provision leads to irreparable damages to the family members.

### C. *Structure of the Article*

This Article is comprised of five substantive parts. The first part introduces the main themes. The second part primarily seeks to ascertain the definitional scope of the phrases ‘unlawful pretrial detention’ and ‘family member.’ The third part explores the conceptual, political and legal contexts that give rise to the rights that can be invoked for the protection of the family members of a detainee in case of an unlawful pretrial detention. The fourth part explores the connection between family members and the detainees by laying down a framework to consider family members’ victims under IHRL who bear rights that can be enforced by resorting to the International Covenant on Civil and Political Rights (ICCPR) or other international covenants. The fifth part contains an analysis of rights and remedies that the family members are entitled to if and when the detainee is a victim of an *unlawful detention* and the family member falls within the definition given herein while also falling into the category of *indirect victims* which is analyzed in the fourth part.

This Article concludes by advancing the position that the extension of rights is possible within the existing legal system when the legal system is looked at as an integral whole which overlaps with many areas of social life, rather than perceiving it in dissected segments that run parallel to one another. Moreover, the analysis indicates there is a possibility of extending certain rights (such as the right to compensation), in selected circumstances, to family members of a detainee even if they reside outside the territory of the U.S.

### D. *Methodological Approach of the Article*

The methodological basis of this Article is drawn from the jurisprudence of recognized international organizations such as the Human Rights Committee (HRC) and treatises of scholars who view international law as a repository, which helps enrich domestic law. The influence of institutions such as the Inter-American Court on Human Rights (IACHR) and the HRC are referred to in this Article as authoritative institutions in setting or shaping the domestic debate on the extension of rights to family members of a detainee on pretrial detention claims. Several decisions of the European Court of Human Rights (ECtHR) are referred to in situations where comparative analysis is required. Employing philosophical debates underpinning IHRL, I engage in an evaluation of contemporary moral, political and societal debates that alter the perceptions pertaining of international law, which enable me to reimagine the rights of family members of detainees.

The underlying theme of this Article is that the domestic legal system should use IHRL to shape unfavorable pretrial detention laws and practices



into acceptable norms that fall within the scope of due process. The theme is based on Professor Joseph Raz's statement that this moment in time is opportune for human rights discourse as "claims about. . . rights are used more widely in the conduct of world affairs than before."<sup>20</sup> This 'persistent power'<sup>21</sup> of IHRL is integrated into this Article's methodological approach to justify the reasons for incorporating IHRL into the U.S. criminal justice system.

## II. DEFINITIONAL CHALLENGES AND IMPACTS OF PRETRIAL DETENTIONS

### A. *Definition of 'Unlawful' Pretrial Detention*

In the context of this Article, the issue arises with regard to 'unlawful' or 'wrongful' pretrial detention as opposed to pretrial detention in general. Nevertheless, this calls for a definition of what pretrial detention encapsulates in general. I note at the outset that the Tokyo Rules emphasize that pretrial detention should only be used as a last resort in any situation<sup>22</sup> and the trial should commence at the earliest possible opportunity.

Unlawful pretrial detention has previously been defined as a situation where the detainee's trial is unduly delayed, or where the detainee has very low or no expectations of being presented for a trial due to the preventive detention policy adopted by the state in respect to certain national or social concerns such as the criminal justice system.<sup>23</sup> Scholars contend that forming a standard definition for pretrial detention is difficult due to differences in the legal systems and because of different purposes for which pretrial detention is used.<sup>24</sup> The other issue that arises is the use of interchangeable

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20. Joseph Raz, *Human Rights Without Foundations*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 321, 321 (Samantha Besson & John Tasioulas eds., 2010).

21. See generally RISSE ET AL., *supra* note 15.

22. Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), G.A. Res. 45/110, U.N. Doc. A/RES/45/110, ¶ 6.1 (Dec. 14, 1990).

23. Compare Deborah N. Pearlstein, *Detention Debates*, 110 MICH. L. REV. 1045 (2012) (reviewing BENJAMIN WITTES, *DETENTION AND DENIAL* (2011)), and Stella Burch Elias, *Rethinking Preventive Detention from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41st COLUM. HUM. RTS. L. REV. 99 (2009), with PREVENTION AND THE LIMITS OF CRIMINAL LAW (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013) (analyzing preventive practices of the States to portray how such practices result in state intervention in the lives of the individuals).

24. Piet Hein Van Kempen, *Pre-Trial Detention in National and International Law and Practice: A Comparative Synthesis and Analyses*, in INTERNATIONAL PENAL AND PENITENTIARY FOUNDATION, *PRETRIAL DETENTION: HUMAN RIGHTS, CRIMINAL PROCEDURAL LAW AND PENITENTIARY LAW*, COMPARATIVE LAW 7 (2012).

terms such as ‘remand in custody’ or ‘preventive detention.’<sup>25</sup> This difference occurs mainly due to the multitude of national enactments used in different states.<sup>26</sup> The French legal system uses the phrase ‘détention provisoire’ and the Spanish legal system uses the phrase ‘la prisión preventiva.’ While the French term indicates the imprisonment is provisional, i.e. with the possibility of being changed later, the Spanish term literally interpreted indicates a preventive incarceration, which could even be interpreted as being indefinite. The differences evident in usage could thus create confusion regarding what is truly meant by the term ‘pretrial detention.’ However, in ordinary terms, pretrial detention can be defined as the “detaining of a person before he is found guilty of a crime.”<sup>27</sup>

It is questionable as to what could constitute an ‘undue’ delay of a trial. As it is a concept where the concept of reasonability comes into play, ascertaining a number of days after which detention becomes unlawful is impossible. Such an approach is open to criticism and would not hold sway due to the differences in the nature of diverse crimes for which individuals are detained prior to trial.

In *United States v. Gallo*, Judge Weinstein stated that “any pretrial detention of more than 90 days exceeds what Congress contemplated, and a pretrial detention of more than six months should flash a warning that a violation of due process has probably occurred.”<sup>28</sup> Although detention lasting for a particular number of days does not indicate an inherent unlawful-

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25. PRETRIAL DETENTION IN THE EUROPEAN UNION 55 (A.M.Van Kalmthout, M.M.Knapen & C. Morgenstern eds., 2009); *see also* the opinion of Judge Sergio García Ramírez in *Lopez Alvarez v. Honduras*, Inter-Am. Comm’n H.R., Ser. C No. 141, IHR L 1525 ¶ 18 (2006) (Judge Sergio García Ramírez points out how preventive detention can turn into a violation of human rights: “preventive detention [is one] of the most severe of the precautionary measures still used in criminal trials, since it implies a profound restriction to freedom, with very important consequences. We normally state that the preventive detention is not a real sanction; it is not a punitive measure, but instead simply a precautionary and ephemeral one. Technically, this is true. However, considering this phenomena in the light of reality—even when it comes up against the technicality—preventive detention does not differ at all, except in its name, of the punitive detention: both are a deprivation of freedom, they (normally) occur in terrible conditions, they cause the subject and those that surround him a serious material and mental damage, and they normally have long-term repercussions, sometimes devastating”); Elizabeth A. Jenkins, *Preventive Detention in the United States of America: Legal and Practical Dimensions*, UNIV. OF. FLA. LAW (2010) [http://www.law.ufl.edu/\\_pdf/academics/centers/cgr/11th\\_conference/Elizabeth\\_Jenkins\\_Preventative\\_Detention\\_in\\_the\\_US.pdf](http://www.law.ufl.edu/_pdf/academics/centers/cgr/11th_conference/Elizabeth_Jenkins_Preventative_Detention_in_the_US.pdf).

26. *See* PRETRIAL DETENTION IN THE EUROPEAN UNION, *supra* note 25, at 55.

27. *See* OPEN SOC’Y FOUNDS., *supra* note 2, at 7.

28. 653 F. Supp. 320, 334 (E.D.N.Y. 1986).

ness in the pretrial detention, I agree that the length of the detention could at least be considered a warning that due process has been violated. However, this case was distinguished in *United States v. Stanford*<sup>29</sup> with reference to *United States v. Salerno*<sup>30</sup> in that the court differentiated between punitive and regulatory detention. According to this line of cases, the latter is considered lawful while the former is not. Hence, the current principle is that the mere duration of detention would not suffice to consider it an unlawful pretrial detention. In addition to undue delay, other circumstances such as police officers lying to or misleading the prosecutors; failing to disclose exculpatory evidence, or unduly pressuring the prosecutor to seek an indictment, are other circumstances that have given rise to unlawful pretrial detention.<sup>31</sup>

### 1. Presumption of Innocence

Interpretation and application of the presumption of innocence in the U.S. becomes important in my attempt to define unlawful detention. While 18 U.S.C. § 3142 (j) reaffirms the applicability of the presumption of innocence, the level of discretion granted to judicial officers in determining the same could result in discriminatory or unreasonable pretrial detentions. The opportunities available for subjective judgments as to whether a suspect ought to be detained prior to trial is evident in the wording of § 3142 (g) (3) (A) which *inter alia* considers the “person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings” in making the decision. According to the human rights approach that is argued for in this Article, the elements mentioned above are characteristics that the court should consider in determining whether an individual should remain in pretrial detention. Accordingly, these characteristics may help determine the individual’s innocence and flight risk. If resorted to in an effective manner, the rule mentioned herein coupled with the adoption of the ‘fair balance test’<sup>32</sup> should lead to a reduction in arbitrary and unlawful pretrial detention. Although several aspects of the section are worthy of deference, making a detention decision, and determining the length of such decision based on employment and financial resources

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29. 722 F.Supp. 2d 803, 808-09 (S.D. Tex. 2010).

30. 107 S.Ct. 2095 (1987).

31. *Evans v. Chalmers*, 703 F.3d 636, 647-48 (4th Cir. 2012). The *Evans* decision also complies with 42 USCA §1983. *Id. But see Julian v. Hanna*, 732 F.3d 842, 846 (7th Cir. 2013) (declining to follow the *Evans* decision).

32. This test is analyzed in detail in Section IV.B.2.

for instance could lead to discriminatory results.<sup>33</sup> Moreover, factors such as flight risk and the nature of the crime alone should not determine the necessity of holding an individual in pretrial detention.<sup>34</sup>

## 2. Arrests and Violations of Due Process

The pretrial detention process generally commences with the arrest of an individual. Either a suspect or a person charged directly with a crime can be arrested. This essentially means that a person does not necessarily have to be charged with a crime in order to be arrested.<sup>35</sup> In some such cases there is a possibility of the detention becoming an unlawful detention.

Many international instruments contain provisions relevant to detentions in general. Some such instruments are the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (Body of Principles),<sup>36</sup> the International Covenant on the Protection of All Persons from Enforced Disappearances<sup>37</sup> and United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.<sup>38</sup> These instruments are relevant in that the provisions of such instruments are useful in changing the domestic legal system to be more norm-compliant and responsive to the rising needs of society.

In the domestic context, it has been identified that most unlawful pretrial detentions generally result from problems in the criminal justice system or immigration laws.<sup>39</sup> In light of the fact that the International Court of Justice (ICJ) has reiterated the injustice created by wrongful deprivation of liberty and condemned it as a violation of fundamental international legal instruments, pretrial detention ought to be taken as a serious issue of human rights. One must pay greater attention to pretrial detention especially when

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33. See also OPEN SOC'Y FOUNDS., *supra* note 6, at 12 (arguing that people from poorer backgrounds suffer more than individuals from a richer background).

34. See, e.g., Piruzyan v. Armenia, <http://www.echr.coe.int> (last visited Nov. 20, 2015); Muller v. France, <http://www.echr.coe.int> (last visited Nov. 20, 2015).

35. KALMTHOUT ET AL., *supra* note 25, at 4.

36. G.A. Res. 43/173, U.N. GAOR, U.N. Doc. A/Res/43/173 (Dec. 9, 1988).

37. Dec. 20, 2006, 2716 U.N.T.S. 3.

38. G.A. Res. 44/159, 82nd Plenary Meeting, U.N. Doc. A/Res/44/159 (Dec. 15, 1989).

39. See, e.g., Devon W. Carbado, *Criminal Law and Immigration Law: Defining the Outsider: II. Criminal Law, Immigration Law, and the Noncitizen: Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Thomas H. Cohen, *Pretrial Detention and Misconduct in Federal District Courts, 1995 – 2000*, BUREAU OF JUST. STAT. (Feb. 2013) <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4595>.

unwarranted levels of discretion play an important role in detention decisions as shown above.<sup>40</sup>

In light of the foregoing analysis, by using the phrase ‘unlawful pretrial detention,’ I refer to detentions made subjectively without resort to objective criteria, detention with unduly delayed trials, violations of rule of law, inhumane conditions prevalent in detention centers, and the continuation of detention even once the reasons for detention have been eradicated.<sup>41</sup>

## B. *Definition of ‘Family Members’*

### 1. Modern Conceptualization of ‘Family Members’

Using the phrase ‘family members of the detainee’ as a generic phrase is as problematic as it is inherently vague. Furthermore, lack of consensus as to what constitutes a family makes it a difficult phrase to define. One main question that arises, therefore, is whether it refers to different categories of family members such as ascendants, descendants and dependents. Could this definition then be extended to such relatives notwithstanding their dependency on the detainee for sustenance? If such a limitation were to be drawn, would that result in further limitation of parties to official legal relationships such as marriages?<sup>42</sup> This gives rise to the next issue: whether partners of civil unions, homosexual partners and concubines are included in the definition. In addition to these, it must also be ascertained whether any definition arrived at could be extended to such family members who reside outside the territorial jurisdiction of the U.S.

This Article does not analyze whether the definition of ‘family members’ should be restricted to the traditional matrimonial unions of heterosexual partners and their children. The general presumption on which this

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40. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 553, 573 (May 24, 1980); see also Martin Schoenteich, *Why the Overuse of Pretrial Detention is an Overlooked Human Rights Crisis*, OPEN SOCIETY FOUNDATIONS (Sep. 12, 2014), <http://www.opensocietyfoundations.org/voices/why-overuse-pretrial-detention-overlooked-human-rights-crisis>.

41. See generally PRISONS IN THE AMERICAS IN THE TWENTY – FIRST CENTURY: A HUMAN DUMPING GROUND (Jonathan D. Rosen & Martin W. Brienens eds., 2015) (critiquing the current penitentiary practices for various reasons including the overuse of pretrial detention and the prison conditions that exist; further critiquing the unduly long pretrial detentions and indicates that such pretrial detentions could transform into unlawful pretrial detentions).

42. See *Hartford Ins. Co. v. Cline*, 139 P.3d 176, 178 (N.M. 2006) (holding the exclusion of domestic partners from an automobile insurance policy was not invalidated as contrary to public policy because there was no express statutory language in New Mexico covering domestic partners within the definition of family members).

analysis is based is that family members should be inclusive of partners of heterosexual, homosexual and transsexual unions.<sup>43</sup> However, lack of empirical data on how pretrial detention affects non-traditional unions compels me to restrict the analysis to the impact of unlawful pretrial detentions on traditional families. It is also important to note that the HRC, in General Comment (GC) 19 has explained that states can determine who should be included within the definition of family in accordance with their respective culture.<sup>44</sup>

One of the main connections between unlawful pretrial detention and the family members of a detainee is that the family nexus is immediately affected by the detention.<sup>45</sup> This inevitably affects family members in the socioeconomic paradigm. The tragic result of the draconian overuse of pretrial detention is found to be more disadvantageous to those who come from poorer backgrounds.<sup>46</sup> One of the reasons that undergird such high pretrial detention rates among the poor is their inability to, *inter alia*, afford bail.<sup>47</sup>

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43. Lack of egalitarianism in recognizing same sex unions can create far-reaching consequences in terms of the rights of family members that I advocate for in this Article. The process has dialectically been slow prior to 2004 until the Courts of the State of Massachusetts ruled that same sex couples can marry. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). There has been gradual development since then. Following *United States v. Windsor*, many states recognize same sex marriages as legal. 133 S.Ct. 2675 (2013).

44. As the comment provides “[t]he Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, “nuclear” and “extended,” exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.” International Covenant on Civil and Political Rights, Art. 23, Gen. Comment 19 (July 27, 1990), [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29\\_%28GC19%29\\_en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC19%29_en.pdf).

45. OPEN SOC'Y FOUNDS., *supra* note 6, at 11.

46. *See id.* at 11-12.

47. In addition to bail, the author also refers to the inability of the detainee to ‘bribe’ or afford a ‘barrister’. *Id.*

## 2. Legislative Impact and Importance

A comprehensive analysis of the implications arising from federal-state political interdependence and independence is required when evaluating the definition of ‘family members.’ It suffices for the purposes of this Article to employ a representative segment of such legislative enactments. It is undisputed that “there has long been conflict over the relationship between the states and the federal system vis-à-vis the family.”<sup>48</sup> Harbach argues that ‘family’ is essentially regarded as a state matter in terms of subject matter jurisdiction.<sup>49</sup> This, however, is not necessarily true in terms of pretrial detention and the criminal justice system in the U.S. because the federal rules pertaining to pretrial detention result in family matters indirectly being converted to federal matters.

In domestic jurisprudence, there are several statutes and documents, which refer to ‘family.’ The Model Penal Code (MPC) of the American Law Institute (ALI), which has greatly influenced the criminal justice of the U.S., does not define what constitutes a family. However, it contains references to substantive offences against families. Many states, which have adopted the MPC in whole or part, have also abstained from defining the term ‘family.’<sup>50</sup> Although the criminal justice system lacks an authoritative definition of the phrase ‘family members,’ there are other legislative definitions of the term at federal, state and zonal levels.

Legislative bodies in certain states have sought to emphasize the importance of residing in one housing or living unit for purposes of being considered a family. For instance, the Florida Statute on Proceedings Relating to Children defines family as “a collective body of persons, consisting of a child and a parent, legal custodian, or adult relative, in which: (a) the persons reside in the same house or living unit.”<sup>51</sup> Domestic Relations Law (hereinafter DRL) concerning marriage and child custody also defines ‘family member’ as “a spouse, including a former spouse, a grandparent, a parent, a child, a stepchild, or any other person living in the same household.”<sup>52</sup>

For purposes of employment law, The Code of Federal Regulations (CFR) states the definition of an individual as a member of the ‘immediate family’ does not depend on whether he is related by blood or marriage.

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48. Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 131 (2009).

49. *See id.* at 134.

50. *See* N.J. STAT. ANN. § 2C:1-14 (West 2006); N.Y. PENAL LAW § 10 (McKinney 2013); OHIO REV. CODE ANN. § 2901.01 (LexisNexis, 2010).

51. FLA. STAT ANN. § 39.01 (West 2015).

52. *See* KY. REV. STAT. ANN. § 403.720 (West 2015).

Accordingly, parents, spouses/partners, biological children, stepchildren, foster-children, stepparents and foster-parents are considered members of the immediate family. The CFR further excludes other relatives even when living in the same household.<sup>53</sup> Due to the many normative ramifications that arise, the definition that I advance does not fall in line with some aspects of the CFR definition. For instance, I argue that the mere fact that an individual does not fall into the category of ‘immediate family’ cannot be used as a justification to deny them of any rights that may arise because of the pretrial detention of a family member. The view that I have adopted can also be substantiated with reference to the DRL. The definition of ‘family’ is required to take into account the economic dependency of such units and its political and economic functions as have also been identified by important IHRL conventions such as the ICCPR and the International Covenant on Economic Social and Cultural Rights (ICESCR). Therefore, any definition of ‘family’ cannot adopt a dismissive stance towards other family members who do not fall within the restrictive scope of ‘immediate family.’

The other challenge that one faces in forming a definition is the use of the terms ‘family,’ ‘traditional family,’ ‘immediate family’<sup>54</sup> and ‘functional equivalent of a traditional family’ in different contexts. Nonetheless, it is safe to determine that each of these terms do not require separate analysis as they are interchangeable and because an ordinary person is capable of understanding the terms to include certain individuals such as parents, spouse, children and other family members dependent on one another and living under one roof. Such a determination is also substantiated by *Morrissey v. Apostol*, where the Appellate Division of the Supreme Court of New York held in relation to zoning laws that that terms ‘family’ and ‘functional equivalent of a traditional family’ are not unconstitutionally vague. The Court highlighted the degree of certainty required in that regard is one sufficient to afford a reasonable person of ordinary intelligence to not be forced to guess at the meaning.<sup>55</sup>

Even though the examples above indicate an almost metaphysical attempt to characterize what a ‘family’ should include and what it ideally should be, the task is made somewhat easier by IHRL. The HRC adopts a rather broad view of what a family should consist of in relation to Article 17 of the ICCPR by allowing states to define families in accordance with the respective cultural practices. It requests state parties to give the term a “a broad interpretation to include all those comprising the family as under-

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53. 29 C.F.R. § 780.308 (2016) (defining immediate family).

54. But see Colo. Const. art. XXVIII § 2(8.5) (defining ‘immediate family member’; held unconstitutional by *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010).

55. 75 A.D.3d 993, 996 (N.Y. App. Div. 2010).



stood in the society of the state party concerned' and invites states to indicate in their reports the meaning given in their society to the terms family and home."<sup>56</sup> The notion that the definition for family members may vary according to the state is further highlighted by the HRC in GC 19 as was indicated above.<sup>57</sup> Hence, the term 'family' should be taken to mean the members who live in one unit and are emotionally, socially, economically and legally attached to one another in a manner that enables them to claim rights when one member is held in unlawful pretrial detention because they too become victims of such circumstances.

### III. CRIMINAL JUSTICE TO HUMAN RIGHTS: BRIDGING THE GAP

#### A. *Factual Background*

The World Prison Population List (WPPL) records a total of 2,239,751 detainees in U.S. prisons as of October 2013.<sup>58</sup> This number is inclusive of pretrial detainees and is the highest recorded detention rate in the world.<sup>59</sup> It ranks above China, which has a total detention record of 1,640,000.<sup>60</sup> According to the empirical data collected by International Center for Prison Studies (ICPS), there were 480,000 pretrial/remand detainees in the U.S. as of May 2014.<sup>61</sup> In relation to the high number of pretrial detainees in the world, the Director of ICPS states that "many of [them] are held unnecessarily, for exceptionally long periods and in conditions which fall far short of internationally agreed standards."<sup>62</sup> Moreover, many works containing the research efforts of Open Society Foundation refer to the U.S. as the country with the highest number of pretrial detainees. It further notes that disregard-

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56. International Covenant on Civil and Political Rights, Art. 17, Gen. Comment 16 ¶ 5 (Apr. 8, 1988), [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29\\_%28GC16%29\\_en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29_%28GC16%29_en.pdf) (internal quotations omitted).

57. ICCPR, Gen. Comment 19, *supra* note 44, ¶ 2.

58. Roy Walmsley, *World Prison Population List (10th ed.)*, APCCA, [http://www.apcca.org/uploads/10th\\_Edition\\_2013.pdf](http://www.apcca.org/uploads/10th_Edition_2013.pdf).

59. *Id.*

60. The number of detainees in China does not include pretrial detainees. *But see* International Center for Prison Studies, *Close to Three Million People in Pretrial Detention Worldwide, New Report Shows*, INST. FOR CRIM. POL'Y RES., <http://www.prisonstudies.org/news/close-three-million-people-pre-trial-detention-worldwide-new-report-shows> (reporting a total of 250,000 pretrial detainees in China as of May 2014).

61. *Id.*

62. *Id.*

ing pretrial detainees can lead to serious human rights violations that are not restricted to the individual in the physical control of the authorities.<sup>63</sup>

The golden thread woven into criminal justice is that an individual charged with a crime, a pretrial detainee and a suspect are innocent until proven guilty. This originates from the Latin expression *ei incumbit probatio qui dicit, non qui negat*, which roughly translates to mean that the burden of proving an individual guilty lies on the one who claims that such individual is guilty. However, it is doubtful whether the presumption of innocence is applied effectively in the contemporary legal system of the U.S. Both the prison statistics mentioned above and Shima Baradaran's analysis of how the shifts in law have swung towards favoring pretrial detention based on judicial findings prior to a determination of facts by a jury,<sup>64</sup> are useful in proving the presumption of innocence is not given primacy by current law. A further conclusion that can be drawn is that nearly 500,000 families are negatively affected in some form due to pretrial detention.

While I will not analyze the specific flaws of the U.S. legal system that lead to pretrial detention it is necessary to turn to IHRL in order to ascertain the rights, if any, which can be made available to the family members of the detainee. First, one must ascertain whether there are justifications to draw from IHRL without restricting the analysis to domestic human rights jurisprudence. The resolution of the above question then leads to the second predicament as to whether it is necessary to determine what rights carry the highest import and how such rights should be incorporated into the domestic jurisprudence to seek enforcement. Thirdly, it is necessary to come full circle and link such rights to the unlawful pretrial detention that occurred through the legal system, which necessitated the quest for enforceable rights in a different domain. Therefore, I shall turn to these three aspects in this part.

#### B. *Should Family Members Have Rights and Remedies Emanating from Unlawful Detention?*

This Article seeks to promote the notion that the state should provide rights and remedies to the family members of the detainee who are affected by the unlawful detention, and that such rights and remedies should be treated separately from the state's liability towards the detained individual. In order to construct a norm-making process, it is essential that the jurispru-

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63. See generally OPEN SOC'Y FOUNDS., *supra* note 2.

64. See Baradaran, *supra* note 9, at 401.

dential and philosophical underpinnings pertaining to human rights are taken into account.

It is noteworthy that in the international human rights sphere, “positivist underpinnings are shaky”<sup>65</sup> and raise the bar much higher when one attempts to interlace two different domains of law. This calls into question the nature of rights that ought to be made available to the family members of the detainee. In this segment, I refer to Jerome Shestack and Morton Horowitz, who respectively argued or acknowledged the perception of human rights as subjective<sup>66</sup> and that rights may have a dual application whereby one party benefits while the other suffers.<sup>67</sup>

Shestack states:

[H]ow we understand the meaning of human rights will influence our judgments on such issues as which rights are regarded as absolute, which are universal, which should be given priority, which can be overruled by other interests, which call for international pressures, which can demand programs for implementation, and which will be fought for.<sup>68</sup>

It is important that rights too can have a hierarchical structure of importance. In this context, undoubtedly the rights of the detainee should be given primacy over and above the rights of the family members as the latter have not lost their right to liberty. However, that does not mean that there is no opportunity at all to provide rights to family members at any cost. The rights that I argue for in this Article—the right to privacy and family life, the right to conjugal visits, the right to spend recreational time with family members and the right to compensation are rights that can be equally beneficial to the detainee as well as the family members. The high proportion of pretrial detention in the U.S. also indicates that it is time to demand programs for implementation of these rights and that international pressure (in this context through decisions of international bodies for instance) can be utilized in promoting rights.

All human rights are dependent on a nexus between an individual and a state. This could be based on an individual’s relationship with another individual who is an agent of the state, which gives rise to a claim against the state. Human rights communications could also be brought by an individual seeking to move an international body or tribunal to pressure his or

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65. Jerome J. Shestack, *The Jurisprudence of Human Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 202 (Theodor Meron ed., 1986).

66. *Id.*

67. Morton J. Horowitz, *Rights*, in PHILOSOPHY OF LAW: CRITICAL CONCEPTS IN PHILOSOPHY (Brian H. Bix ed., 2006).

68. Shestack, *supra* note 65.

her state to grant him or her rights based on the nexus that exists between him or her and another individual who has been victimized by the state. Such individuals seek to claim that the nexus between the direct victim and the claimant, entitles the latter to a set of rights in connection with, and independent of, the rights of the direct victim.

It is clear that claims by family members of the detainee in pretrial contexts arise due to such a complex chain of connections. In this exercise, one must positively prove that the pretrial detention is unlawful. Secondly, one must prove that there is a valid and legitimate relationship between the individual who is in pretrial detention and the individual claiming the right. Thirdly, the alleged harm suffered by the family member must be shown to be consequent upon either the state's delay in holding the trial or the detention which has become tainted by unlawfulness. Fourthly, it must be proven that prior to the unlawful detention, the status quo of the family was better than at present. Finally, proof that releasing the detainee or conducting the trial in a timely manner, or remedies given by the state are capable of genuinely remedying the situation, must be shown. A broken link in this chain would severely harm the causal nexus that is required for a family member of the detainee to justify their claims. Hence, this five-fold approach should be adopted to establish the rather difficult interlink between the domestic legal system and IHRL. In addition, the general rule according to which a claim is considered admissible is based on proof that domestic remedies have been exhausted or there is no effective remedy available for the claims in the domestic system.

I now turn to human rights law as a tool to promulgate the notion that the bridging of the gap between the two domains enables a meaningful co-existence. This, in turn, will lead to lesser violations of rights of family members of a detainee and it would contribute to the reduction of unlawful pretrial detention. In this exercise, Horwitz's conception of rights holds significance as it propounds how "rights have helped and hurt the struggle for a more just society."<sup>69</sup> It can be used to expose how the rights of the majority to be safe from suspected offenders, and the state's interest in successfully convicting arrested suspects, have overridden the rights of the family members of the detainee to the extent that the legal system fails to take account of such rights at all. The dual purpose of law of helping and hurting the struggle for human rights is also evident in provisions such as § 3142 (g) (3) (A) of the U.S.C. that was analyzed above.<sup>70</sup> Horwitz further sub-

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69. Horwitz, *supra* note 67, at 28.

70. Such laws can be interpreted broadly or narrowly. Depending on the interpretation, the lack of community ties for instance, could mean that the detainee has a higher flight risk which will be used in justifying the pretrial detention. But it is ques-

stantiates the argument that rights are still capable of preserving the 'rich and the powerful,'<sup>71</sup> which can be substantiated with Sadhbh Walshe's argument that the likelihood of being jailed for months prior to trial is much higher for the poor and the potential to being released on bail is directly proportional to the potential of being acquitted.<sup>72</sup> These difficulties indicate there are other concerns underlying the laws pertaining to pretrial detention. This calls for an analysis of the politics of human rights.

### C. *Politics of Human Rights*

Alison Kesby argues the question is not of "being recognized as a rights-bearer by virtue of a conferred legal or political status, but of demonstrating that one is a subject of rights."<sup>73</sup> This indicates a category of individuals can be regarded by law as bearing rights and yet not be considered 'subjects' of those rights. In other words, Kesby shows how interpretations can lead to the denial of rights to those who are right-bearers. It is thus axiomatic that human rights contain political connotations. Hence, in any attempt to combine two overlapping frameworks with the notion of unifying them, the analysis would fall short of the preconceived aspirations in failing to address politics of human rights. Kesby correctly points out that the "analysis centres less on law and more on the claims of political philosophy as to how the right to have rights is to be interpreted."<sup>74</sup>

Kesby's treatment of human rights is connected to the notion of citizenship. It is possible to interpret that approach as an attempt to find a nexus to connect the right bearer with the 'right,' which is taken as an abstract concept. The application of the same approach to this context would demand a nexus be recognized as between the family members of the detainee and the rights that I argue for in this Article. However, the nexus required here poses different 'political' concerns than what she argues for, as a state's perception of what constitutes a family plays a major role in determining whether the individuals concerned are in fact eligible to claim a

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tionable whether the mere lack of community ties indicates a danger to society from the pretrial detainee. Hence, these laws can grant the relevant authority a large margin of discretion thereby leading to discrimination.

71. *Id.* at 29.

72. Sadhbh Walshe, *America's bail system: one law for the rich, another for the poor*, THE GUARDIAN, (Feb. 14, 2013), <http://www.theguardian.com/commentisfree/2013/feb/14/america-bail-system-law-rich-poor>.

73. ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY AND INTERNATIONAL LAW 118 (2012).

74. *Id.*

right.<sup>75</sup> Moreover, if citizenship ought to be regarded as the ground warranting the granting of human rights, it will negate the universal nature of rights that are connected to liberty that IHRL aspires to achieve. That approach could also complicate my attempt in this Article to argue that family members, even if residing outside the territory of the U.S. may be eligible to receive certain rights in the event that a member of their family is found to be detained unlawfully within the U.S. In this respect, I depart from Kesby's position. I do not concur with her position that one must be a national of the state to be entitled to rights. For instance, the preamble of the American Convention on Human Rights (ACHR) recognizes that rights are not based on nationality but on 'human personality.'

Legal legitimacy of the claims that can be raised by the family members of the detainee is, to an extent, dependent on the political legitimacy of the claims. The discourse becomes politicized in pretrial detention-related rights, as inability to pay bail, for instance, gives rise to longer periods of pretrial detention only for a particular class of people.<sup>76</sup> This violates the very norm that the law undertakes to preserve: equal treatment under the law. Such violations taking place in the U.S. can be addressed through the implementation of the provisions of the ICCPR which is analyzed more fully in the segments that follow.

Pablo Gilabert<sup>77</sup> asserts that the political and practical perspective of human rights ought to be contrasted with the traditional understanding of human rights, whereby the rights are viewed as existing prior to an institutional structure.<sup>78</sup> Often, when institutional importance is not acknowledged, the possibility of creating a framework of rights suffers, as it would amount to the creation of a norm or policy that does not contain the metaphorical teeth to bite. If human rights are perceived as functioning within an institutional structure, its political connotations naturally become known. The first step in any attempt to establish family members of a detainee have tangible rights that can be claimed under IHRL ought to recognize the political underpinnings that create barriers for new rights to come into existence. The suppression of new rights, from the stance of governance, is sensible as it facilitates smooth governance, although the claim that governance can be smooth when rights are suppressed is rather ironic. The reality is that it in fact constitutes a suppression of rights which ought to be acknowledged.

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75. See *supra* Section II.B.

76. See generally OPEN SOC'Y FOUNDS., *supra* note 6.

77. Associate Professor of Philosophy, Department of Philosophy, Concordia University.

78. Pablo Gilabert, *Humanist and Political Perspectives of Human Rights*, 39 POL. THEORY 439 (2011).

Such acknowledgement is the first step in addressing the concerns. Gilabert claims the understanding of 'political' and 'practical' perspectives of human rights as complementary to the traditional understanding of human rights, *i.e.* 'humanist' or 'naturalistic,' proves that both aspects are necessary for full realization of human rights.<sup>79</sup>

In the context of pretrial detention, any attempt to create a framework for family members to claim rights, involves primarily the institutional aspects of the prison system and the state. The aspirations of the prison system to incarcerate anyone who breaches the law or is suspected to have breached a law, complements the normative deterrent, retributive and incapacitation objectives of the state. While the institutional aspirations may be reflective of the majoritarian outlook of the general society, the objective of the law ought to be the provision of justice and equal access to justice.

The use of the term 'minority' generally triggers symbols of racial or ethnic minorities. However, I use the term minority to represent those whose interests are not adequately represented *lex lata* in any given context. Because of having definitive symbolic meanings as to what minorities signify, the general application of the word becomes rather restricted, preventing the masses from viewing those who are adversely affected by pretrial detentions as minorities. Although it is beyond the scope of this article to engage in an etymological and semantic analysis of the term 'minority,' it suffices to state the particular class of society affected by pretrial detentions should be perceived as a minority. This could be a class of people who are either poor, less powerful or belong to ethnic minorities, and which is incapable of paying bail or obtaining services from top-tier influential counsels who are capable of pulling the legal strings for an expedited trial. This practical aspect contributes to the perpetuation of problems faced by pretrial detainees and their family members.

Gilabert gives much prominence to "coherence with practice and justification" in the five-dimensional analytical framework proposed in his synthesized political-naturalistic approach to human rights.<sup>80</sup> He emphasizes that "the view of human rights as institutionally bounded is particularly coherent with current legal and political practice."<sup>81</sup> Although, Gilabert fails to respond to the question of the nature of the institutions he deals with in his analysis, this question was raised and answered in late 2004 by Professor Roland of the University of California.<sup>82</sup> He classifies institutions into

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79. *Id.* at 440.

80. *See generally id.*

81. *Id.* at 440.

82. E. Morris Cox Professor of Economics and Professor of Political Science, Economics Department, University of California, Berkeley.

slow-moving and fast-moving ones, showing different approaches that ought to be adopted when seeking to alter existing political stances.<sup>83</sup> While Roland's approach to classified institutions takes an economic turn, a similar line of thought can be utilized to alter the existing mindset pertaining to institutional control of pretrial detention.

### 1. Slow-Moving Institutions

Roland identifies culture, values, beliefs and social norms as examples of slow-moving institutions.<sup>84</sup> The perceptions embedded in society are difficult to change and it is apt to call such institutions slow-moving. While human rights activism may be capable of gradually altering slow-moving institutions, the legal framework is also capable of changing institutions such as the ones mentioned above. There is an important reciprocal interconnection between slow-moving and fast-moving institutions in that the former shapes the latter, and as time goes by the transfigured version of the latter helps alter the former. It has to be understood that the rights that are propounded in this article have to be introduced gradually through policy changes and that such policy changes are inherently associated with longer durations of lobbying.<sup>85</sup>

### 2. Fast-Moving Institutions

Functional approach and macrosystemic approach are two different tools that Roland identifies for classifying different institutions. Under the functional approach "a specific institution corresponds to each [economic] need, while the macrosystemic approach 'starts from a descriptive list of different institutions going from general to specific categories.'<sup>86</sup> The latter method concentrates on political, legal and social institutions, which according to him are more capable of creating a sustainable development.<sup>87</sup> The sense in which I apply this theory to the pretrial detention context is based on the ideology of altering legal institutions. Hence, the fast-moving institution in this sense ought to be a change brought through the legal framework of the country.

As pointed out above, there is an inherent interdependence between fast-moving and slow-moving institutions. While cultural and societal

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83. Gérard Roland, *Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions*, 38 *STUD. IN COMP. INT'L DEV.* 109 (2004).

84. *Id.* at 109.

85. See generally RISSE ET AL., *supra* note 16.

86. Roland, *supra* note 83, at 112.

87. *Id.*



changes are important, such changes are often impossible to achieve when divorced from institutional alterations. Especially, when concerning rights, the changes have to adopt mandatory initial steps within a legal framework. Although activism pertaining to human rights may trigger this, at the initial stages there exists many societal barriers that prevent such rights from succeeding. Classic examples for the above assertion appear with regard to granting equality to women or racial minorities. Moreover, the spiral model of human rights also leads one to the same result.

In short, much depends on how regimes can be encouraged to appreciate the link between the criminal justice system and IHRL so they are not treated as completely severable from one another, but instead perceived as sufficiently connected for the implementation of one system to give rise to rights under the other. The realization that a change for family members can only be effectively brought through fast-moving institutions lays the foundation for analyzing the existing legal framework. Such an approach helps ascertain *lex lata* and strengthens justifications for formulating *lex ferenda*.

The existence of moral connections between wrongdoing and the application of criminal law for retributive or deterrent purposes is undisputed. Nonetheless, in light of the State being responsible for all citizens within its care, the moral philosophy that I appeal to in this context is different in nature in that I seek to promote morality in general with specific reference to secular morality. Such secular morality can only be gained by altering the existing legal framework, which is identified in this segment as a fast-moving institution. Effectively altering fast-moving institutions will ultimately contribute to the change of perceptions in culture and value-based institutions thus creating a consensus that disfavors unlawful pretrial detention which will be perceived for what it really is, namely, the violation of rights of the detainee as well as those of the family members of the detainee.

#### D. *Legal Framework*

In questioning the reasons for initial opposition to a federal government, Dean Russell states:

The power of government is always a dangerous weapon in any hands. The founders of our government were students of history as well as statesmen. They knew that without exception every government in recorded history had at one time or another turned its power – its coercive power as the police force – against its own citizens –

confiscated their property, imprisoned them, enslaved them, and made a mockery of personal dignity.<sup>88</sup>

The quoted passage succinctly sums up the trust society places in institutions can be misused by such authorities if the discretion is not controlled through law. The impact it has on personal dignity was, is and will always be a major concern. The power that rests on the legislature to draft laws to enable pretrial detention, to the extent that it grants discretionary power to a sitting judge to determine the period of pretrial detention, does in fact make a mockery of personal dignity which makes one question the efficacy of the Bill of Rights that was included in the Constitution to prevent that very mockery. The judges too are helpless in this regard to a certain extent due to various pressures (external or otherwise) unless they adopt a radical activist stance in altering the indifferent ‘hands-off approach’ to detention practices.

Russell refers to the Bill of Rights of the U.S. Constitution as a “bill of prohibitions against government” as it restricts the power of government to make laws that would infringe the rights of individuals.<sup>89</sup> Individual liberty, equality, and restriction of discretionary power—which can adversely affect either liberty or equality—are at the core of the Constitution. In this regard, Amendments V, VI and VIII are directly relevant to the criminal justice system. These Amendments also lay the foundation to draw from the international bill of human rights. Amendment V prohibits the deprivation of life, liberty, or property without due process of law, while Amendment VI guarantees a right to a fair trial, and Amendment VIII prohibits cruel and unusual punishment along with the prohibition on excessive bail and excessive fines. I proceed with the presumption that each of these Amendments, in turn, creates rights for the family members of the detainee.<sup>90</sup>

### 1. Domestic to Cosmic: Domestic Human Rights Framework to IHRL

In this segment, I evaluate the possibility of resorting to IHRL to guarantee the rights of the family members of the detainee. In general, this is premised on the notion that there are many underpinning theoretical justifications pertaining to IHRL to warrant drawing from it to enrich the body of law applicable in the domestic sphere. Risse and Sikkink argue ideas and norms pertaining to IHRL have an influence on domestic behavior of states although, unfortunately, only a few scholars have “demonstrated the actual

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88. Dean Russell, *The Bill of Rights*, in THE FOUNDATION FOR ECONOMIC EDUCATION, INC., 1 ESSAYS ON LIBERTY 26-27 (1952).

89. *Id.* at 29.

90. Constitutional law is not analyzed as it is beyond the scope of this Article.

impact that international norms can have on domestic politics.”<sup>91</sup> These authors use the spiral model to show how international instruments of rights can impact the behavior of governments of states party to such instruments. For a comprehensive view of the model they developed, I refer to their two seminal works—*The Power of Human Rights: International Norms and Domestic Change*, and *The Persistent Power of Human Rights: From Commitment to Compliance*. They initially developed the spiral model to “incorporate simultaneous activities at four levels into one framework”<sup>92</sup> and named it a five-phase model<sup>93</sup> of norm-socialization.<sup>94</sup> The five phases of the model indicate five stages a government goes through prior to becoming an international norm-complying state. The five phases are: repression, denial, tactical concessions, prescriptive status and rule-consistent behavior.<sup>95</sup> In this theory, the authors give primacy to “the domestic society in the norm-violating state, the links between the societal opposition and the transnational networks.”<sup>96</sup> They focus on how domestic pressure rising from within a state can lead to the alteration of state behavior. This is compatible with the arguments in Section 3.3.1 where I portrayed how a society can influence the change of laws. Moreover, in Section 5.4.2, in the analysis of extraterritorial application of human rights, the influence of the spiral model is visible in that there is rising domestic pressure against the narrow interpretation of the provisions of the ICCPR, which prevent individuals from benefitting from the full extent of the rights therein.

In addition to Risse, Ropp and Sikkink, Anne-Marie Slaughter and William Burke-White are two scholars who adopted the stance that resorting to IHRL can improve domestic law. They commence their analysis in *The Future of International Law is Domestic* stating:

International law has traditionally been just that – international. Consisting of a largely separate set of legal rules and institutions, international law has long governed relationships among States. Under the traditional rules of international law, the claims of individuals could only reach the international plane when a State exercised diplomatic protection and espoused the claims of its nationals in an international forum. More recently international law has penetrated the once exclusive zone of domestic affairs to regulate the relationships between

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91. RISSE ET AL., *supra* note 16, at 1, 2.

92. *Id.* at 21.

93. RISSE ET AL., *supra* note 15, at 103.

94. RISSE ET AL., *supra* note 16, at 6.

95. RISSE ET AL., *supra* note 15, at 103.

96. RISSE ET AL., *supra* note 16, at 18.

governments and their own citizens, particularly through the growing bodies of human rights law and international criminal law.<sup>97</sup>

They then move on to a comprehensive analysis as to how a shift has come into place in IHRL and international law in general. The authors refer to how “the EU law has migrated from a thin set of agreements based on the functional needs of states in to a far more programmatic comprehensive legal order.”<sup>98</sup> The examples and the analysis that Slaughter and Burke-White have employed indicate their preference in resorting to IHRL to enrich and develop domestic law. These two scholars are not alone in this endeavor and the approach is praise-worthy as it helps domestic jurisprudence absorb developments from a global perspective, thereby enabling it to provide better rights to those within its territory and jurisdiction.

Even though it is appealing to resort to scholarly works which adopt a similar line of reasoning as I have in this article, the real challenge lies in identifying the domestic laws that justify having recourse to IHRL. The primary basis on which IHRL can be resorted to within the U.S., can be found in Article VI (2) of the Constitution. It makes all treaties made under the authority of the Constitution the Supreme Law of the Land. Although there are doubts regarding the extent of application,<sup>99</sup> an approach of modern internationalism enables one to draw from international treaties. One can arrive at such a presumption validly when *opinio juris* pertaining to the matter is read in conjunction with the jurisprudence of the HRC and current state practice with regard to the ICCPR.<sup>100</sup>

According to Immanuel Kant, the rights that states have undertaken in the international sphere under *jus publicum civitatum*<sup>101</sup> formally require the

97. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)* in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW* 110 (Janne Nijman & André Nollkaemper eds., 2007).

98. *Id.* at 112.

99. Many sources are available to assist in this analysis. *Cf.* *Medellin v. Texas* 128 S.Ct. 1346 (2008); *Safety Nat. Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714 (5th Cir. 2009); *Fund for Animal Inc. v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006); *Renkel v. United States*, 456 F.3d 640 (6th Cir. 2006). (2009); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations And Human Rights Treaties*, 24 *YALE J. INT’L L.* 129 (1999).

100. *Opinio Juris* on the matter is analyzed in Section V.D.2. *See* Hum. Rts. Comm., Concluding observations on the fourth periodic report of the United States of America, ¶ 4(a), U.N. Doc. CCPR/C/USA/CO/4 (Apr. 24, 2013).

101. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 213 (W. Hastie trans., T.&T. Clark 1887) (1796).

state to apply those rights meaningfully within the domestic jurisdiction. He mainly emphasizes the existence of a connection between international law and domestic justice, which has found approval in the writings of subsequent authors.<sup>102</sup> The above proposition advanced by Kant is used in this article in establishing the argument that family members of the detainee have rights emanating from pretrial detention that can be invoked against the state by resorting to the international obligations the state has undertaken specifically through the IHRL.

## 2. International Instruments

The UDHR recognizes in Article 12 that no one should be subject to arbitrary interference with his privacy, family, home or correspondence and that everyone has the right to the protection of the law against such interference or attacks. The UDHR further highlights the importance of the family unit and reiterates that it should be protected even from the state.<sup>103</sup> The ACHR adopted in 1969, recognizes in its preamble that “rights of man are not derived from one’s being a national of a certain state, but are based upon the attributes of the human personality, and that they therefore justify international protection in the form of a Convention reinforcing or complementing the protection provided by the domestic law of the American states.” However, the U.S. remains merely a signatory to the treaty since 1977 without ratification of the same, which makes it difficult to effectively rely on the provisions of the ACHR.

In 1998, the U.S. ratified the Convention Against Torture (CAT). Mental suffering intentionally inflicted for purposes of obtaining a confession from an individual or a third person amounts to torture under Article 1 of the CAT. While this is applicable to the family members of the detainee, it is impossible to determine whether the unintended consequences of the pretrial detention could satisfy the requirements of Article 1 of CAT. Furthermore, the “Understanding” added by the U.S., which states that “the definition of torture in Article 1 is intended to apply ‘only to acts directed against persons in the offender’s custody or physical control,’”<sup>104</sup> hinders any possibility of this Article being applied to the family members of the detainee. The hindrance is two-fold, as the state is capable of arguing that

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102. Fernando R. Téson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

103. UDHR, *supra* note 1 art. 16(3) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

104. *See* Comm. against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/28/Add.5 (Oct. 15, 1999).

the impact on family members is unintended and they are not in the offender's custody or physical control.

General Comment 03 of the Committee Against Torture defines victims to include 'immediate family members.'<sup>105</sup> Although not binding, the General Comment's validity and meaningfulness in this respect cannot be denied because:

[General Comments] are means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance.<sup>106</sup>

Accordingly, even if the 'understanding' that has been recorded by the U.S. could deny remedies for mental torture on the aforementioned technical grounds, the objective and purpose of the CAT remains unchanged. Furthermore, it is widely accepted that State parties should abstain from acts, which would defeat the object and purpose of a treaty.<sup>107</sup> Even in cases of 'Reservations', their validity is conditional upon their compliance with the object and purpose of the treaty.<sup>108</sup> Hence, the mere fact that an 'Understanding' applies to the provisions of the CAT cannot be justifiably used by the State to avoid compliance with a particular provision. Alternatively, family members' right to invoke mental torture under CAT remains a possibility in light of unlawful detentions. However, it is impossible to argue that this right will be handed down to such family members on a silver platter anytime in the near future. Therefore, it is necessary to turn to other rights that can lay the stepping-stones to this destination.

The U.S. has not ratified the ICESCR, Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). The U.S. remains a mere signatory to these.<sup>109</sup> The supremacy clause of the U.S. Constitution indicates the treaties entered into have the capacity of becoming the supreme law of the

105. Comm. against Torture, General Comment No. 3 of the Committee against Torture, ¶ 3, U.N. Doc. CAT/C/GC/3 (Nov. 19, 2012).

106. Philip Alston, *The Historical Origins of "General Comments" in Human Rights Law*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY* (2011).

107. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

108. *Id.* art. 19(c).

109. The three Covenants were respectively signed on October 5, 1977, July 17, 1980, and February 16, 1995.

land.<sup>110</sup> Irrespective of the supremacy clause, the general stance of the U.S. is that supremacy in the domestic sphere is only applicable to ratified treaties and it essentially nullifies the favorable impact that could have been created through Article VI.

### 3. ICCPR

The United States is also a party to the ICCPR which in Article 9 (1) guarantees the “right to liberty and security of person” and protection from “arbitrary arrest or detention.” Timely notification of the arrested party of the reasons and charges against him is also a requirement of Article 9 (2). In general, this Article emphasizes the importance of conducting a hearing promptly.<sup>111</sup> Article 9 (1) through (4) are specifically applicable to the detained person. Article 9 (5) may arguably be extended to the family members.<sup>112</sup>

Article 14 establishes the right to equality before a court of law accompanied by the right to a fair trial.<sup>113</sup> This guarantees the presumption of innocence, the right to a prompt trial, equality, adequate time and facilities for forming a proper defense, the right to be tried without undue delay, the right to examine and have witnesses examined, the right to have the services of an interpreter and not be compelled to testify against him. Article 17 (1) guarantees protection from arbitrary and unlawful interference with the family. Article 17 (2) which establishes in absolute form that “everyone has the right to the protection of the law against such interference or attacks,” can be used by the family members of a detainee as a fundamental premise on which the protection is sought from IHRL in the context of unlawful pretrial detention. Article 23 (1) recognizes the family “as the natural and fundamental group unit of society” which is ‘entitled to protection by society and state’ and Article 24 (1) lays the framework for ‘every child’ to have a right to measures of protection “by his status as a minor, on the

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110. U.S. CONST. art. VI (“this Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, under the authority of the United States, shall be the supreme Law of the Land; and all Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

111. ICCPR, *supra* note 1 art. 9(3) (“anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgment”).

112. See discussion *infra* Section V.B.2.c.

113. See *infra* Section IV.B.3.

part of his family, society and the state.” In the pretrial detention context, Articles 23 and 24 hold significance as they transform into international norms that can contribute to norm-setting in the domestic sphere. The right to family life, privacy, conjugal rights and recreational time argued for in the latter segment of the article are inextricably linked to these basic rights drawn from the ICCPR.

Some rights mentioned herein are used in the section that follows to substantiate the foundational rights of family members argued for in this article. Where such matters are arguably vague, reference will be made to GCs of the HRC and the *travaux préparatoires* of the ICCPR for authority and substantiation. The array of rights pertaining to detention and family members in the ICCPR is a justification for relying on the IHRL framework in one’s attempts to solidify rights of the family members. Hence, in order to ascertain whether the IHRL framework lays the normative foundation for rights to be extended to family members in situations of unlawful pretrial detention, analogical references will be made in the segment that follows to the decisions of IACHR and the ECtHR in similar matters.

#### IV. PRETRIAL DETENTIONS AND DETAINEES’ FAMILIES

##### A. Overview

The foregoing segments of this article laid down the framework for the argument that in certain contexts pretrial detention becomes unlawful thereby affecting the family members of such detainees. I argue in this segment that when such an unlawful detention occurs, family members, as defined above, become victims of the circumstances. I contend that, albeit unintentional, the state bears responsibility to remedy the issues and respond to their grievances in the qualified circumstances in which the IHRL framework considers them indirect victims.

The family members of detainees invariably suffer socio-economic effects irrespective of whether the detention is pretrial, post-trial, lawful, or unlawful.<sup>114</sup> Even though these effects may be largely similar in all of the categories mentioned above, the unlawfulness associated with a detention, especially when it occurs in the pretrial context, creates a stronger foundation for the analysis of rights that can be extended to family members. That is on the premise that state intervention, being inherently unlawful, results in the violation of rights not only of the individual directly involved but also of those who are connected to the individual. Prior to ascertaining what rights should be so extended, it is essential to identify the nature of the

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114. See generally OPEN SOC’Y FOUNDS., *supra* note 6.



impact on the family members, the situations in which they can be considered as victims, and the obligations that the state has to fulfill. Hence, in this part of the article, the aforementioned aspects will be analyzed as a precursor to the analysis of rights for which family members should have a legal claim in pretrial detention contexts.

### B. *Complications Arising Out of Marginality*

It is important in respect to laws of the U.S., that have been referred to in previous segments, to take into account the social, cultural, economic, and political factors that affect family members of a detainee. Such differences exist due to the standards of life being different among different social hierarchies. If the standards of life remain precariously imbalanced between such social groups, the system of justice will be negatively affected. "Most people in pretrial detention are poor. . .by the standards of the society in which they live. The poor are more likely to come into conflict with the law, more likely to be detained pending trial, and less able to afford the three B's of pretrial release; bribe, bail or barrister."<sup>115</sup> This is a problem of marginality that should be taken into consideration when assessing the impact created on the family, when drafting new laws, or when evaluating policy considerations to bring domestic law up to speed with IHRL norms.<sup>116</sup> It is important to recognize such groups as socio-economic minorities not in the sense they are a minority as a percentage of the population, but in the sense they are not able to access the protection of the law with ease. In connection thereto, the family members of the detainee are equally disadvantaged as the law still poses barriers to recognize the need to enable them to have a remedy as they are merely considered indirect victims of unintended consequences of certain inherent features of pretrial detention. Unless this marginality is taken for what it is (i.e. a disadvantage which the law fails to take into account), remedying the situation becomes utopian.

#### 1. Societal Influence and Repercussions on Families

Previous studies authoritatively prove those who are subject to pretrial detention are the poor, marginalized, fractions of minority communities, non-citizens, mentally ill, intellectually disabled and individuals belonging

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115. OPEN SOC'Y FOUNDS., *supra* note 2, at 30.

116. See OPEN SOC'Y FOUNDS., *supra* note 6 (giving a detailed analysis of pretrial detention's socio-economic impact on the family members).

to other vulnerable groups.<sup>117</sup> Empirical data is unnecessary to state there is historical oppression in relation to the aforementioned categories irrespective of attempts at social equality or justice. .

Most human rights changes have arisen not merely because of powerful institutions or lawmakers' attempts to provide equality but through societal groups of revolution, activism and many years of struggle. The spiral model of human rights and the analysis on slow-moving institutions bear evidence to this reality. Success stories are as much a part of the human rights rhetoric applicable in this context as it is applicable to contexts of racial or gender segregation. The very success of such attempts can be used in order to create a momentum amongst the public regarding the injustices of pretrial detention, which result in undue burdens on the family members of the detainee.

It is undisputed that there are many factors affecting individual behavior. Environmental factors belong to one such category that can impact individual behavior. What I take environmental factors to mean in this context is the family environment. Its impact on family members has been studied previously from a sociological perspective absent of any legal analysis. For instance, when a parent is in pretrial detention, children invariably suffer as has been shown in *The Socioeconomic Impact of Pretrial Detention*.<sup>118</sup> The suffering would not only be caused by the absence of the parent but also by the discriminatory treatment prevalent in general in society. There are circumstances in which children are stripped off their innocence due to continuous harassment. It is quite possible for some of these children to develop anti-social behavioral patterns. In families where the absent parent functions as the sole breadwinner, the situation becomes even worse as the parent or guardian who is taking care of the child may have to be away from home for long durations in order to find money for the sustenance of the family. While these sociological perspectives are self-evident, what remains to be studied is how such influences can be responded to by the use of the law. Unlawful pretrial detention not only affects the mentality of children but also affects the psychological health of the family members who are, more often than not, left destitute due to long durations of pretrial detention. Society's reluctance to interact with such families may cause anti-social behavior amongst the adult family members as well. While a detailed analysis of the socio-economic impacts on family members are not provided in this article, it may be presumed that the example provided above and the literature referred to lay the foundation to demonstrate authoritatively that

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117. See also Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L. J. 1344 (2014).

118. OPEN SOC'Y FOUNDS., *supra* note 6.

such an impact justifies the invocation of the law to remedy the imbalances. Therefore, it is important to recognize that pretrial detention results in costs that are burdensome for society. It is much easier to prevent these social costs rather than address them once they arise. Use of law to regulate pretrial detention better would be one mechanism through which such a goal may be realized. Once the law is developed to the desired level, enforcement mechanisms can be strengthened by holding individuals and institutions responsible for unlawful pretrial detentions, and undue delays in due process in general. They can further be held monetarily liable for the effects family members of the detainee have suffered.<sup>119</sup>

## 2. 'Fair Balance' Test

In all the circumstances mentioned above, the result is unlawful intervention of the state in the privacy and family life of the detainee. Cecilia Medina, President of the IACHR, has argued similarly in relation to the ACHR<sup>120</sup> while the ECtHR,<sup>121</sup> HRC and other human rights organizations also adopt a similar approach.<sup>122</sup>In *Ferla v. Poland*<sup>123</sup> where the wife of a pretrial detainee applied for permission to visit him, permission was not granted on the grounds that the wife was called as a witness by the prosecution. Even on the occasions she was allowed to visit him, they had been prevented from engaging in effective communication. The court concluded:

[The authorities] went beyond what was necessary in a democratic society "to prevent disorder and crime." Indeed the measure in question reduced the applicant's family life to a degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair bal-

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119. A comprehensive analysis of remedies that should be made available to family members of the detainee and the state and/or individual responsibility follows in Section V.

120. CECILIA MEDINA, *THE AMERICAN CONVENTION ON HUMAN RIGHTS* 162 (Peter Krupa trans. 2014).

121. Liz Campbell, *Criminal Labels, The European Convention on Human Rights and the Presumption of Innocence*, 76 *THE MODERN L. REV.* 681 (2013).

122. See *Pretrial Release and the Right to be Presumed Innocent: A Handbook on International Law Rights to Pretrial Release*, *LAWYER'S RTS. WATCH CAN.* (2013), <http://www.lrwc.org/ws/wp-content/uploads/2013/04/Pre-trial-release-and-the-right-to-be-presumed-innocent.pdf>; *World Report 2015 – Events of 2014*, *HUM. RTS. WATCH* (2015) [https://www.hrw.org/sites/default/files/wr2015\\_web.pdf](https://www.hrw.org/sites/default/files/wr2015_web.pdf) (analyzing pretrial detention practices that amount to state intervention in the privacy and family lives of the detainees in various countries such as Bolivia, Haiti, Italy, Georgia etc).

123. App. No. 55470/00 *Eur. Ct. H.R.* (2008).

ance between the means employed and the aim sought to be achieved.<sup>124</sup>

This is a classic example of how the state oversteps its obligation to enforce criminal justice perhaps to the detriment of its other obligations. The fair balance that is mentioned in the judgment may even be considered a valid test against which societal interests and the private interests of the family may be balanced. The inherent limitations that are associated with a pretrial detention should not be the sole justification that a state has when such detentions result in negative repercussions. In the U.S. where it is alleged that pretrial detention is overused,<sup>125</sup> the adoption of the fair balance test may guarantee that law enforcement authorities and judicial bodies will mandatorily engage in a balancing act between the implications of a pretrial detention on the public and private spheres of the lives of the citizens.

Although the fair balance test will not completely be free from its subjective elements, it will serve a useful purpose in helping courts determine the extent of legality of a pretrial detention. When a detainee (or even a family member) raises a question in court regarding the legality of the detention, the court will be obliged to assess whether the prison authorities have arbitrarily denied the rights to the detainee and the family members. The development of the jurisprudence in this regard can contribute to the selection of criteria that will help determine the legality of the actions of the responsible authorities. While it is premature to determine what components will create the fair balance test, one cannot disregard it before its efficacy is tried and tested. Arguably, the fair balance test will be able to strike a balance by applying a set of rules to ascertain whether the detention and the restriction of rights remain valid or invalid in each case.

### C. *When Do Family Members Become Victims?*

While it is easier to state that a family member becomes a victim the moment there is any form of detention irrespective of its legality, the interesting question in this context is at what point family members can be legally recognized as victims. In this regard, analogical references are made to the decisions of the IACHR, the ECtHR and the HRC's treatment of matters pertaining to personal liberty in general.

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124. *Id.* ¶ 48.

125. See generally OPEN SOC'Y FOUNDS., *supra* note 2; OPEN SOC'Y FOUNDS., *supra* note 6.

### 1. Family Members as Indirect Victims

In its 95th Plenary Meeting held on 29th November 1985, the United Nations General Assembly (UNGA),<sup>126</sup> in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Victims' Declaration) defines 'victims' as persons "who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power."

On a secondary level, the latter part of the second prong of the definition of victim in the Victim's Declaration is relevant to this discourse. Accordingly, "the term 'victim' also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."<sup>127</sup>

When the state violates the rights of the detainee, the consequences that befall the family members are often unintended and the quoted section is in line with the idea that family members can be regarded as indirect victims of such violations. Terminology that identifies one party as a 'direct victim' implies that others such as the immediate family members or dependents of the direct victim can be referred to as indirect victims.

The preamble of the Victim's Declaration recognizes that "frequently. . . families [of victims of crime]. . . are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders."<sup>128</sup>

This highlights the reality on multiple levels. Family members are victimized immediately and, subsequent to unlawful pretrial detention, become victimized at later stages due to financial struggles that are the ramifications of loss of income of the direct victim. Moreover, the Victim's Declaration identifies indirect victims also face challenges when they attempt to assist the prosecution of offenders. Lack of awareness as to how legal systems function, how to effectively negotiate with counsel, and the cost and time associated with such prosecutions can be mentioned as a few examples of difficulties that the family members have to undergo.

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126. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, annex A sec. 1*, UN.ORG (Nov. 29, 1985), <http://www.un.org/documents/ga/res/40/a40r034.htm>.

127. *Id.* § 2.

128. *Id.*

The ECtHR recognizes a category of ‘indirect victims’ and specifically provides the example of the close family members of a person who is illegally detained.<sup>129</sup> However, it further notes that merely suffering from some level of discomfort or worry does not qualify one to have a legal basis to make a claim as an indirect victim before the ECtHR.<sup>130</sup> It sets down certain criteria in order for a family member to be eligible to have *locus standi* stating that persons aggrieved should be in a position to indicate that their suffering “goes beyond what is normal or unavoidable in a case in which a family member is subject to human rights violations.”<sup>131</sup> This may be critiqued for containing a subjective element as it is not clear what constitutes ‘normal’ or ‘unavoidable.’ However, such wording is also essential, as the unavoidable circumstances, emanating from criminal penalties then would result in a plethora of claims from all affected parties leading to a standstill of the law. In other words, a law, which is too broad and does not qualify the circumstances in which a family member can have a legal claim, may open up the proverbial floodgates. This quagmire could perhaps be resolved by applying the standards for determining what constitutes an unlawful pre-trial detention and who can claim remedies when such violations occur.

In *Kurt v. Turkey*,<sup>132</sup> where the applicant’s son had disappeared, the ECtHR unanimously determined there had been a violation of Article 13 of the ECHR which allows “everyone whose rights and freedoms. . . [have been violated to] have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity.”<sup>133</sup> The court was also of the view that when a person has disappeared, the family member should have an arguable right to compensation, “a thorough and effective investigation leading to the identification and punishment of those responsible and including effective access for the relatives for the investigatory procedure.”<sup>134</sup> The significance that a case of this nature holds in the context of this article is that it sets an international

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129. *Claim to be a victim: Indirect victim*, ECHR-ONLINE (2016), [http://echr-online.info/article-34/victim/#Indirect\\_victim](http://echr-online.info/article-34/victim/#Indirect_victim). These members are parents, spouses, and children, etc. *Id.*

130. *Id.*

131. *Id.*

132. 27 Eur. H.R. Rep. 373 (1998).

133. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (Sept. 3, 1953) [hereinafter ECHR]; *see also Kurt*, 27 Eur. H.R. Rep. ¶ 71 (Amnesty International, in submitting its views to the courts, referred to the ‘severe mental anguish’ that family members suffer in the face of the disappearances of a loved one. In this context, the anguish suffered by the family members of the detainee becomes a relevant factor).

134. *Kurt*, 27 Eur. H.R. Rep. ¶ 140.

precedent for family members to be directly involved when the suffering they undergo is indirect. Moreover, the legal right that an individual, whose right to liberty has not been infringed has in exerting pressure on state authorities in obtaining a thorough investigation is highlighted in this case. Its importance is also prominent in that family members are considered as having such enforceable rights even when the violation has been committed by an individual acting in official capacity. If such an approach can be adopted in relation to unlawful pretrial detentions, it may be possible to have a more favorable stance towards the rights of the family members.

In *Çakici v. Turkey*, where the brother of a person who allegedly disappeared brought a claim before the ECtHR, the court considered the criteria that have to be fulfilled by an indirect victim to obtain *locus standi* in relation to enforced disappearances. The court reaffirmed: “whether a family member is [an indirect] victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation.”<sup>135</sup>

The elements laid down as necessary for one qualifying as an indirect victim in the ECtHR are as follows: (a) proximity of the family tie, (b) the particular circumstances of the relationship, (c) the extent to which the family member witnessed the events in question, (d) the involvement of the family member in the attempts to obtain information about the disappeared person, and (e) the way in which the authorities responded to those enquiries. While the final three criteria should be specifically applied to cases of disappearances, the first two are applicable in claiming that one is an indirect victim with regard to unlawful pretrial detentions. It is noteworthy that this approach is also compatible with the foregoing analysis pertaining to the definition of family members in part 2 of this article.

The admissibility of the claims raised by an indirect victim is predominantly dependent on the “nature of the violation alleged and considerations of the effective implementation of one of the most fundamental provisions in the Convention system.”<sup>136</sup> In other words, the gravity of the claim should play an important role in determining the admissibility or inadmissibility of a victim’s claim. IACHR too adopts an approach that is similar to that of ECtHR. Who falls into the category of ‘indirect’ victims is debatable. However, in a separate opinion in the Case of Ituango Massacres v. Colombia, Judge Sergio García Ramírez explained who an indirect victim is:<sup>137</sup>

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135. *Çakici v. Turkey*, App. No. 23657/94 ¶ 98 (1999).

136. *Fairfield v. United Kingdom*, App. No. 24790/04 (2005).

137. Judgement, Inter-Am Ct. H.R. (ser. C) No. 148, (Jul. 1, 2006).

when we refer to an indirect victim, we allude to an individual who does not suffer this illegal conduct in the same way – immediately, directly and deliberately – but who also sees his own rights affected or violated, from the impact on the so-called direct victim. The damage suffered by the indirect victim is an effect of the damage suffered by the direct victim, but when the violation affects him, he becomes an injured party himself—rather than by derivation—based on the Convention and on the rights established therein.<sup>138</sup>

This succinct description explains how and why an indirect victim can be regarded as having a direct claim. One main argument that can be raised against the extension of ICCPR rights to family members who bring claims against unlawful pretrial detentions is that they do not suffer the illegal conduct directly, and that the consequences that they face are not direct and deliberate. The above-quoted paragraph responds to this anticipated objection to the extension of rights to indirect victims. It also indicates how the indirect victim then becomes a direct victim of violation of his or her own rights thereby justifying his or her claims. The trend in law ought to be the aspiration to expand its reach for the benefit of many. Therefore, it is correct to argue that a similar approach should be adopted under the ICCPR as well.

In an alternative light, the International Commission of Jurists opines that in certain circumstances an individual may be regarded as having a right to reparation though he or she may not be considered a victim in the strict sense of the word.<sup>139</sup> Even if one hesitates to accept that family members of the detainee are indirect victims in a semantic sense, the proposition that such family members are entitled to reparation may be acceptable in a normative sense.<sup>140</sup>

## 2. State Obligations to Family Members

Victims' Rights Organizations of the U.S. such as National Crime Victim Law Institute, National Alliance of Victims' Rights Attorneys, National Organization for Victims' Assistance and National Center for Victims of Crime are primarily focused on providing rights and remedies to victims of crime who are incapable of raising a voice for the protection of indirect victims. However, the mere existence of such organizations cannot guaran-

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138. *Id.* ¶ 11.

139. *See* INT'L COMM'N OF JURISTS, *THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONER'S GUIDE* 33 (2006) (“...in some cases, while a person is not considered a victim, he or she may nevertheless have suffered harm and be entitled to reparation”).

140. *See infra* Section V.



tee that states will fulfill their duties toward citizens. Although a Declaration does not have the same force of legality as a treaty, it does have some persuasive power, and in that light, the Victim's Declaration becomes important. It lays down guidelines for states to engage in a self-evaluation of practices to ensure that the law changes according to societal needs and that the law is capable of controlling abuses of power. If each state engages in such self-evaluation, their obligations to the family members will naturally be fulfilled.

Article 4(c) of the Victim's Declaration calls upon member states of the United Nations Organization (UNO) to "review periodically their existing legislation and practices in order to ensure responsiveness to changing circumstances, and to enact and enforce legislation proscribing acts that violate internationally recognized norms relating to human rights, corporate conduct, and other abuses of power."

Pursuant to the obligations undertaken as members of the UNO, all state parties have a moral obligation to adjust their laws to cater to the needs of the modern society. While the Victim's Declaration is not binding as an international instrument ratified by states, the common goal the Victim's Declaration seeks to achieve is compatible with the broader framework of IHRL to which state parties have agreed specifically by ratifying treaties such as the ICCPR. Thus, the obligation to periodically review legislation and practices has to be considered an integral aspect of state policy. The lack of such mechanisms in the U.S. implies that the state's obligation on behalf of the victims, both direct and indirect, has not been fulfilled.

The Victim's Declaration "is designed to assist Governments and international community"<sup>141</sup> and it is the duty of the states to take measures to reduce "abuse of economic and political power."<sup>142</sup> In addition to the general duties of the state outlined above, it is responsible for the commissions and omissions of its officers that lead to violations of rights. This notion of vicarious liability is also highlighted in Article 4 (f).<sup>143</sup>

State obligations to families in general also arise through Article 23 of the ICCPR as mentioned elsewhere in this article. In GC 19, the HRC recommends that states adopt "legislative, administrative or other measures" to protect family units.<sup>144</sup> In this light, the absence of specific mechanisms to

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141. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 126, ¶ 3.

142. *Id.* pmb1.

143. *Id.* art. 4(f) ("to promote the observance of codes of conduct and ethical norms, in particular, international standards, by public servants, including law enforcement, correctional, medical, social service and military personnel as well as the staff of economic enterprises").

144. ICCPR, Art. 23, Gen. Comment 19, *supra* note 44 ¶ 3.

safeguard the family unit from the negative impact of unlawful pretrial detention connotes the state's abrogation of its duties.

The impact the absence of parents can have on their children is undisputedly immense and the absence caused by unlawful pretrial detention is tragic. In this sense, the state bears additional responsibilities towards families with minor children and the obligation is much higher especially in cases where single parents are taken into custody leaving the children unattended or at the mercy of the flawed foster care system. In GC 17 on Article 24, the HRC emphasizes the additional protection mechanisms that should be implemented for the protection of young children.<sup>145</sup> Hence, this too can be identified as one situation in which the state bears responsibility for the protection of the family.<sup>146</sup> The overall impression that one gets from evaluating IHRL is that it already contains the provisions that can function as the premise for establishing enforceable rights for family members of a detainee. Even if other international instruments may not be regarded as being applicable to the U.S., it being a party to the ICCPR by way of ratification lays the framework for the inarguable argument that rights and remedies can be made available to the family members of pretrial detainees by resorting to the provisions of the ICCPR.

## V. RIGHTS AND REMEDIES OF THE FAMILY MEMBERS

### A. Overview

In this segment, I present the main argument of the article that family members who are indirect victims of the consequences of unlawful pretrial detention ought to be able to raise claims regarding the right(s) to privacy and family life, and the right to restitution and reparation when they have suffered losses. It is also argued that in the event family members live in a territory outside the U.S., they should continue to be treated as coming within the jurisdictional scope of the U.S. for the purposes of ensuring the same rights as family members living in the U.S. are entitled to in similar circumstances. For practical purposes, it is suggested that the rights argued herein should come into existence upon a case being filed to ascertain the legality of the pretrial detention. In the event that family members reside outside the territory of the U.S., compensation can be paid to minimize the

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145. Hum. Rts. Comm., CCPR Gen. Comment No. 17: Article 24 (Rts. of the Child) ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 7, 1989).

146. See also Jean Tomkin, *Orphans of Justice: In search of the Best Interest of the Child when a Parent is Imprisoned – A Legal Analysis*, QUAKER UNITED NATIONS OFFICE (Aug. 2009), [http://www.quno.org/sites/default/files/resources/ENGLISH\\_Orphans%20of%20Justice.pdf](http://www.quno.org/sites/default/files/resources/ENGLISH_Orphans%20of%20Justice.pdf).

economic and financial loss that the family experiences due to the pretrial detention. This article neither proposes nor advances a theory to ascertain the quantum of compensation that ought to be paid but limits its analysis to the proposition that compensation ought to be paid when a violation of a right has occurred.

B. *'Hands-Off Doctrine' of the Courts*

Prior to determining the nature and extent of the rights that should be given to family members of a detainee, the courts' 'hands-off' approach should be examined briefly. In relation to *Rehm v. Malcolm*<sup>147</sup> and *Clutchette v. Proconier*,<sup>148</sup> Professor Klipp argues "there is a lingering judicial reluctance to become involved in prison reform, despite the waning of the 'hands off' doctrine."<sup>149</sup> Although these cases will not be analyzed in detail in this context, what matters is the truth it reveals about the judiciary's reluctance to be directly involved in prison reform. However, in a common law country, the judiciary can be more closely engaged in promoting human rights in connection with IHRL.

A judge's duty, though primarily is to interpret and apply the law, cannot be restricted to a vacuum where decisions will be taken divorced from socioeconomic or sociopolitical realities. Professor Wiseman contends in a recent article that electronic monitoring could be adopted in a high number of cases instead of resorting to pretrial detention.<sup>150</sup> What is more convincing in his argument is his proposal that such a measure should be adopted by the judiciary as "electronic monitoring, is not likely to be adopted by legislative or executive action" although it is a feasible measure that is in accord with the 8th Amendment's prohibition on excessive bail.<sup>151</sup> He makes a case for judicial intervention in that regard by resorting to normative, constitutional and statutory references and responds to some of the main criticisms that opponents could raise against his proposition. Professor Wiseman's central argument is also premised on a fair balance approach as was advocated for in this article.<sup>152</sup> According to Professor Wiseman, judicial intervention can function as a check on the encroachment of liberty and privacy. Although he does not directly refer to the hands-off doctrine of the

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147. 507 F.2d 333 (2d Cir. 1974).

148. 328 F. Supp. 767 (N.D. Cal. 1971).

149. Todd L. Klipp, *Pre-Trial Detainees Must Be Held Under The Least Restrictive Means Possible To Assure The Detainees' Presence At Trial*, 3 *FORDHAM URB. L. J.* 685, 699 (1974).

150. Wiseman, *supra* note 119.

151. *Id.* at 1344.

152. *Id.* at 1404.

court, it is evident from his analysis that his approach to altering current pretrial detention practices is principally dependent on the judiciary performing an active role.

Considering the ground reality that pretrial detention of an individual, when prolonged and unlawful, has a mammoth impact on family members as well, it is hardly controversial to propose the judiciary should order the relevant prison authorities to provide the rights proposed in this article. Several rights proposed in this part, such as the right to conjugal visits and the right to engage in recreational activities can be made available to detainees and family members irrespective of the legality of the detention. The main argument in this respect is that these rights should be made available during the interim period where the legality of the detention remains in question.

### C. *Right(s) to Privacy and Family Life*

In recent decades where choice and freedoms have escalated to heights never before seen, the right to privacy and individual autonomy remain prominent. Connected to those rights is the right to family life. The underlying arguments of this article indicate how unlawful pretrial detentions (albeit unintended) can have a negative socio-economic impact on family members and family life of the detainee. Hence, the normative content of the right(s) to privacy and family life are significant in this context. Although these can be regarded as two separate rights, they will be analyzed as forming one right within this context. The task of this article is to portray the rights available to the family members of the detainee in an unlawful pretrial detention setting. However, it is possible to argue at a secondary level, that some of these rights can be granted to the family members of the pretrial detainees even if pretrial detention takes place within the boundaries of due process.

#### 1. Normative Content of Right(s) to Privacy and Family Life

Article 17 (1) of the ICCPR seeks to prevent individuals from being “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” Article 17 (2) creates a right to the protection of the law against interferences or attacks on family life.” When taken together the sub provisions of Article 17 create both positive and negative duties that the state should comply with.<sup>153</sup> The normative substance of the provision is

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153. See discussion *infra* Section V.B.2. Compare ECHR, *supra* note 135, art. 8 (advocating for particularly strict standards that the States have to abide by when interfering with family life, due to the understanding that there are certain State interventions in private and family life, which deny the affected person the possibility of

easily ascertainable through the General Comments dealing with the respective provision. The explanations provided by the HRC in GC 16 on the use of the terms 'unlawful' and 'arbitrary interference' in respect of Article 17 of the ICCPR hold significance in this respect. According to the HRC, 'unlawful' means "no interference can take place except in cases envisaged by the law."<sup>154</sup> The phrase 'arbitrary interference' carries a much higher weight as it is "intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant."<sup>155</sup> In other words, this portrays a situation in which a detention can be regarded unlawful not because the cause of detention is unlawful but because the *process* used for the detention remains unlawful.

In paragraph 6 of General Comment 16, the Committee opines that state reports should contain information on the "the authorities and organs set up within the legal system [ . . . ] which are competent to authorize interference allowed by the law."<sup>156</sup> This requires states to regulate how the authorities enforcing law and order interact with the family life of individuals who are exposed to the law. In light of such regulatory schemes, policy frameworks such as the 'tough on crime' rhetoric may have to undergo changes in order to make the domestic law and policy compatible with the structure of IHRL. In paragraph 7 of the GC, the HRC, commenting on the relative nature of protection of privacy, calls on states to "indicate in their reports the laws and regulations that govern authorized interferences with private life."<sup>157</sup> This highlights the Committee's understanding of the right to privacy in connection to family life as a relative concept. However, it leaves room for wide interpretation that can favorably influence how states perceive the said right in pretrial contexts. The HRC further emphasizes the relative nature of the right by advocating for a case-by-case administration of interferences even if the law permits such interferences.<sup>158</sup>

The concluding observations the HRC has drawn with regard to Article 17 show the tendency of the Committee to focus more on administrative mechanisms, such as wiretapping that is used in violation of privacy, while other aspects of family life that can be enhanced through the same article

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challenging the measures), *with* ECHR, *supra* note 135, art. 11 (extending to the protection of family life from "arbitrary or abusive interference").

154. Hum. Rts. Comm., CCPR Gen. Comment No. 16: Article 17 (Right to Privacy) ¶ 3, U.N. Doc. HRI/GEN/1/Rev.9 (Apr. 8, 1988).

155. *Id.* ¶ 4.

156. Hum. Rts. Comm., *supra* note 154, ¶ 6.

157. *Id.* ¶ 7.

158. *Id.* ¶ 8.

remain unelucidated.<sup>159</sup> In Communication No 1890/2009 in the matter between *F.K. Baruani and the Democratic Republic of Congo*, the author raised claims under Articles 7, 9 and 17 of the ICCPR as he was arrested by the Presidential Special Police Department and was held in custody without charges and was subjected to torture.<sup>160</sup> He further claimed he had no contact with his wife and children while he was held in custody and that he was constantly worried about them.<sup>161</sup> While this ought to have been taken as an opportunity by the HRC to consider and elaborate on the normative content of Article 17, it concluded that “having found a violation of Articles 7 and 9 of the Covenant, the Committee will not consider the author’s complaint related to the violation of Article 17 of the Covenant.”<sup>162</sup> This is one instance where the HRC has abandoned an excellent opportunity for ascertaining Article 17’s extent of application.

The challenging nature of proving violations of Article 17 is evidenced also by a communication submitted to the HRC by K.I. Whildy against Libya, where the author claimed the state has engaged in a violation of the said Article in relation to his brothers.<sup>163</sup> The author argued that security forces intruded into the family home and the state party omitted to provide a remedy thereby violating Article 17.<sup>164</sup> The HRC declared the claim pertaining to Article 17 inadmissible purely for reasons of provided information being limited and claims insufficiently substantiated.<sup>165</sup> Although I have only provided two communications heard by the HRC in connection to the matter at hand, it is sufficient to substantiate the argument that even the HRC faces various limitations in its attempt to elaborate the normative content of Article 17(1), especially in relation to protection from arbitrary and unlawful interference with family life. While lack of evidence is a permissible reason for the HRC to take a back seat, the dismissive approach adopted in the *Baruani* communication is not favorable as it abstains from analyzing Article 17 merely because violations of two other articles were established.

Irrespective of the limitations highlighted above, the right to privacy and family life in connection with Article 17 (1) can be said to comprise the following components in all circumstances:

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159. *IV. Concluding Observations: ICCPR*, BAYEFKY.COM, [http://www.bayefsky.com/themes/privacy\\_concluding-observations.php](http://www.bayefsky.com/themes/privacy_concluding-observations.php).

160. Hum. Rts. Comm., Views adopted by the Committee at its 110th session, ¶¶ 2.2-7, U.N. Doc. CCPR/C/110/D/1890/2009 (Apr. 23, 2014).

161. *Id.* ¶ 2.4.

162. *Id.* ¶ 6.10.

163. Hum. Rts. Comm., Views adopted by the Committee at its 106th session, ¶ 1, U.N. Doc. CCPR/C/106/D/1804/2008 (Jan. 25, 2013).

164. *Id.* ¶ 3.6.

165. *Id.* ¶ 6.4.

(a) *Access to justice* – Family members of pretrial detainees claiming that the detention is unlawful ought to be given *locus standi* under the domestic legal system and the omission to provide the said remedy should be considered by the HRC as an autonomous violation of Article 17 (2) of the Covenant.

(b) *Communication and interaction with the family* – Even when in detention (pretrial or otherwise) the state party should guarantee the detainee is authorized to maintain a reasonable level of communication with family members. As per paragraph 8 of GC 16, the level of communication allowed for each detainee with family members may be determined on a case-by-case basis. This should also contain the right to conjugal visits and the right to be able to spend time with the members of the family. Furthermore, in unions where there are children, the pretrial detainee should be able to interact with children sufficiently.

(c) *Non-Discrimination* – Detainees belonging to various social and economic classes should be treated in relation to their access facilities to family members on a horizontal equality standard meaning that discrimination ought not to be committed on any of the prohibited grounds under the Covenant.

While the normative content of Article 17 (1) with its integrated categories could be much broader than what has been portrayed in this article, the three composite elements mentioned herein are sufficient to protect privacy and family life from interference in respect of unlawful pretrial detentions.

## 2. Abstinance from Interference and Obligation to Employ Active Measures

The positive and the negative duties referred to in Section 5.3.1 create both freedoms and entitlements for family members. It is hardly necessary to mention there is a wide difference between positive and negative obligations. This could also be identified as an area where domestic politics and policies pertaining to rights come into direct contact with IHRL. From the standpoints of finance and accountability in general, it appears that it may be in the interest of the state to limit rights that have been argued for in this article to negative rights. The question arises, however, once an indirect interference has been established, how the obligations of the state should evolve into positive obligations. The duties and obligations of the state, to prevent indirect interferences, do not have to be limited to legislative enactments. The common law tradition of the U.S. grants the judiciary many opportunities to be actively involved in the process of interpreting IHRL treaties in a manner consistent with the objects and purposes of said treaties.

In consideration of the multi-dimensional approach of the rights of family members that are connected to the pretrial detentions of individuals, it is appropriate for courts to adopt a more comprehensive and active stance in interpreting the rights. The judiciary can use the active stance recommended herein to replace the hands-off approach of the court with regard to prison reforms.

a. *Measures facilitating conjugal relations between pretrial detainees and their spouses/partners*

A note published by the Michigan Law Review Association as far back in 1974 contends that authorization of conjugal visits should be a component of a state's positive obligations. The note adopts a different stance than previously existing literature by deviating from the usual argument that the denial of such rights constitutes a violation of the 8th Amendment and arguing that "the denial of conjugal visitation is an impermissible intrusion of the rights of privacy of the married couple involved."<sup>166</sup> While the focus of the note remains the conjugal rights of detainees, it interestingly focuses on the application of the right to non-prisoners or pretrial detainees as well.<sup>167</sup> Prior to arguing the right of conjugal visitation should be extended to pretrial detainees, the authors consider three arguments that should be countered. The arguments are that (a) courts are incapable of interfering with prison administration or interfering with prison rules,<sup>168</sup> (b) by committing a crime, an individual strips him/herself from some constitutional protections,<sup>169</sup> and (c) "a citizen's right to be free of governmental intrusion into his marriage does not require the state to create special places or programs in prisons for the private conduct of marital relations."<sup>170</sup> Admittedly, the second counterargument has no relevance in pretrial contexts, as the guilt or innocence of the individual concerned remains undetermined at pretrial stage. Then the authors move on to analyzing the other two positions. The authors conclude that pretrial detainees have a strong argument to justify their claims for conjugal visits based on a strict standard of judicial review where it will be evaluated whether the denial of the right is requisite, necessary and justified by compelling necessity.<sup>171</sup> However, this argument is fraught with inherent limitations as it calls for the application of the right to

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166. Notes, *Conjugal Visitation Rights and the Appropriate Standard of Judicial Review for Prison Regulations*, 73 MICH. L. REV. 398, 399 (1974).

167. *Id.*

168. *Id.* at 401.

169. *Id.* at 403.

170. *Id.*

171. *Id.* at 405.



all pretrial detainees irrespective of the legality or the duration of the detention itself. While it is appealing for human rights advocates to accept such a line of arguments, the administrative difficulties and the pure breadth of such a measure will necessarily delay the primary goal that this article seeks to achieve in providing effective remedies to those who are affected by 'unlawful' pretrial detentions.

In light of the fact that only six states currently allow conjugal visits even to convicted detainees makes the breadth of the argument more an aspirational argument than a realistic one.<sup>172</sup> The number of states allowing conjugal visits has decreased from seventeen in 1993 to six in 2015 and the decline indicates the need for policy modifications in this area.<sup>173</sup> Currently, according to a Program Statement released by the U.S. Department of Justice (DoJ) in 2003, mother, father, stepparents, foster parents, brothers and sisters, spouse and children are entitled to family visits.<sup>174</sup> However, the issue pertaining to conjugal visits remains unresolved, mostly unimplemented and uncategorized as a specific right.

In *Rhem v. Malcolm* the court argued that "[t]he impact of deprivation of contact visits, and its psychological importance are real."<sup>175</sup> The statement of the court shows that it recognizes the importance of contact visits. Such recognition can pave the way for future recognition of a right that detainees and family members are entitled to claim. During the proceedings of the case, Dr. Menninger (psychiatrist and author on prison conditions) stated "the one great thing that he [the inmate] can look forward to is the reestablishment, contact, with this world."<sup>176</sup> Although this case only considered the mental health of the detainee in general, the impact that can be brought through the denial of contact visits applies to all family members involved. While this approach may appear to be contentious, the family members, who suffer along with a pretrial detainee, who is by definition innocent, ought to move the authorities to adopt reasonable measures in accordance with human rights. The denial of such rights and restricting pretrial detainees to covered booths during their visitation hours is inhuman and degrading. The court, however, did not elaborate on the advantages that

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172. At the time the article was published in the Michigan Law Review, only two states, Mississippi and California, had laws allowing conjugal visits.

173. See Deborah C. England, *States that Allow Conjugal Visits*, CRIMINALDEFENSELAWYER (2015), <http://www.criminaldefenselawyer.com/resources/criminal-defense/state-felony-laws/states-that-allow-conjugal-visits>. Currently California, Connecticut, Washington, New Mexico, New York and Mississippi allow conjugal visits. *Id.*

174. U.S. DEPT. OF JUST., FED. BUREAU OF PRISONS PROGRAM STMT NO. 7331.04 § 27 (Jan. 31, 2003).

175. 371 F. Supp. 594, 601 (S.D.N.Y. 1974).

176. *Id.*

the contact visits could bring to both detainees and family members although it seems to have noted the importance of contact visits in an ephemeral manner. In fact, the holding of the case does not return to this issue nor does it make an enforceable order in that regard. Nevertheless, Dr. Menninger's statements considered and accepted by the court are helpful in determining advantages that can be brought through contact visits to both family members and the individual detained.

Arguably, it can be stated that the state should authorize prison authorities through legislation to allow conjugal visits to pretrial detainees, at least when a petition questioning the legality of the detention is pending in a court of law. One may oppose this proposition on many grounds and it is beyond the scope of the article to answer such opposition in detail. However, the short explanation to such an anticipated opposition is that justifications can be drawn from two foundations. Firstly, the pretrial detainee is technically innocent until proven guilty and his or her rights can only be restricted in exceptional circumstances. This means that he or she is entitled to general rights including the right to maintain a family life. Secondly, even if the administration is certain that the individual detained is guilty of the crime charged, until convicted, the administration does not have the authority to deny the detainee of his or her rights. Such a denial results in the violation of the rights of both the pretrial detainee who is technically innocent and the rights of his/her family members. An added advantage of compelling and/or encouraging the states to adopt high standards of providing rights to pretrial detainees and their family members could also result in the reduction of overuse of pretrial detention.

b. *Recreational opportunities involving family members*

In the Program Statement of the DoJ, the U.S. explained its existing policies regarding recreational facilities in detention facilities.<sup>177</sup> However, according to the DoJ Statement, "when consistent with institutional security and good order, pretrial detainees MAY BE allowed the opportunity to participate with CONVICTED INMATES in recreational activities" (emphasis added).<sup>178</sup> This rule ought to be altered in two ways: (a) by making it mandatory for prison authorities to allow pretrial detainees to engage in recreational activities, and (b) to promote such activities among family members of a detainee periodically without encouraging unnecessary interaction between convicted inmates and the pretrial inmates. Bringing together the two categories of prisoners unnecessarily is also contrary to the

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177. See generally PROGRAM STMT. NO. 7331.04, supra note 174.

178. *Id.* § 22(a).

first section with which the DoJ Statement begins. Section 1, which explains the purpose and scope of the Statement, seeks to separate pretrial inmates from convicted inmates.<sup>179</sup>

Section 22 (b) (2) of the Statement of the DoJ creates a minimum standard to allow pretrial inmates “two hours daily of indoor recreation” and in accordance with that section, family members can be introduced into the picture with ease. Allowing the inmate to play indoors with his/her children using board games, read books with their children, or allowing them to converse with family members with minimum interference by law enforcement officers would be sufficient to satisfy recreational requirements. That approach will benefit the morale of the family members and the detainee, and parents would not be separated from their children unnecessarily. By adopting such standards, the State can fulfill its positive obligations under Article 17 and 26 of ICCPR. The advantages such measures would bring to both detainees and their family members are obvious.

According to *Epps v. Levine*,<sup>180</sup> any limitation of the right of the detainee to engage in recreational activities or visitation rights of the family member should be justified by a compelling state interest. Considering the argument that the pretrial detainee remains innocent during the pendency of the trial, any restriction of access done in excess of the extent to which it is necessary ought to be regarded as contributing to the ‘unlawfulness’ of the detention.

In view of the fact that the jurisprudence on recreation of pretrial detainees, especially recreation opportunities with family members, is still in its infancy, it is beneficial to examine how the right to recreation is treated under similar human rights settings. Although many cases on point are not available, the ECtHR interpreted Article 3 of ECHR on the prohibition of torture, cruel, inhuman and degrading treatment as being inclusive of a right to recreation.<sup>181</sup> In other words, when the authorities prevent a detainee from enjoying his right to recreation, a court of law can interpret that as amounting to a violation of Article 3. By analogy, the HRC is in a position

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179. *Id.* § 1; *see also id.* § 3(a) (according to which pretrial detainees would be assessed and screened for ascertaining whether they would pose a threat to security or the orderly running of the institution before permitting pretrial detainees to have regular contact with convicted inmates).

180. 457 F. Supp. 561 (D. Md.1978).

181. *Assenov v. Bulgaria*, 1998-VIII Eur. Ct. H.R. 3269 ¶ 135 (1998) (stating that when a determination of violation of Article 3 is made, regard should be given to “all the circumstances, such as the size of the cell and the degree of overcrowding, sanitary conditions, opportunities for recreation and exercise, medical treatment and supervision and the prisoner’s state of health”).

to apply the same reasoning in matters arising out of the provisions of the ICCPR.

c. *Rights to restitution and reparation*

In this article, the term restitution is used in a dual sense. Firstly, it refers to the need to ‘restore’ family relationships that have been affected by the unlawful pretrial detention. Secondly, it refers to the duty of the state to pay compensation to the detainee and the family when it is established that pretrial detention was unnecessary, extensive, cruel, and inhuman and that it was in violation of the established procedure. State actions or omissions that result in unlawful detention should be interpreted, for the purposes of IHRL, as violations of privacy and family life of both detainees and the family members concerned. This approach, which is justified through the foregoing analysis, lays the foundation to establish the violation required in IHRL to enable the granting of compensation where necessary.

The aspects of restitution as a matter of philosophy are generally associated with an *ex post facto* framework. However, the *status quo* of the family life of the pretrial detainee can be maintained through the provision of conjugal/contact visits and recreation time with family members. It may not be possible to provide all these rights to all pretrial detainees irrespective of the legality of the detention. Therefore, as a starting point in the expansion of rights, I argue these rights should be made available with immediate effect from the point in time when the legality of the detention is questioned in a court of law. Such immediate action is required due to the sensitive nature of the rights involved as well as the reality that compensation *ex post facto* is insufficient to remedy damages that may have been caused to the family during the period of unlawful detention. By adopting these measures as interim remedies, the state may avoid future liability and abstain from harming family members further. Moreover, such an approach helps to provide more rights to the pretrial detainee in addition to the ordinary rights that he or she is generally entitled to.

In the segment on restitution, Victim’s Declaration provides that states should review and reformulate practices to provide restitution as an appropriate remedy and that “offenders or third parties responsible for their behavior should where appropriate, make fair restitution to victims, their families and dependents.” Such guidelines are extremely important in the unlawful pretrial detention context as law enforcement officers may be liable for unlawfully detaining an individual prior to trial. Its importance is two-dimensional. Primarily it identifies the state can hold a specific individual liable for the violation of the right in selected situations. On a secondary level, the offender can be regarded as the relevant institution through which

the violation of the right occurred. Arguably, the shifting of the blame to the institution rather than a single individual could be favorable to those who are seeking restitution and compensation as the institution's capacity to provide restitution may naturally be greater than the capacity of an individual employed by that institution. However, the flaw in this argument is in the presumption that the offending individual was acting *colore officii*. In the event that his action was solely committed in a private capacity, the legal threshold that ought to be satisfied to hold the institution liable for restitution is much greater. Article 11 supports the argument made above pertaining to vicarious liability although the Declaration creates direct individual liability.<sup>182</sup>

A surface reading of Article 9 (5) of the ICCPR appears to create a right for victims of "unlawful arrest(s) and detention(s)" to have "an enforceable right to compensation." The question arises as to who reserves the right to claim compensation under this provision. It uses the term 'anyone' and does not restrict its application to detainees. A broad reading of the provision implies that anyone who can produce evidences in substantiation of the fact that he or she is a victim in that situation may be eligible for compensation. The nomenclature employed herein plays a significant role as it does not limit the right to the individual who is detained. In that regard, the previous analysis of how family members become victimized in situations of unlawful pretrial detentions is significant. This distinction becomes much clearer when it is compared with Article 9 (4) which directly addresses the detainee.

In the General Remarks of General Comment 35,<sup>183</sup> the Committee asserts that Article 9 applies to, *inter alia*, police custody and remand detention.<sup>184</sup> This assertion is significant as it lays the foundation for making claims in the pretrial detention context. Section VI of GC 35 is comprised of four paragraphs and is on the right to compensation for unlawful or arbitrary arrest or detention. This section does not state that the right to compensation is restricted to the detained individual. While allowing the state to devise specific procedures for the enforcement of the right to compensation,

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182. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 126, art. 11 ("Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims").

183. Hum. Rts. Comm., General comment No. 35: Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

184. *Id.* ¶ 5.

the Committee emphasizes that state parties “should establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion.”<sup>185</sup> What the Committee seeks to encourage in this GC is an effective system which will provide compensation within a reasonable period.<sup>186</sup> Although states are not required to provide compensation *sua sponte*, the Committee anticipates formal procedure that would enable the victims to initiate and commence proceedings for compensation.<sup>187</sup> When taken in abstract, General Comment 35 does not expressly create a right of compensation to family members. However, neither does it exclude family members as a category. If family members are regarded as indirect victims, they come within the scope of paragraph fifty of General Comment 35, which requires states lay down procedures for the payment of compensation to “victims.” The general practice of the HRC is comprised of instances in which it ordered the state to pay compensation to both the direct victim and the family members. In *Abushaala v. Libya*,<sup>188</sup> a case concerning an enforced disappearance, the HRC ordered the State party under Article 2 (3) to provide “adequate compensation to the author and his parents for the violations suffered as well as to Abdelmotaleb Abushaala, if he is still alive.”<sup>189</sup> What is important in this wording is that the Committee does not seem to be implying that compensation has to be restricted to the victim of enforced disappearance if he is found to be alive. In other words, his being alive does not negate the right of the family members to receive compensation for the suffering that they have endured. Nor does it reduce the amount of compensation that the individual who was subject to the direct violation is entitled to. In this case, the suffering of the family members was purely mental agony as evident from the facts. However, in other situations of enforced disappearance, the suffering could be spread across a range from emotional to economical.

One of the remarkable explanations in the General Comment is contained in paragraph 51, where the HRC states with reference to *Marquez de Morais v. Angola* “the unlawful character of the arrest or detention may result from violation of domestic law or violation of the Covenant itself, such as substantively arbitrary detention and detention that violates procedural requirements set out in Article 9.”<sup>190</sup>

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185. *Id.* ¶ 50.

186. *Id.*

187. *Id.*

188. Hum. Rts. Comm., Views adopted by the Committee at its 107th session, U.N. Doc. CCPR/C/107/D/1913/2009 (June 21, 2013).

189. *Id.* ¶ 8.

190. Hum. Rts. Comm., Views adopted by the Committee at its 83rd session, U.N. Doc. CCPR/C/83/D/1128/2002 (Sept. 5, 2002).

Any detention that falls into the criteria of unlawful pretrial detention defined in part 2 of this article qualifies to be brought before the HRC when domestic measures for the enforcement of the right to compensation have been exhausted. This line of argument can further be extended to include family members as parties to the action, which enables the court to take the full family context into account when ascertaining the damage that was caused to the family due to the unlawfulness of the pretrial detention. For instance, deterioration of the mental health of the family members requiring them to incur medical expenditure, financial difficulties faced by the family, etc. can also be considered when determining the quantum of compensation the responsible authority is required to pay.

Senior Legal Advisor of International Commission of Jurists, Matt Pollard states, “the consistency across the global and regional treaty systems [in guaranteeing the right to compensation] suggests that explicit treaty provisions and jurisprudence on compensating reflect an underlying rule of general international law.”<sup>191</sup>

Such arguments buttress the proposition propounded in this article that compensation does not necessarily have to be contingent on domestic law or even the ICCPR, but that it ought to be considered as a right under customary international law, which states cannot derogate from. This is important in the light of the understanding that the U.S. has added to Article 9 (5). The understanding states:

[The] right to compensation referred to in Articles 9 (5) and 14 (6) require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or miscarriage of justice may seek, and where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject of the reasonable requirements of domestic law.<sup>192</sup>

This understanding can be perceived as a restricted view of justice that is framed in a way to negate the object and purpose of the Article proper. It is generally understood that enforcement mechanisms of the Treaties are subject to domestic law. It is important to pay attention to the wording of the understanding, which refers to a reasonable requirement as opposed to mere requirements. While it does indicate that the state will only subject compensation to reasonable requirements of domestic law, the term ‘reasonable’ is unreasonably vague by definition. In view of there being no

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191. Matt Pollard, *Scope of remedies upon a successful challenge to the lawfulness of detention*, OHCHR (Sept. 2, 2014), <http://www.ohchr.org/Documents/Issues/Detention/Consultation2014/MatthewPollard.pdf>.

192. 138 Cong. Rec. S4781-01, ¶ II(2) (daily ed. Apr. 2, 1992).

cases at present where family members have been considered victims for the purpose of being entitled to compensation in the pretrial detention context, it is rather difficult to determine how the state would interpret the reasonability requirement. At the current juncture, I can only raise questions as to whether it will be considered a reasonable justification by the state to deny the right to compensation to family members of a detainee on the grounds that they did not suffer a direct injury. When this is coupled with the understanding that the U.S. added to Article 1 of the CAT to limit the definition of torture to an individual in the physical custody of the violator, one may suppose the U.S. will not interpret Article 9 (5) as being a foundation on which compensation should also be paid to the family members of the detainee in consequences of an unlawful pretrial detention. The addition of the understanding in this context not only entrenches in writing a fact which is axiomatic and implied in the text of the ICCPR but also has the effect of taking the sub-Article in abstract thus invalidating the macro effect that the Article sought to achieve.

Compensation, thus conceived, has the capacity of serving its full purpose although one must also be mindful of the domestic legislative impediments that one has to overcome in order to make an enforceable claim of compensation. The situation is further worsened due to the absence of established jurisprudence by the HRC on the issue of compensation. There is no jurisprudence pertaining to Article 9(5) specifically addressing pretrial contexts. Analogical reference, however, can be made to the existing communications.

#### *D. Rights and Remedies Without Borders*

Extraterritorial application of human rights has always been a contentious topic amongst state parties to various international human rights instruments because of complications states face in complying with their obligations in such matters. Nonetheless, it remains a valuable topic for analysis especially in cases of unlawful pretrial detention as the detaining state is concomitantly invoking the legal system of another jurisdiction in situations where the detainee and his/her family members are nationals of another state.

While it would be contentious to propose that states should be held accountable under varying legal systems, rights and remedies that contain the essence of equality and justice demands that everyone be treated with equality and equity at all circumstances. In other words, the nationality of family members or the country of residence should not be a barrier for their attempts at enforcing their rights. Although the basis of this claim is debatable, there are provisions in IHRL, and Declarations that have been entered



into by state parties, which by implication promote extraterritorial application of remedies in certain circumstances.

The assumption that underlies this topic is that it is an undue burden to expect states to provide rights and remedies to non-nationals or to those residing outside its territory.<sup>193</sup> Examination of this assumption indicates this concept is linked with the idea that duties and obligations of a state are inherently tied up with its perception of sovereignty. The concept of sovereignty emanates from the people. 'The people' in this sense are identified only as the nationals of the state. While I do not promulgate that the basic notion of what constitutes 'the people' of a state should undergo a radical conceptual alteration to fit the purposes for which I extend my arguments in this article, what is thus proposed is that in the field of human rights, the duties and the obligations of states do not in all situations necessarily have to be bound to the concept of its sovereignty and its people. This can easily be substantiated with reference to the undertaking of human rights obligations by states through signing and ratifying IHRL instruments. This enables states to redefine their restrictive notion of 'the people' which is perceived in light of sovereignty. The ultimate result of this will be the ability of the state to receive a broader framework of rights and obligations. This will extend the rights from the narrow scope of rights of nationals to the rights of human beings. Examining the assumption in this sense reveals that the ideas generally associated with duties and obligations can be deconstructed in order to reveal the bases on which such notions rest. Such a deconstruction can then lay the foundation for the expansion of rights, which remain the core hypothesis of this article.<sup>194</sup>

### 1. General Perceptions of the Extraterritorial Application of Human Rights Instruments

The actions of a state have an increased capacity of resulting in cross-border consequences in the present day context, which warrants the doctri-

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193. See generally Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligation: Now is the Time for Change*, 90 INT'L. L. STUD. 20 (2014). Although this is an analysis of the extraterritorial application of obligations emerging under the body of international humanitarian law, the author raises interesting arguments which are analogically relevant to the claims that have been made in this Article. *Id.*

194. This hypothesis is supported mainly with the concepts of the spiral model and the impact that slow moving institutions can create on the domestic laws. The hypothesis is also connected to the modern internationalist argument that draws on IHRL to justify the broadening of domestic laws to comply with the norms set internationally.

nal analysis of the extraterritorial application of human rights. However, the mere conceptual analysis of the same fails to change the ground realities. States increasingly continue to guard their conceptions of sovereignty through the making of reservations and they are reluctant to extend obligations and remedies to territories outside their jurisdiction. Although internal and external pressure is rising and compelling states to change their stance, political attitudes regarding the extraterritorial reach of rights and remedies have to be subject to stricter alteration processes. In this respect, one must put one's faith in the spiral model and the slow-moving institutions to bring about gradual change.

Some scholars strictly oppose any approach that justifies drawing on international law to alter domestic law or create new rights within the domestic jurisprudence.<sup>195</sup> Even though this approach portrays a strict formal interpretation of territorial sovereignty and the resultant authority that a state receives in connection with it, the formal interpretation of human rights treaties and declarations indicate a different result through its portrayal of rights as being dependent on inherent humanity rather than on nationality.

It is thus important to extend the rights to those who are subject to the jurisdiction of the U.S. rather than limiting the rights to those who are within the territory of the U.S. In other words, the territorial approach to human rights should be replaced by the jurisdictional approach to human rights. While it is possible to argue that such an approach leads to an inclusion of a larger body of people, it is not an unusual or unprecedented mechanism.

What is directly relevant to the debate pertaining to extraterritoriality in the U.S. is its interpretation of Article 2 (1) of the ICCPR. Its interpretation greatly differs from that of the interpretation of the HRC. However, prior to delving in to the debate between the HRC and the U.S. pertaining to the extraterritorial application of the ICCPR, I will briefly analyze a similar debate that arose in connection to the IACHR, the American Declaration and the Body of Principles.

The draft of the ACHR had contained the phrase 'territory and jurisdiction'<sup>196</sup> while the adopted ACHR refers only to jurisdiction.<sup>197</sup> Further-

195. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997).

196. MEDINA, *supra* note 122, at 8.

197. Organization of American States, American Convention on Human Rights art. 1, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("The States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms. . ." (emphasis added)).

more, Medina explains this change as the attempt on the part of states to “include not only those actions or omissions attributable to state agents as violations of obligations under the Convention committed or omitted within State territory, but also responsibility for acts and omissions carried out outside state territory, but within state jurisdiction.” Although Medina restricts her analysis to acts and omissions carried within and without the territory, one should interpret the term ‘jurisdiction’ in a much broader sense than that. In other words, the state should be liable for the *impact* of acts and omissions committed within its territory that may transcend the territorial boundaries yet be within its jurisdictional scope.

The preamble of the ACHR recognizes “the essential rights of the man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality.”<sup>198</sup> This can hence be regarded as one of the primary provisions that would justify the extension of similar remedies, as has been argued for in this article, to the family members of the detainee that reside outside the territorial jurisdiction of the U.S. Furthermore, in the debate pertaining to jurisdiction, many refer to Article 2 of the Convention, which is regarded as the jurisdictional clause. However, Christina M. Cerna argues this is inappropriate and it is “more accurately identified as an autonomous substantive rights provision.”<sup>199</sup>

Subsequent to establishing the correct jurisdictional clause of the ACHR, Cerna moves onto a comparative analysis of the exceptions the ECtHR recognizes to the general principle that the jurisdiction of the states is territorial in normal circumstances:<sup>200</sup>

[T]he three exceptions are as follows: (1) the first exception is found in the *Soering* line of cases, which held that the European Convention is violated if lawful acts committed within the territory of a state were likely to give rise to actual violations outside the state’s territory (2) the second exception is that states are responsible for human rights violations in territories that are under their “effective control” even if the territories are outside the state. . . (3) the third exception [is] where extraterritorial responsibility reached its zenith. . . where neither the European Court nor Turkey questioned that the Convention applied to Turkish forces operating in Iraq, a state not party to the Convention.<sup>201</sup>

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198. *Id.* pmb1.

199. Christina M. Cerna, *Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law 2* (Ctr. For Hum. Rts. & Glob. Just., Working Paper No. 06, 2006).

200. *Id.* at 3.

201. *Id.*

She then moves onto an analysis of the Inter American Commission's work on extraterritorial application. In her analysis, she employs the three-exception approach of the ECtHR and divides the Inter-American Jurisprudence in the following manner: "(1) The Soering line of cases; (2) 'effective control' cases; and (3) cases in which extraterritorial application was not questioned."<sup>202</sup> The type of cases she refers to as the 'Soering line of cases' is what is relevant to this analysis as I am concerned with the impact that pretrial detention within the U.S. can have on family members who reside outside the territory. With regard to the ACHR, the U.S. position was that "the Declaration is not a treaty and [that it] has not acquired binding legal force."<sup>203</sup> Cerna does not expand her arguments pertaining to the first exception beyond this point but in the conclusion, she criticizes the Inter-American System for not expanding "the jurisdictional envelope much more than the European system has."<sup>204</sup>

As Cerna engaged in a detailed analysis of the 'acts' for which the state should bear extraterritorial liability, I will only add one clarifying comment in this regard. State responsibility should extend to both its actions and omissions. In other words, in this context, the state's liability should be extended beyond its territorial scope when it fails to take cognizance of the rights of the family members that are affected through the state's failure to prevent unlawful pretrial detention.

## 2. Extraterritoriality, ICCPR and the United States

The principles pertaining to extraterritorial application of human rights instruments have been subject to academic debate over the last few decades, especially in the aftermath of the 1995 Interpretation of the ICCPR Article 2 (1) by the U.S. Both sides of the debate received considerable attention by scholars and practitioners alike. But it is safe to argue there is a consensus in favor of the extraterritorial application of Article 2 (1) outside the U.S. in select circumstances as is shown in the analysis that follows.

Professor Austen L. Parrish<sup>205</sup> writes against extraterritoriality of human rights instruments and points out that scholars writing on the issue of territoriality can be divided into two categories – (a) sovereigntists, and

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202. *Id.*

203. Report No. 51/96: Decision of the Commission as to the Merits of Case 10/675, ¶ 66 (Inter-Am. Ct. H.R. 1997), <http://www.cidh.org/annualrep/96eng/USA10675.htm>.

204. Cerna, *supra* note 199, at 16.

205. Dean and James H. Rudy Professor of Law, Indiana University, Maurer School of Law.

(b) modern internationalists.<sup>206</sup> According to him, sovereigntists are “scholars who are skeptical of – if not hostile to – international law and institutions” and modern internationalists are comprised of a group of scholars who “reject the sovereigntist thesis and instead herald in international law as the key means of promoting human and environmental rights.”<sup>207</sup> In a comprehensive analysis, he argues “scholars like Curtis Bradley, Jack Goldsmith, Julian Ku, Eric Posner, Jeremy Rabkin, Jed Rubinfeld and John Yoo are often identified with the sovereigntist movement’ while ‘Harold Koh and . . . Anne-Marie Slaughter are among the most well-known of [modern internationalist] scholars.”<sup>208</sup> However, Parrish seems to have conveniently avoided naming all notable scholars who favor a broader approach justifying extraterritorial application.<sup>209</sup> This is perhaps because Parrish sought to be selective to serve the narrow purposes of his argument that the international law needs to be ‘reclaimed’ from the threat of extraterritoriality. The analysis below indicates that current state practice and the position adopted by international organizations are much broader than the narrow line of arguments propounded by Parrish.

As pointed out above, Article 2 (1) of the ICCPR is the focal point of analysis. Article 2 (1) is both regarded as laying down the jurisdiction as well as establishing equality and non-discrimination. This Article has led to a considerable debate regarding state obligations that it creates outside the territory. The U.S. is in the forefront of the debate and has often denied having extraterritorial liability. Article 2 (1) states “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>210</sup>

This provision functions both as the general obligation clause determining what responsibilities states bear as well as ensuring that such responsibilities are carried out without any discrimination. The debate revolves around the eight words “within its territory and subject to its jurisdiction.” The American debate with the HRC began in 1995 with the interpretation adopted by Mr. Conrad Harper, who was the Legal Advisor of the

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206. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 817 (2009).

207. *Id.*

208. *Id.* at 816-17

209. While he names seven scholars who follow the sovereigntist camp in addition to him, he names only two scholars of the modern internationalist camp.

210. ICCPR, *supra* note 1.

Department of State from 1993-1996. This interpretation came to be known as the ‘1995 Interpretation.’

Two months prior to the adoption of the unwelcome 1995 Interpretation, Professor Theodor Meron published a brief yet influential analysis of extraterritorial application of human rights treaties which is important in the present context.<sup>211</sup> Referring to Marc J. Bossuyt’s *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Meron argues the legislative history of Article 2 (1) “does not support a narrow territorial construction.”<sup>212</sup> He further quotes with approval, Professor Buergenthal’s argument that Article 2(1) should be read to include “all individuals within its territory [and] to all individuals subject to its jurisdiction.”<sup>213</sup> Meron points out “this interpretation has almost never been questioned and has long ceased to be the preserve of scholars; it has obtained the imprimatur of the Human Rights Committee and UN rapporteurs.”<sup>214</sup> Although Meron favors the notion of the extraterritorial application of the ICCPR, he argues “not all the provisions of the Political Covenant are by their nature intended for extraterritorial application.”<sup>215</sup> However, he includes fundamental provisions, such as the prohibition of the arbitrary taking of life, treatment of prisoners in detention, prohibition of inhuman or degrading treatment or punishment and due process, as the provisions that should be treated as having extraterritorial application.<sup>216</sup>

In a very influential passage, Meron argues:

[I]n view of the purposes and objects of the treaties, there is no a priori reason to limit a state’s obligation to restrict human rights to its national territory. Where agents of state, whether military or civilian, exercise power and authority (jurisdiction or de facto jurisdiction) over persons outside national territory, the presumption should be that the state’s obligation to respect the pertinent human rights continues.<sup>217</sup>

The above line of reasoning is also compatible with the VCLT and the analysis that I have engaged in, in part 3.4.2 of this article. If a state interprets a provision of a treaty in a manner that is incompatible with the objects and purposes of the treaty, IHRL generally considers such an

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211. Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995).

212. *Id.* at 79.

213. *Id.*

214. *Id.*

215. *Id.* at 80.

216. *Id.*

217. *Id.* at 80-81.

interpretation invalid to the extent that it violates the purposes of the treaty. The argument the U.S. forwarded in respect of the American Declaration—that it is not legally binding—is not applicable to the ICCPR as the U.S. is a party to it. Therefore, it is clear that the U.S. is incapable of resorting to that line of reasoning in connection to the ICCPR. In conclusion, Meron calls for the *bona fide* interpretation of human rights treaties by the administration and the courts “in accordance with their object and purpose of promoting human rights, even where such interpretation leads to the extraterritoriality of humanitarian obligations of the United States.”<sup>218</sup> What Meron essentially does through this approach is to encourage the judiciary to adopt an activist *modus operandi* when the impact of state actions transcends territorial boundaries.

Two months after the publication of Meron’s article, in March 1995, Conrad Harper stated that the “Covenant was not regarded as having extraterritorial application.”<sup>219</sup> He further argued “in general where the scope of application of a treaty was not specified, it was presumed to apply only within a party’s territory.”<sup>220</sup> He sought to restrict the application of Article 2 (1) by emphasizing the word ‘and’ used in the provision. He contended that the use of the word ‘and’ creates a ‘dual requirement’ restricting “the scope of the Covenant to persons under United States jurisdiction and within United States territory.”<sup>221</sup> Mr. Harper referred to the negotiating history of the ICCPR stating “the words ‘within its territory’ had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to a party’s territory.”<sup>222</sup> However, in its report of the 50th Session, the HRC pointed out:

[It] does not share the view expressed by the [U.S.] Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that in special circumstances, persons may fall under the subject – matter jurisdiction of a State party even when outside the State’s territory.<sup>223</sup>

This clearly reveals the HRC does not view the stance of the U.S. favorably and that such a restrictive approach has the capacity of being contrary to the objects and purposes of the ICCPR.

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218. *Id.* at 82.

219. Hum. Rts. Comm., Summary Record of the 1405th Meeting, ¶ 20, U.N. Doc. CCPR/C/SR.1405 (Apr. 24, 1995).

220. *Id.*

221. *Id.*

222. *Id.*

223. Rep. of the Hum. Rts. Comm. ¶ 284, U.N. Doc. A/50/40 (Oct. 3, 1995).

The territoriality debate resurfaced in 2004 with the HRC's adoption of General Comment 31. In General Comment 31, the HRC noted "a general obligation is imposed on States parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction."<sup>224</sup> In paragraph 10 of the General Comment, the HRC emphasizes that:

State parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.<sup>225</sup>

The HRC has thereby clarified its stance pertaining to the extraterritorial application of the rights found in the ICCPR. When this approach is applied to the matter at hand, one finds it easy to argue that when a family member of a detainee establishes a violation of a right, such an individual is entitled to a remedy disregarding the territorial boundaries. An individual should only be required to prove a violation of a right has occurred and the individual comes within the jurisdictional scope of the state that has engaged in such a violation irrespective of living outside U.S. territory.

In General Comment 31, the HRC advances beyond territorial limits by further affirming "the enjoyment of Covenant rights is not limited to citizens of State parties, but must also be available to all individuals regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers, and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party."<sup>226</sup>

The above approach indicates the HRC's understanding is not a restrictive approach, which limits the application of the ICCPR to the territory or the citizens of the state party. Even though it is beyond the scope of this article to engage in a separate and comprehensive discourse of pretrial detainees who are non-nationals, it suffices to state at this point, similar rights as the ones that have been argued for in this article are applicable to non-nationals and their families. Such an interpretation is perfectly within the scope of what the HRC advocates in this respect.

Six years subsequent to issuing GC 31, in 2010, the U.S. Department of State adopted a somewhat altered stance pertaining to the extraterritorial-

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224. Hum. Rts. Comm., General Comment No. 31 [80] ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

225. *Id.* ¶ 10. *Contra* Parrish, *supra* note 206.

226. General Comment No. 31, *supra* note 224 ¶ 10.



ity of the ICCPR.<sup>227</sup> In the Memorandum Opinion of the Geographic Scope of the International Covenant on Civil and Political Rights, the U.S. Department of State noted:

[T]he 1995 Interpretation has been brought into question by the International Court of Justice. . . the Human Rights Committee. . . and a number of [the U.S.'s] closest allies in their written comments to the Human Rights Committee. All have taken the considered position – contrary to the 1995 Interpretation – that the protections afforded by the Covenant do not in all cases stop at the water's edge.<sup>228</sup>

After having noted the concerns raised by the ICJ, the HRC and allies of the U.S., the Memorandum moves on to an analysis of the U.S.'s current position. The Memorandum states that after an initial investigation, it was established:

[T]he 1995 Interpretation overstated the clarity of the text and negotiating history (*travaux préparatoire*) of the Covenant. Upon fuller analysis, we found that neither the text nor the *travaux* of the Covenant requires the extraordinarily strict territorial interpretation that the United States has asserted regarding the geographic scope of the Covenant – particularly when taking into account the treaty's broader context and object and purpose, as standard rules of treaty interpretation require.<sup>229</sup>

This is a more favorable position with regard to the extraterritorial application of the ICCPR provisions although this has not yet been adopted officially. It also serves the purpose of this article which seeks to encourage the judiciary and the state to resort to IHRL and apply it to family members who are affected by unlawful pretrial detentions irrespective of whether they remain within or without the territory. However, one must note the visitation rights and recreational rights argued for in this article cannot be

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227. The author of this Memorandum is said to be Harold Koh who is currently Sterling Professor of International Law at Yale Law School. He served as the Legal Advisor to the U.S. Department of State from 2009 – 2013. On EJIL: Talk!, Dr. Marko Milanovic (Associate Professor at the University of Nottingham School of Law) states that the 2010 Memorandum was a “leaked document” obtained by a journalist named Charlie Savage writing for The New York Times. See Marko Milanovic, *Harold Koh's Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties*, EJIL: TALK! (Mar. 7, 2014), <http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties/>

228. U.S. DEP'T OF STATE, MEMORANDUM OPINION OF THE GEOGRAPHIC SCOPE OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 3 (Oct. 19, 2010).

229. *Id.*

applied to family members residing outside the territory of the U.S. due to obvious practical reasons. Even though that is a practical constraint, what is more important is that this analysis paves the way for future scholarship to advocate for more rights for the family members of the detainee that can be provided both within and without the U.S. territory.

After the Memorandum Opinion was released to the public in March 2014, referring to Charlie Savage's News Report in *The New York Times*,<sup>230</sup> Dr. Milanovic stated:

If Savage's reporting does prove to be correct and the US now clearly reiterates before the Committee that the ICCPR cannot apply extra-territorially because its Article 2(1) is supposedly crystal clear and unambiguous when it says that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,' an important opportunity will have been missed.<sup>231</sup>

It turns out now that both Savage and Milanovic were correct in their fears that the U.S. would miss 'an important opportunity' in changing its stance regarding Article 2 (1) of the ICCPR. The U.S. submitted its Fourth Periodic Report to the HRC in December 2011. This was subsequent to Harold Koh arguing for a change of stance in the Memorandum Opinion of the Geographic Scope of the International Covenant on Civil and Political Rights. The Fourth Periodic Report is comprised of 84 paragraphs on Article 2 of the ICCPR, none of which refers to the issue pertaining to the extraterritorial application of Covenant rights.<sup>232</sup> The U.S. has chosen to report only on the equality aspect of Article 2, disregarding its territorial and jurisdictional scope.

In the list of issues that was issued by the HRC to the U.S. on 29 April 2013, the HRC did not specifically raise the question pertaining to the extraterritorial application of the ICCPR.<sup>233</sup> In this regard, the HRC too has missed an opportunity of questioning the U.S. of its stance pertaining to territoriality. In its reply, the U.S. strictly adhered to the issues raised by the

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230. See Charlie Savage, *U.S. Seems Unlikely to Accept that Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES (Mar. 6, 2014), [http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?\\_r=0](http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?_r=0).

231. Milanovic, *supra* note 227.

232. See U.S. DEPT. OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Dec. 30, 2011).

233. See Hum. Rts. Comm., *supra* note 14.

HRC conveniently avoiding the question regarding the interpretation of Article 2(1).<sup>234</sup> However, in its Concluding Observations on the Fourth Report of the United States of America, the HRC condemns the U.S. practice of continuing to adhere to the 1995 Interpretation.<sup>235</sup> The HRC states that it:

[The HRC] regrets that the State Party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1 supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice.<sup>236</sup>

As the HRC refers to its jurisprudence in conjunction with that of the ICJ and state practice, it is possible to argue that there is a rising tendency to consider rights of the ICCPR apply extraterritorially in certain circumstances. One may note that a customary international norm has arisen in this regard. As the U.S. has maintained its position as an objector to the extraterritorial application of the provisions of the ICCPR since 1995, it may attempt to deny the applicability of the customary norm by raising the claim that it has remained a persistent objector throughout. However, Professor Jonathan I. Charney<sup>237</sup> has argued in several publications that resorting to the 'persistent objector' argument may not be considered a very strong justification for not upholding rights and obligations undertaken in the international sphere.<sup>238</sup>

Charney argues:

The role of the dissenting State in the development of customary international law is difficult to identify. The positivists clearly held that no rule of international law could be binding on a State without its consent. Most modern theories of international law do not require that express consent be found before a rule of customary international law can be held to be binding on a State. Many authorities argue that a State can be bound by a rule of customary international law even though the State neither expressly nor tacitly consented to the rule.<sup>239</sup>

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234. Hum. Rts. Comm., Replies of the United States of America to the list of issues, U.N. Doc. CCPR/C/USA/Q/4/Add.1 (July 5, 2013).

235. Hum. Rts. Comm., *supra* note 1.

236. *Id.* ¶ 4.

237. Professor Jonathan I. Charney (late) was the Lee S. and Charles A. Spier Professor at Vanderbilt University School of Law.

238. See Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985); Jonathan I. Charney, *Universal International Law*, 87 A.J. INT'L L. 529 (1993).

239. Charney, *Persistent Objector Rule*, *supra* note 238, at 1.

Although the extract does not clarify the position that international law takes when a state has been persistently objecting to a rising norm of customary international law, it establishes the position that a state's express consent is not required for the establishment of such a norm. It insinuates that the norm of customary international law can be binding on all states irrespective of their lack of express or tacit consent. In an article published eight years after his previous work, Charney argues:

[T]he position gains the objecting State very little. It does not immunize the so-called persistent objector to the pressure that the other states may impose upon it to conform to the norm. This pressure may be characterized as merely political, but the alleged legal right of the persistent objector does not equip that state with any real defenses in practice. Accordingly, international law allows steps to be taken against the objector as if it were violating the law. Because international law is one of the legitimate products of the political process, it is hard to show that the persistent objector gains anything from this purported status.<sup>240</sup>

The debates pertaining to extraterritoriality and persistent objector are not merely academic as they contain very real pragmatic effects on state parties involved. A trend has arisen among scholars, the HRC, the ICJ, other international organizations and states to condemn the U.S. position.<sup>241</sup> It is true that the U.S. does not have a clear record of its human rights obligations. It is also true that it is difficult and next to impossible to compel a superpower to abide by the international rules especially when the argument is based on customary international law to which the U.S. considers itself a persistent objector. Nonetheless, it is noteworthy that even a superpower is incapable of existing without being influenced, at least to a lesser extent, by extraneous circumstances. The pressure has begun to develop within the U.S. as is evident from reactions to Koh's Memorandum of 2010. Hence, it is possible to argue the U.S. will change its stance, either voluntarily or involuntarily, as the pressure develops both from within and without.

In the latest Concluding Observation of the HRC on the U.S. Fourth Periodic Report, the HRC emphasizes:

[The] state party should interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extraterritorial application of the Covenant under

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240. Charney, *Universal International Law*, *supra* note 238, at 539.

241. U.S. DEP'T OF STATE, *supra* note 232, at 4.

certain circumstances, as outlined, *inter alia*, in the Committee's General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.<sup>242</sup>

This shows the growing discomfort regarding the U.S. position and the fact that the HRC considers the 1995 Interpretation to be a *mala fide* interpretation that violates the objects and purposes of the Covenant. Considering the foregoing analysis, it is quite probable that a norm of customary international law is on the rise, if not already in existence, regarding the extraterritorial application of the ICCPR in select circumstances. Hence, one may argue the U.S. will have to succumb to pressure in the future even though one cannot guarantee at which point of time it would become a reality. However, it serves the purpose of this article to argue pretrial detention is a situation which comes within the scope of 'select circumstances' in which the ICCPR should be regarded as having extraterritorial application. As explained above, this is because the right to life and liberty are considered the most important rights. In that light, it is possible to conclude that when an unlawful pretrial detainee's family members reside outside the territory of the U.S., they should be provided the rights (in this case compensation) irrespective of the territorial boundaries as they qualify to be considered as coming within the jurisdiction of the U.S.

#### E. *'Tough on Crime' Rhetoric and Aphorisms of Justice*

Should the U.S. rethink its position on the 'tough on crime' concept? This question arises because the costs of such an approach seem to have outweighed its perceived benefits. The number of lives lost through rash actions of the police, the allegations of racism against the police, the potential for even innocent men and women who happen to become victims of circumstances to be treated as criminals are but some costs, which come to mind in association with the rhetoric. However, the 'tough on crime' approach may have an impact on the judiciary in a manner that the society may not perceive. According to the Open Society Foundation, "[a] conservative judicial attitude to pretrial release and reluctance to conditional release. . . may result from concerns that being seen as "soft on crime" will affect career-aspirations [or they may be based on] perceived pressure from the media and the public."<sup>243</sup>

One may argue such judicial attitudes violate the rights of the family members. Although it is impossible to instill professional ethics and deco-

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242. Hum. Rts. Comm., *supra* note 100 ¶ 4(a).

243. OPEN SOC'Y JUST. INITIATIVE, IMPROVING PRETRIAL JUSTICE: THE ROLES OF LAWYERS AND PARALEGALS 36 (2012).

rum among the members of any professional body including that of the judiciary, the Code of Conduct for U.S. Judges attempts to achieve that task. In Canon 3, the Code of Conduct states that the judge “should be faithful to, and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor or fear of criticism.”<sup>244</sup> In the English case *R v. Sussex Justices, Ex Parte McCarthy*,<sup>245</sup> Lord Hewart CJ famously opined that “it is not merely of some importance but is of fundamental importance that justice should not only be done, but manifestly and undoubtedly seen to be done.”<sup>246</sup> That aphorism is universal and cannot be dismissed as being restrictively applicable to the United Kingdom where the judgment was delivered. Applying that principle to the pretrial context would insinuate that judges should be extra cautious of keeping their attitudes in check in order to do justice to matters that come before them.

#### F. Recommendations

One of the main causes for the increasing tendency to hold particular groups of people in pretrial detention may be caused by implicit bias. Just as strategies are developed in general to make the members of the judiciary aware of the implicit biases pertaining to race, it is also necessary to identify other factors that can give rise to such biases. A study conducted by the National Center for State Courts (NCSC) on Race and Ethnic Fairness in the Courts proposes that the first step lies in the identification of risk factors such as emotional states, ambiguity, salient social categories, low effort cognitive processing, distracted or pressured decision-making circumstances and lack of feedback.<sup>247</sup> Although the specific findings of the study are irrelevant in this context, the general criteria propounded by it are applicable to the pretrial context as well. Hence, I propose similar mechanisms should be put in place to help judges avoid implicit biases.

NRCS also suggests that raising awareness of the existence of implicit biases is important as a stepping-stone towards the elimination of such biases. So long as one refuses to accept the existence of the problem, it is impossible to address it, as you cannot cure a disease that you are unaware of. Such unawareness does not prevent harm. Likewise, the dangers of implicit bias harm the society in general. If a judge’s decision is contingent on

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244. CODE OF CONDUCT FOR UNITED STATES JUDGES (Mar. 2014).

245. [1924] 1 KB 256.

246. *Id.*

247. *Helping Courts Address Implicit Bias: Strategies to Reduce the Influence of Implicit Bias*, NAT’L CTR. FOR STATE COURTS, [http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\\_Strategies\\_033012.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx) (last visited Mar. 29, 2016).

their prospects of career success or on the ease that comes along with affirming a pretrial detention under the pretext of 'protection of the society' or on societal impact, such a judgment cannot be regarded as appropriate. Hence, I recommend that societal, economic, political and individual concerns of judges that may impede justice and lead to a spillover effect on society being empirically studied. Such a study should then lead to the adoption of a procedure through which judges are educated and assisted in the process of justice.

### CONCLUSION

In an attempt to respond to the question of whether the family members of the detainee should have a claim to a separate set of rights when the detainee is unlawfully detained in pretrial detention, this article further responds to four related questions: (a) what constitutes an unlawful pretrial detention and what constitutes a family; (b) when can family members be considered victims; (c) when do states have obligations towards family members; and (d) what is the nature of the obligations of the state when the rights of the family members are implicated.

In this article, I do not propose that pretrial detention be considered unlawful in its entirety. However, a segment of pretrial detention turns out to be unlawful as has been shown in the foregoing analysis. This category has unfortunately become a very large proportion of overall pretrial detentions in the U.S.

The impact created by unlawful pretrial detention is not restricted to the detainee but extends to family members who can be validly regarded as victims of unlawful pretrial detention. Although, for purposes of law, they may be regarded as indirect victims, the victimization that they suffer in reality is direct. As has been analyzed in this article, the spill-over effects of pretrial detention far exceeds any benefit that the state may anticipate through the detention of an individual who has not yet been convicted, especially when the detention transforms into an unlawful measure.

The legal system as it stands today does not provide a proper mechanism by which a detainee, let alone family members, can vindicate the affected rights in a meaningful manner. The spillover effect caused to the society through the impact of unlawful pretrial detention on family members is an avoidable cost if the legislature adopts direct mechanisms to address the abuses, discriminations and discretions associated with pretrial detentions.

Once a family member has established an unlawful detention has taken place and a significant relationship exists between the direct victim and the family member that entitles the latter to enforceable rights, they should be

entitled to several basic rights. The basic rights I argue for are the right to privacy and family life, including the right to conjugal visits and the right to spend recreational time with the detainee, and finally the right to compensation. The right to compensation is more or less argued for as a right that arises *after* a court determines the detention was unlawful. However, the other rights should be enforced during the interim period when the legality of the pretrial detention is in question. These rights of family members are argued for on the presumption that they do not have an adverse effect on the rights of the pretrial detainee. The nature of the rights discussed herein supplies ample proof that, in fact, these rights are beneficial to both direct and indirect victims.

Except the right to compensation, the other rights argued for in this article, can be applied to pretrial detainees and their family members even when the detention is lawful. In fact, this long-term aspiration underlies the ideology presented in this article. The proposition that rights and remedies can be made available to family members of a detainee even if those family members reside outside the territorial boundaries of the U.S. has been advanced in this article. Due to practical reasons, the right to conjugal visits and the right to spend recreational time with a detainee cannot be made available to such parties, although the right to compensation should remain available despite their extraterritorial residency.

While legal measures alone would not suffice to address the issues highlighted in the article, it is evident that the law should be used as the primary norm setting tool in connection with IHRL as it is considered as a fast-moving institution. Even then, there are challenges to be faced such as the lack of specific laws addressing the issue or the lack of willingness on the part of Congress to draft laws specific to pretrial detention. One may hope there would be lesser or no problems when there are statutes addressing these concerns. However, there are implicit biases or other concerns that may affect judicial decisions. Such aspects call for reform of judicial practices through non-conventional mechanisms such as awareness-raising programs, training of judges and instilling judicial ethics in them as prejudicial judicial attitudes contribute to the violation of family members' rights.

The state should interpret laws in a manner favorable to society and not in a dictatorial draconian fashion. The family unit should be regarded as the most important unit of society. This warrants the adoption of all measures within state power, to protect the family unit if and when individuals are subject to pretrial detention. Pretrial detention laws' potential for abuse should be recognized and remedied with reference to IHRL. To deny family members their rights by formulating technical interpretations cannot be regarded as a *bona fide* effort by a state to comply with the norms that it has undertaken under IHRL. Therefore, the state should attempt to recognize



the mass-scale denial of rights associated with unlawful pretrial detentions and adopt measures for its immediate remedy. As Nelson Mandela stated, “[t]o deny people their human rights is to challenge their very humanity.”<sup>248</sup>

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248. Todd McHenry, *Carrying on the work of Nelson Mandela*, CNN (Jul. 17, 2015), <http://www.cnn.com/2013/12/05/world/iyw-mandela-charitable-legacy/>.