CLOSING INTERNATIONAL LAW'S INNOCENCE GAP

95 S. Cal. L. Rev. __ (forthcoming)

BRANDON L. GARRETT*, LAURENCE R. HELFER†, AND JAYNE C. HUCKERBY‡

ABSTRACT

Over the last decade, a growing number of countries have adopted new laws and other mechanisms to address a gap in national criminal legal systems: the absence of meaningful procedures to raise post-conviction claims of factual innocence. These legal and policy reforms have responded to a global surge of exonerations facilitated by the growth of national innocence organizations that increasingly collaborate across borders. It is striking that these developments have occurred with little direct help from international law. Although numerous treaties recognize extensive fair trial and appeal rights, no international human rights instrument—in its text, existing interpretation, or implementation—explicitly and fully recognizes the right to assert a claim of factual innocence.

We label this omission international law's innocence gap. The gap appears increasingly anomalous given how foundational innocence protection has become at the national level, as well as international law's longstanding commitment to the presumption of innocence, fair trial, and other criminal process guarantees. We argue the time has come to close this innocence gap by recognizing a new international human right to assert post-trial claims of factual innocence.

* L. Neil Williams, Jr., Professor of Law, Duke University School of Law and Director, Wilson Center for Science and Justice, Duke University School of Law. bgarrett@law.duke.edu.

† Harry R. Chadwick, Sr. Professor of Law, Duke University School of Law and Permanent Visiting Professor, iCourts: Centre of Excellence for International Courts, University of Copenhagen. helfer@law.duke.edu.

‡ Clinical Professor of Law, Director, International Human Rights Clinic, Duke University School of Law. huckerby@law.duke.edu. For invaluable comments and critiques, we are grateful to Ira Belkin, Mong-Hwa Chin, Michelle Coleman, Mark Godsey, Joanna Harrington, Jim Johnson, G.J. Alexander Knoops, Dr. Gentian Zyberi, and to participants at the 2020 ASIL Mid-year Meeting, the Association of Human Rights Institutes Conference on Human Rights Strategies, the ICON-S 2021 Mundo Conference, an iCourts conference on Transforming Evidence and Proof in International Criminal Trials, and the Innocence Scholarship Forum 2021. Alex Bednar, Xinyue Dai, Olivia Daniels, J. Connor Daughton, Jo Un Eom, Matthew Steyl, and Andres Pacuic provided excellent research assistance.

INTRODUCTION

Over the last decade, a growing number of countries have established mechanisms for persons convicted of crimes to raise post-trial claims of innocence.[1] Take the example of Taiwan, which experienced its first DNA exoneration in 2014, when the Taiwan High Court granted Long-Qi Chen a retrial after serving four years in prison.[2] In response, Taiwanese lawmakers promptly revised the standard for reopening a conviction to make clear that "new evidence"—either alone or considered as part of the totality of the circumstances—is grounds for reversing a criminal conviction.[3] Many other countries have similarly enacted new laws or taken other steps to address a longstanding gap in national criminal legal systems: the absence of a meaningful procedure to raise post-conviction claims of innocence.[4] These national legal and policy reforms have responded to a global surge in exonerations, including high-profile and capital cases in Australia, China, Germany, Japan, Switzerland, Taiwan, the United Kingdom, and the United States.[5]

Exonerations in these and other states have been facilitated by the growth of national innocence organizations, which have secured exonerations for wrongful convictions in many jurisdictions.[6] For example, in the United States, more than 370 convictions have been overturned based on post-conviction DNA testing,[7] resulting in an "innocence movement."[8]

---

1. *See generally* Brandon L. Garrett, *Towards an International Right to Claim Innocence*, 105 CALIF. L. REV. 1173 (2017) (describing the rise in national-level adoption of post-conviction innocence claims).

2. *See Case: B03陳龍綺 Chen, Long-Qi*, TAIWAN INNOCENCE PROJECT, https://twinnocenceproject.org/en/case/chen-long-qi [https://perma.cc/PY6M-UDWJ]; *see also* Garrett, *supra* note 1, at 1210–11.

3. For discussions of the Long-Qi Chen case and the statutory reforms it prompted, see *Case: B03陳龍綺 Chen, Long-Qi*, *supra* note 2. *See also* CODE OF CRIMINAL PROCEDURE art. 420 (Taiwan), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0010001 [https://perma.cc/FJN2-V3WL].

4. *See* Garrett, *supra* note 1, at 1173–74.

5. *See infra* Section I.B.

6. *See Network Member Organization Locator and Directory*, THE INNOCENCE NETWORK, https://innocencenetwork.org/directory [https://perma.cc/5GTM-E4LA] (describing 68 independent member organizations on four continents); *see also Exonerations*, INNOCENCE CANADA, https://www.innocencecanada.com/exonerations [https://perma.cc/53UU-ZA3Q] ("Innocence Canada has helped to exonerate 24 innocent people since 1993"); *Exonerations*, RED INOCENTE, https://redinocente.org/exoneraciones-red [https://perma.cc/377C-Y9LZ] (listing exonerations in a range of Latin American countries).

7. *See DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states [https://perma.cc/VC9Q-F3ST]; *Convicting the Innocent: DNA Exonerations Database*, DUKE L. WILSON CTR. FOR SCI. & JUST., https://www.convictingtheinnocent.com [https://perma.cc/C6G7-EEE2].

8. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5–13 (2011) (studying the characteristics of the first 250 DNA exonerations in the United States); Brandon L. Garrett, *Convicting the Innocent Redux*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed ed., 2017) (describing updated data concerning first 330 DNA exonerations); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 133–34 (2008); Emily Hughes, *Innocence Unmodified*, 89 N.C. L.

Echoed by advocacy campaigns in several other countries, this innocence movement has now gone global.[9] The resulting exonerations have attracted substantial public and media attention in documentaries, films, podcasts, and books,[10] sparking urgent and profound debates about "the fallibility of human justice."[11]

The achievements of the transnational innocence movement are unmistakable. Yet it is equally striking that these achievements have occurred with little direct help from international law. Although numerous human rights treaties recognize detailed rights to a fair trial and to appeal, no international instrument—in its text, existing interpretation, or implementation—has fully and explicitly recognized the right to assert a claim of innocence following a criminal conviction and sentence.[12] We argue that human rights treaties are capable of being—and should be—interpreted to protect such a right. To date, however, international law has fallen short by failing to comprehensively articulate the full scope of this guarantee. Instead, human rights law and its interpretative bodies tend to assume the existence of national-level mechanisms to assert innocence claims, without either mandating the creation of those mechanisms or regulating their substantive standards or procedural safeguards.[13]

We label this omission international law's "innocence gap." The gap appears increasingly anomalous, given how important innocence claims have become at the national level as well as international human rights law's abiding commitment to the presumption of innocence and the possibility of interpreting existing treaties to recognize this right.

What explains the innocence gap in international law? Where does this leave convicted persons who have new evidence of innocence in countries

---

REV. 1083, 1084 n.1 (2011); Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2011).

9. *See generally* Mark Godsey, *Introduction*, 80 U. CIN. L. REV. 1067 (2012) (introducing a symposium on global innocence movement).

10. *See, e.g.*, BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); *The Innocence Files* (Netflix 2020); *Wrongful Conviction with Jason Flom*, LAVA FOR GOOD PODCASTS, https://www.wrongfulconvictionpodcast.com/with-jason-flom [https://perma.cc/STB4-769F]; CONVICTION (Fox Searchlight Pictures 2010); JUST MERCY (Warner Bros. Pictures 2019); *see also* FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE (2008) (analyzing media coverage of wrongful convictions).

11. AMNESTY, INT'L, DEATH SENTENCES AND EXECUTIONS 2014 6–7 (2015), https://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf [https://perma.cc/4LVU-VHM5] (describing 112 exonerations of death row prisoners in nine countries); *see also* AMNESTY INT'L, AMNESTY INTERNATIONAL GLOBAL REPORT: DEATH SENTENCES AND EXECUTIONS 2017 8 (2018), https://www.amnestyusa.org/wp-content/uploads/2018/04/Death-Penalty-REPORT.pdf [https://perma.cc/PVA7-HRSG] (describing 55 exonerations of death row prisoners in six countries).

12. *See infra* Section II.C.

13. *See infra* Section II.C.

that do not yet recognize this right? What does such recognition reveal about current debates over so-called rights inflation? And, perhaps most important, how would a new right to claim innocence be recognized in international law?

This Article is the first to ask these questions.[14] We argue that the time has come to close international law's innocence gap by recognizing a new human right to assert post-trial claims of factual innocence. The recognition of such a new right has several important benefits. It reflects a burgeoning transnational social movement and progressive changes to national criminal laws. It consolidates recent international law developments that, as we analyze *infra*, reveal a solid normative foundation for a human right to claim innocence.[15] And it advances the core values of fairness and justice shared by domestic and international legal systems that protect individual liberties and civil and political rights in general.

Arguments in favor of new rights have been made since the emergence of international human rights law following World War II.[16] Such claims are especially fraught in the current political environment, in which governments, civil society groups, and commentators are trenchantly debating whether international courts and monitoring bodies have appropriately expanded or unduly proliferated human rights. We take these concerns seriously, but we demonstrate that the right to claim innocence can be defended as a necessary expansion of international law's protective reach, whether derived from several established human rights (to life, fair trial, appeal, remedy, and compensation for miscarriages of justice) or recognized as a new, freestanding international right.[17]

Part I of this Article reviews different definitions of innocence and summarizes recent domestic law trends concerning post-trial claims of

14. No prior scholarship has comprehensively documented the gap in international law regarding a post-conviction right to raise innocence claims, nor argued that human rights treaties should affirmatively recognize such a right. *But see* Garrett, *supra* note 1, at 1217–18 (noting the gap and briefly suggesting that the right might one day be accepted in customary international law). Scholars have, however, addressed related topics in ways that support the claims made in this Article. For example, there is considerable research on international law requirements regarding the burden of proof and fair trial rights, including the presumption of innocence. *See, e.g.*, AMAL CLOONEY & PHILIPPA WEBB, THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW 206–16 (2021). Scholars have also analyzed the right to an appeal and touched on its relation to preventing wrongful convictions. *See, e.g.*, Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMPAR. & INT'L L. 1, 3 (2011). And one recent publication has reviewed the right to compensation following an exoneration. *See* Jamil Ddamulira Mujuzi, *The Right to Compensation for Wrongful Conviction/Miscarriage of Justice in International Law*, 8 INT'L HUM. RTS. L. REV. 215, 215 (2019).

15. *See infra* Sections III.B–C.

16. *See infra* Part II.

17. *See infra* Section III.D.

innocence.[18] We discuss three national models for constructing claims of innocence and highlight international law's limited direct influence on the development and implementation of these models.[19]

Part II provides the analytical and empirical foundation for recognizing a right to claim innocence in international law. We begin by cataloguing the many advantages that are likely to flow from such recognition.[20] We next describe two primary pathways by which new international human rights have been recognized, explain why the right to claim innocence satisfies both of these approaches, and discuss the relative merits of each.[21]

Part III sets forth our proposal for closing international law's innocence gap. We explore the normative content of the right to claim innocence, as well as the modalities and practical consequences of its more formal recognition. We also consider potential objections to our proposal, including critiques that the number and scope of internationally recognized human rights should not be further expanded.[22]

A brief conclusion highlights the implications of our proposal for efforts to redress racial disparities in wrongful convictions globally[23] and, more broadly, to reform criminal legal systems and law enforcement practices to address racial injustice and to protect human rights.[24]

I. POST-TRIAL CLAIMS OF INNOCENCE IN NATIONAL LAW

This Part begins by exploring the definition of innocence claims applied in this Article. Next, we explain how the transnational innocence movement has pressured countries to relax and revise traditional rules of finality that impeded the ability to raise such claims. We then set out three models by which such claims have been recognized at the national level: a post-

18. *See infra* Sections I.A–B.
19. *See infra* Sections I.C–D.
20. *See infra* Sections II.A–B.
21. *See infra* Sections II.C–D.
22. *See infra* Section III.D.
23. *See, e.g.*, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES ii (Samuel R. Gross ed. 2017) ("African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated"); CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, JUSTICE DENIED: A GLOBAL STUDY OF WRONGFUL DEATH ROW CONVICTIONS 11 (2018), https://secureserv-ercdn.net/198.71.233.33/l8z.2c6.myftpupload.com/wp-content/uploads/2019/12/Justice-Denied-A-Global-Study-of-Wrongful-Death-Row-Convictions.pdf?time=1634328115 [https://perma.cc/7Z76-PTN2] (identifying racial and ethnic discrimination, particularly of foreign nationals, as a risk factor for wrongful convictions).
24. *See, e.g.*, Hum. Rts. Council, Rep. of the U.N. High Comm'r for Hum. Rts. on Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers, U.N. Doc. A/HRC/47/53, at 12 (2021).

conviction model, an appellate model, and an administrative model. Part I concludes by highlighting the limited direct influence of international law on the development, implementation, and transnational spread of these models, identifying lacunae that can be filled by a new right to claim innocence.

A. DEFINING INNOCENCE CLAIMS

Cases and commentators have broadly distinguished between two types of innocence claims: *factual innocence*—in which the wrong person was convicted of a crime or no crime occurred at all—and *legal innocence*—which refers to legal defects in a conviction, ranging from unfair trials and other errors in the criminal process to evidence that is legally insufficient to convict.[25] This Article focuses primarily on international law's gap regarding factual innocence claims, but it also discusses legal innocence claims involving procedural errors.

We emphasize factual innocence for both normative and strategic reasons. These claims constitute the most urgent gap in international law. They provide an incisive critique of finality rules and illustrate, in stark terms, the need for post-conviction exoneration mechanisms. These claims also, as Part II explains, have a firm textual and doctrinal foundation in global and regional treaties, without, however, being explicitly or fully guaranteed in those international instruments.

We recognize that legal innocence claims sometimes overlap with claims of factual innocence. For example, the reversal of a conviction resulting from a fair trial violation is often accompanied by a finding that the procedural error impacted the verdict, such that no reasonable juror would convict.[26] In addition, the transnational movement, described *infra*, focuses on a range of legal and factual innocence issues and confronts obstacles to overturning wrongful convictions for both types of claims.[27]

Our focus on factual innocence does not seek to deter these efforts; on the contrary, national governments and domestic innocence organizations could extend our proposal to other miscarriages of justice and gross procedural errors. We nevertheless believe that closing international law's innocence gap requires—at least as a first step—explicitly recognizing factual

25. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 45 (1987) (detailing exonerations in death penalty cases in the United States and defining category of miscarriages of justice); *see also* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1159–60 (2010) (describing different definitions of exonerations and of miscarriages of justice). For other works providing taxonomies of definitions of innocence, see, for example, Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 n.4 (1995).

26. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1684–85 (2008).

27. *See infra* Section I.C.

innocence claims in order to complement existing procedural guarantees whose violation provides the basis for legal innocence claims.

Limiting our focus to factual innocence still raises a host of complex questions. These include what counts as "evidence" of innocence, when such evidence is sufficiently "new," and whether to include cases in which a sentence or sentencing enhancement, rather than guilt, is called into question, as well as guilty pleas in which no evidence was presented at a trial.[28] Additional issues relate to whether and in what circumstances a convicted person later found to be innocent should receive compensation. National jurisdictions have grappled with these issues and adopted laws to address some of them, as we discuss in the next section.[29] Even so, the absence of an international right to claim innocence has left gaps in these domestic laws and impeded the transnational spread of post-conviction procedures and sharing of best practices.[30]

B. THE TRANSNATIONAL INNOCENCE MOVEMENT'S FOCUS ON THE FINALITY OF CRIMINAL CONVICTIONS

Traditionally, rules of finality in criminal proceedings have barred relitigating factual evidence of innocence after a conviction becomes final or a relatively short statute of limitations period expires.[31] These finality rules have, however, eroded rapidly as government officials and judges in numerous countries have confronted unequivocal evidence of wrongful convictions.[32]

These changes have been driven by "functional similarities" in the causes of wrongful conviction determinations across jurisdictions, especially in such emerging technologies such as DNA testing.[33] Researchers have documented exonerations in several countries, including China, Germany, and the United States; in other countries, there is anecdotal awareness of wrongful convictions, but comprehensive data is lacking.[34] These exonerations,

28. *See* Garrett, *supra* note 1, at 1210.

29. *See infra* Section I.B.

30. We develop these arguments in detail *infra* Part III.

31. *See* Herrera v. Collins, 506 U.S. 390, 417 (1993) (discussing the "disruptive effect that entertaining claims of actual innocence would have on the need for finality").

32. *See* Garrett, *supra* note 1, at 1177 ("[F]inality is entering a period of new international ferment.").

33. Kent Roach, *Comparative Reflections on Miscarriages of Justice in Australia and Canada*, 17 FLINDERS L.J. 381, 381 (2015).

34. For an effort to document exonerations worldwide, noting several recent mass-exonerations of tens of thousands of persons in England, Wales, and Germany, see *Innocents Database*, FOREJUSTICE, http://forejustice.org/search_idb.htm_[https://perma.cc/7PUX-ELWX]. For exonerations in the United States, see *Exonerations by Year: DNA and Non-DNA*, THE NAT'L REGISTRY OF EXONERATIONS, UNIV. OF CAL. IRVINE NEWKIRK CTR. FOR SCI. & SOC'Y, UNIV. OF MICH. L. SCH. & MICH. ST. UNIV. COLL. OF L., https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx

whether occurring in large numbers or in high-profile cases, have, in turn, created awareness that existing post-conviction remedies are inadequate when new evidence of innocence arises.[35]

Beginning with the first innocence projects in several countries, including the United Kingdom (with the creation of the Criminal Cases Review Commission) and the United States (which saw several innocence projects established by the mid-1990s), national innocence organizations have increasingly investigated potential wrongful convictions and harnessed DNA technology to assert claims of factual innocence.[36] Today, there is not only an Innocence Network that spans the globe, but regional networks of innocence projects in Europe, East Asia, and Latin America.[37] This movement comprises a diverse set of actors—non-governmental organizations, law school clinics, pro bono attorneys at private law firms,[38] and a growing number of conviction review units in prosecutors' offices.[39] Additionally, individual exonerees have formed organizations to advocate for legal reforms, including broader access to remedies for innocence claims.[40]

The national-level changes in response to these advocacy efforts are striking. For example, in the United States, all fifty states and the federal government have enacted post-conviction statutes permitting access to DNA

[https://perma.cc/C2SU-JFZ4] [hereinafter *National Registry*] (detailing over 2,500 exonerations in the United States since 1989); DUKE L. WILSON CTR. FOR SCI. & JUST., *supra* note 7 . For data from China, Australia, Switzerland, and Germany, see generally Moulin Xiong & Michelle Miao, *Miscarriage of Justice in Chinese Capital Cases*, 41 HASTINGS INT'L & COMPAR. L. REV. 273 (2018); Rachel Dioso-Villa, *A Repository of Wrongful Convictions in Australia: First Steps Toward Estimating Prevalence and Causal Contributing Factors*, 17 FLINDERS L.J. 163 (2015); Gwladys Gilliéron, *Wrongful Convictions in Switzerland: A Problem of Summary Proceedings*, 80 U. CIN. L. REV. 1145 (2012); Fredericke Leuschner, Martin Rettenberger & Axel Dessecker, *Imprisoned but Innocent: Wrongful Convictions and Imprisonments in Germany, 1990-2016*, 66 CRIME & DELINQUENCY 687 (2020). Many countries do not maintain accurate information on convictions reversed on innocence grounds. *See, e.g.*, Luca Lupária & Chiara Greco, *Unveiling Wrongful Convictions Between the U.S. and Italy: Cross-Learning from Each Other's Mistakes*, 1 WRONGFUL CONVICTION L. REV. 101, 118 (2020) ("[T]he Italian system does not provide accurate statistics or research concerning wrongful convictions . . . .").

35. *See, e.g.*, Rachel Dioso-Villa, Roberta Julian, Mark Kebbell, Lynne Weathered & Nina Westera, *Investigation to Exoneration: A Systemic Review of Wrongful Conviction in Australia,* 28 CURRENT ISSUES CRIM. JUST. 157, 158 (2016); Stephanie Roberts, *Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal*, 81 J. CRIM. L. 303, 304–05 (2017). For efforts to revise legal standards in a wide range of countries, see generally Garrett, *supra* note 1.

36. For an overview of the entire innocence movement, see generally ROBERT J. NORRIS, EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT (2017).

37. *See* THE INNOCENCE NETWORK, *supra* note 6; INNOCENCE CANADA, *supra* note 6; RED INOCENTE, *supra* note 6*; see also* Godsey, *supra* note 9, at 1067.

38. For example, the Colorado Innocence Project was formed as a consortium of pro bono law firm lawyers. *See Khorey Wise Innocence Project*, COLO. L., https://www.colorado.edu/law/academics/public-service/korey-wise-innocence-project [https://perma.cc/2LL9-CZXN].

39. For an overview of the role that different Conviction Integrity Units, centered in prosecutors' offices, have played in exonerations in the United States, see *National Registry*, *supra* note 34.

40. *See, e.g.*, *Meet the Change Agents*, INNOCENCE PROJECT, https://innocenceproject.org/change-agents/ [https://perma.cc/J6CJ-8R9X]; *see also* Garrett, *supra* note 1, at 1176–79 (describing exoneree advocacy regarding federal legislation).

and other new evidence of innocence, as well as relief based on that innocence.[41] Recent reforms in Canada broadening judicial acceptance of new evidence on appeal were "driven by a recognition of the role that postconviction barriers and finality concerns played in wrongful convictions."[42] Various other countries have adopted similar reforms.[43]

Despite these changes, finality still poses an obstacle to relief in many jurisdictions—sometimes just for certain cases, such as plea bargains,[44] but also where procedural rules impose time limits, require diligence of counsel, impose restrictions on the types of new evidence that may be considered, or even bar consideration of new evidence altogether.[45] These and other impediments reveal that an important innocence gap remains, notwithstanding the significant shifts in national law and policy.[46]

C. NATIONAL MODELS FOR RAISING INNOCENCE CLAIMS

In most national jurisdictions, the concept of innocence traditionally did not have distinct legal significance; rather, a person was found guilty or not guilty at a trial, while clemency could be granted in the interests of justice based on a variety of concerns, including but not limited to innocence.[47] In recent years, however, a wide range of countries with different legal systems and criminal procedures have modified their appeal and post-conviction review mechanisms to allow defendants to seek review and relief based on new evidence of innocence.[48] These mechanisms, often adopted in response to efforts by the transnational advocacy network discussed *supra*, have led to a growing number of exonerations of individuals whose factual innocence

41. THE INNOCENCE NETWORK, TODAY, ALL 50 STATES HAVE DNA ACCESS LAWS, BUT MANY DNA ACCESS LAWS HAVE LIMITATIONS 1, https://globalwrong.files.wordpress.com/2013/05/dna_innocencenetwork_website.pdf [https://perma.cc/V6CM-NDNL]; *see also* BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 164 (2013).

42. Carrie Leonetti, *The Innocence Checklist*, 58 AM. CRIM. L. REV. 97, 115 (2020).

43. *See* Garrett, *supra* note 1, at 1177.

44. *See, e.g.*, Rebecca Stephens, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM. L. & CRIMINOLOGY 309, 320–21 (2013).

45. *See, e.g.*, David Hamer, *Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission*, 37 U. NEW S. WALES L.J. 270, 288 (2014); *see also* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 685–86 (2005). More generally, scholarship has described post-conviction procedure as unduly complex and inadequate. *See, e.g.*, Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 75 (2017).

46. *See, e.g.*, Huang Shiyuan, *Chinese Wrongful Convictions: Discovery and Rectification*, 80 U. CIN. L. REV. 1195, 1195–96 (2012) (describing the need for a "more effective mechanism in China to discover and rectify erroneous cases").

47. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1322–23 (1997).

48 *See, e.g.*, Godsey, *supra* note 9, at 1067.

claims were upheld.

Drawing on existing scholarship, we describe three basic models for asserting these innocence claims: (1) a post-conviction model, in which a separate legal mechanism permits a challenge to a conviction after appeals are exhausted; (2) an appellate model, which broadly distinguishes between civil and common law approaches; and (3) an administrative model, in which a dedicated government agency reviews innocence claims. We also indicate where international human rights law has (or, more often, has not) meaningfully influenced these models.

1. The Post-Conviction Model

Numerous countries provide for a separate collateral procedure, unrelated to the trial and appeal, to a challenge to a criminal conviction. The common law writ of habeas corpus, which developed largely in the pre-trial context, has been repurposed as a post-conviction mechanism, mainly via statutes but also in constitutional provisions.[49] Many states in Latin America recognize a separate judicial writ, the *amparo de libertad,* and other common law writs, such as *coram nobis*; and statutory mechanisms can be used to litigate new evidence after a conviction.[50]

In the United States, post-conviction claims of innocence have been largely facilitated through state and federal post-conviction statutes unaided by the federal constitution or international law. In *Herrera v. Collins*, the U.S. Supreme Court declined to recognize a freestanding constitutional claim of actual innocence, noting that doing so would have a "disruptive effect . . . on the need for finality . . . ."[51] At the time of that decision, in the early 1990s, only two states recognized a right of access to post-conviction DNA testing to prove factual innocence.[52] In the decades since, finality rules have been relaxed significantly. In response to thousands of exonerations, over three hundred of which involved DNA testing, all fifty states and the federal government enacted post-conviction statutes permitting access to DNA and other evidence of innocence and creating procedures for seeking relief based on that evidence.[53] Most states and the federal government have also adopted statutes that provide compensation to wrongly convicted persons.[54] There is, however, no consistent national standard for making these

49. *See* GARRETT & KOVARSKY, *supra* note 41, at 1–3. Habeas corpus is also a constitutionally recognized remedy in Ireland. CONSTITUTION OF IRELAND 1937 art. 40, https://www.irishstatutebook.ie/eli/cons/en/html [https://perma.cc/CLG9-YRKE].

50. *See* GARRETT & KOVARSKY, *supra* note 41, at 1–2; Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 VA. J. SOC. POL'Y & L. 1, 1 (2003).

51. Herrera v. Collins, 506 U.S. 390, 417 (1993).

52. *See* Garrett, *supra* note 26, at 1631, 1646–50, 1673–75.

53. *See* THE INNOCENCE NETWORK, *supra* note 41; GARRETT & KOVARSKY, *supra* note 41.

54. *See National Registry*, *supra* note 34 (providing a primer on state and federal compensation

claims, nor for what type of or how much compensation is appropriate.

These statutes have also arisen in isolation from international human rights law. The United States has ratified the International Covenant on Civil and Political Rights ("ICCPR"). As we explain *infra*, although the ICCPR does not require States parties to provide a mechanism for post-conviction review of innocence claims, it does recognize a right to compensation for miscarriages of justice. However, due to the treaty's non-self-executing status in the U.S. legal system, no state or federal court has applied the ICCPR when reviewing wrongful convictions.[55]

2. The Appellate Model

In most countries, convictions may be challenged at one or more levels of an appeal, but there is no general mechanism for collateral post-conviction review. Instead, some jurisdictions have rules that permit the introduction of new evidence of innocence during appeals.

In many civil law countries, appeals have long been considered a fundamental right.[56] The appellate process is typically, however, confined to questions of law and the factual record at trial.[57] A distinct, and more limited, appellate process for reopening a case once ordinary remedies are concluded is termed a revision.[58] Countries have expanded both types of appeals to include claims based on newly discovered evidence of innocence.[59]

France, for example, made significant changes to its revision statute in 1989 and 2014 in response to high-profile wrongful conviction cases and to facilitate claims based on new evidence of innocence.[60] Judges had interpreted the prior standard to require "serious" doubt; lawmakers reinforced that even the "slightest" doubt sufficed.[61] The People's Republic of China also adopted sweeping changes in criminal procedure statutes and court rules

---

statutes and linking to an Innocence Project spreadsheet surveying exoneration compensation statutes in fifty states).

55. The ICCPR has been considered by U.S. courts only rarely, and mostly in relation to the death penalty and sentences of juvenile life without parole. *See* Connie de la Vega, *Using International Human Rights Standards to Effect Criminal Justice Reform in the United States*, AM. BAR ASS'N (Apr. 1, 2015), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2015--vol--41-/vol--41--no--2---human-rights-at-home/using-international-human-rights-standards-to-effect-criminal-ju- [https://perma.cc/F7MU-Y6VL].

56. *See* Marshall, *supra* note 14, at 1, 11, 15.

57. *See* Marshall, *supra* note 14, at 15.

58. *See* Garrett, supra note 1, at 1202–03.

59. *See* Garrett, *supra* note 1, at 1645–51. (providing overview of innocence claims and their evolution in civil law countries).

60. *See, e.g.*, CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 622 (Fr.); *see also* Katrien Verhesschen & Cyrille Fijnaut, *Correcting Wrongful Convictions in France: Has the Act of 2014 Opened the Door to Revision?*, 4 ERASMUS L. REV. 22, 22 (2020).

61. Verhesschen & Fijnaut, *supra* note 60, at 24.

over the past several decades, creating several appellate avenues for reopening convictions, including based on newly discovered evidence.[62] Appeals or revision in both countries involve a proceeding before judges, who consider newly introduced facts as part of the record.

The greater burdens of trials in common law jurisdictions (including live witness testimony and determination of guilt by jurors) have long engendered resistance to reopening convictions based on new evidence of innocence.[63] Yet the movement to develop modern systems of criminal appeals arose in common law countries out of the "concern over the incidence of wrongful convictions."[64] More recently, several jurisdictions have responded to wrongful convictions by altering their finality rules, in some instances reflecting the influence of international human rights law.

In the United Kingdom, for example, lawmakers adopted appellate reforms in response to prominent cases, including the Birmingham Six and Guildford Four.[65] In 1995, the United Kingdom amended the standard for appeal to include "unsafe" convictions, permitting a claim based on evidence of innocence that is not conclusive or such that no reasonable juror could convict.[66] Subsequently, international law influenced the adoption of a more flexible "unsafe" conviction standard. In *Condron v. United Kingdom*, the European Court of Human Rights ("ECtHR") interpreted the European Convention on Human Rights ("ECHR") as mandating appellate review of the overall fairness of criminal trials.[67] In response, the UK Parliament adopted the Criminal Justice Act of 2003, opening additional avenues for retrials based on a broader category of "new and compelling evidence."[68]

In Australia, courts can overturn "unsafe" convictions not supported by the evidence, but their inquiry is confined to the facts available at the time of

62. *See* Criminal Procedure Law of the People's Republic of China ch. III, art. 136 (1979) (setting out process for appeal); *see also* Garrett, *supra* note 1, at 1197 (providing overview of process); Margaret Y.K. Woo, *The Right to a Criminal Appeal in the People's Republic of China*, 14 YALE J. INT'L L. 118, 123–34 (1989) (providing detailed history of appeals in China).

63. *See* Marshall, *supra* note 14, at 10 (recounting finality concerns as objections to expanding appeals in common law countries).

64. *See* Marshall, *supra* note 14, at 3.

65. *See* ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 1993, Cm. 2263, at iii (UK) (recommending the creation of the Criminal Case Review Commission ("CCRC") to replace the Criminal Case Unit of the Home Office); Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 108 & n.8 (2009); Jacqueline S. Hodgson, *The Future of Adversarial Criminal Justice in 21st Century Britain*, 35 N.C. J. INT'L L. & COM. REGUL. 319, 325–26 (2010).

66. BEN EMMERSON, ANDREW ASHWORTH, ALISON MACDONALD, ANDREW L-T CHOO & MARK SUMMERS, HUMAN RIGHTS AND CRIMINAL JUSTICE 21, 36–38 (3d ed. 2012).

67. Condron v. United Kingdom, App No. 35718/97, ¶ 63 (Eur. Ct. H.R. May 2, 2000), http://hudoc.echr.coe.int/eng?i=001-58798 [https://perma.cc/7XTV-KYZR].

68. *See* Criminal Justice Act 2003, c. 44, §§ 78, 79(2) (UK).

trial.[69] Appeals are only permitted on questions of law, and once a final decision is entered, the case cannot be reopened.[70] While intermediate appellate courts can examine "fresh evidence," that is, evidence not introduced at trial, the High Court has long been prohibited from such review.[71] As a result, no recourse exists if the intermediate court denies relief.[72] In academic writings, former High Court Judge Michael Kirby has argued that this gap impedes justice.[73]

In 2013, responding to international human rights concerns regarding the right to appeal, lawmakers in the State of South Australia expanded the opportunities to introduce new evidence of innocence in second or subsequent appeals before the state's supreme court.[74] The basis for such an appeal is "fresh and compelling evidence" to be considered "in the interests of justice."[75] Similar appellate reforms were enacted in Tasmania and Victoria, and a number of exonerations resulted from the use of these statutes in high-profile cases.[76] However, the Australian High Court has continued to interpret these new statutes narrowly and limit appeals raising innocence claims; and other state jurisdictions in Australia have not enacted similar laws.[77]

3. The Administrative Model

Several common law and civil law countries have established

69. *See* AUSTL. HUM. RTS. COMM'N, INQUIRY INTO THE CRIMINAL CASES REVIEW COMMISSION BILL 2010 ¶ 18 (2011), https://humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20111125_criminal_case_review.pdf.

70. *Grierson v. The King* (1938) 60 CLR 431, 435 (Austl.); *see Re Matthews*, [1973] VR 199, 210–11 (Austl.) (discussing policy reasons for ensuring the finality of jury verdicts).

71. AUSTL. HUM. RTS. COMM'N, *supra* note 69, ¶ 20–21.

72. *See Mickelberg v. The Queen* (1989) 167 CLR 259, ¶ 9; AUSTL. HUM. RTS. COMM'N, *supra* note 69, ¶ 21.

73. *See* Michael Kirby, *Black and White Lessons for the Australian Judiciary*, 23 ADEL. L. REV. 195, 206 (2002); AUSTL. HUM. RTS. COMM'N, *supra* note 69, ¶ 22.

74. *See* Michael Kirby, *A New Right of Appeal as a Response to Wrongful Convictions: Is It Enough?*, 43 CRIM. L.J. 299, 302–03 (2019) (observing that the new amendment enacting a right to second or subsequent appeal responded to an Australian Human Rights Commission report finding that Australia's system of criminal appeals did not comply with the ICCPR). The new provisions were enacted in 2013 in the Statutes Amendment Appeals Act 2013, which inserted Section 353A in the Criminal Consolidation Act of 1935. *Id.* at 299 n.1. The provisions were later repealed and reenacted as Section 159 in the Criminal Procedure Act 1921. For more information, see Robert N. Moles & Bibi Sangha, *Australian New Right of Appeal Homepage*, NETWORKED KNOWLEDGE, http://netk.net.au/AppealsHome.asp [https://perma.cc/ZS4C-XMGH].

75. *Criminal Procedure Act 1921* (S. Austl.) s 159(1). These are defined as: "(6) For the purposes of subsection (1), evidence relating to an offence is—(a) *fresh* if—(i) it was not adduced at the trial of the offence; and (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and (b) *compelling* if—(i) it is reliable; and (ii) it is substantial; and (iii) it is highly probative in the context of the issues in dispute at the trial of the offence." *Id.* at s 159(6).

76. *See* Kirby, *supra* note 74, at 303–04.

77. *See* Kirby, *supra* note 74, at 305 ("To do nothing and to persist with the flawed facility of seeking Executive consideration of a complaint behind closed doors constitutes a breach of Australia's obligations under the ICCPR.").

administrative bodies to investigate potential wrongful convictions and request courts to reopen cases based on claims of factual innocence.[78] The structure of these bodies varies. One example on the formal end of the spectrum is the United Kingdom's Criminal Case Review Commission ("CCRC"), the first of its kind in the world.[79] The CCRC was not explicitly informed by international human rights law.[80]

Other countries use less formal bodies and methods to review convictions and secure judicial release for prisoners who raise new evidence of innocence. In China, for example, Politics and Law Committees and People's Congresses can convene and refer concerns regarding criminal convictions to judges.[81] In Canada, legislation enacted in 2002 authorizes a defendant whose appeals are exhausted to apply to the Minister of Justice to investigate a claim of innocence.[82] Nonbinding guidelines—modeled on right to compensation for miscarriages of justice in the ICCPR, discussed in detail *infra*—establish criteria that a wrongfully convicted person must meet to be entitled to this remedy.[83] In the Netherlands, a 2012 amendment to the Dutch Code of Criminal Procedure permits the defense to request that the Attorney General investigate a case based on a "novum"—"a new fact not known to the judge at the time of trial."[84]

In Australia, a national administrative body, the Australian Human Rights Commission, was asked a decade ago to review a proposal to adopt a UK-style CCRC.[85] Emphasizing that the overarching goals of the relevant provision of the ICCPR "operate[] to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice,"[86] the Commission concluded that "[t]he current system of criminal appeals in Australia for a person who has been wrongfully convicted or who has been subject to a gross miscarriage of justice to challenge their conviction may not be fully

78. *See* ROYAL COMM'N ON CRIM. JUST., *supra* note 65, at i (recommending the creation of the CCRC to replace the Criminal Case Unit of the Home Office, under which the Home Secretary could order new investigations of criminal cases for referral to the Court of Appeal); Garrett, *supra* note 1, at 121213; Griffin, *supra* note 65, 118–21.

79. For the first substantial empirical study of the CCRC's work, see generally CAROLYN HOYLE & MIA SATO, REASONS TO DOUBT: WRONGFUL CONVICTIONS AND THE CRIMINAL CASES REVIEW COMMISSION (2019).

80. *See* ROYAL COMM'N ON CRIM. JUST., *supra* note 65, at i (describing impetus for the creation of the CCRC).

81. *See* Garrett, *supra* note 1, at 1197–98.

82. *See* Kent Roach, *Wrongful Convictions in Canada*, 80 U. CIN. L. REV. 1465, 1482–89 (2012).

83. *See Hinse v. Canada (Att'y Gen.)*, 2015 2 S.C.R. 621, 660. We discuss the guidelines in Section II(C)(4) *infra*.

84. Garrett, *supra* note 1, at 1208.

85. *See* Bibi Sangha & Bob Moles, *The Right to a Fair Trial in the Context of International Human Rights Obligations*, 8 NSW DIST. & LOC. CTS. PRAC. NEWSL. 112, 112 (2011).

86. AUSTL. HUM. RTS. COMM'N, *supra* note 69, ¶ 10.

compatible with the right to a fair trial" in the ICCPR.[87] Although the Commission identified a CCRC-type administrative body as one mechanism to comply with international human rights standards, no such body has been created in response to its recommendation.[88]

D. THE LIMITED INFLUENCE OF INTERNATIONAL LAW ON NATIONAL MODELS

The three models discussed *supra* illustrate the wide range of institutions and procedures that countries use to review innocence claims. In some jurisdictions, such review is consolidated with the appellate process. In others, it is formally independent from that process, but the same judges adjudicate collateral proceedings. In still other countries, separate administrative bodies investigate and recommend relief based on claims of innocence, which are then typically referred back to national judges. In sum, there is no single way to adapt innocence claims to domestic criminal procedural rules.

This diversity reflects the fact that the national models developed organically in response to a common problem—wrongful convictions—that was, nonetheless, experienced quite differently due to variations in domestic criminal proceedings. Government officials, civil society groups, and scholars studied the approaches of other countries, learned from their successes and failures, and, in some instances, modified national models in light of the information they learned.[89] However, these bottom-up and horizontal processes of law reform and policy diffusion occurred with limited input from international human rights law.

In other areas of the criminal process—such as fair trial guarantees—human rights treaties are specific and detailed, establishing an international baseline of protection that has influenced all national legal systems.[90] In the absence of a bespoke right to claim innocence, however, international law has had less influence on national models for addressing wrongful convictions, especially regarding claims of factual innocence.

Human rights treaties have been invoked to justify some criminal law reforms in some common law countries, most notably in the United

87. AUSTL. HUM. RTS. COMM'N, *supra* note 69, ¶ 31.

88. Kirby, *supra* note 74, at 302.

89. *See generally* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE (C. Ronald Huff & Martin Killias eds., 2008); *see also* MIRANDA JOLICOEUR, NAT'L INST. OF JUST., INTERNATIONAL PERSPECTIVES ON WRONGFUL CONVICTIONS: WORKSHOP REPORT 5 (2010), (examining "how other countries . . . are handling wrongful convictions . . . to determine possible best practices that could be adapted for the U.S. system to prevent and correct wrongful convictions").

90. *See generally*, DOVYDAS VITKAUSKAS & GRIGORIY DIKOV, PROTECTING THE RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A HANDBOOK FOR LEGAL PRACTITIONERS (2d ed. 2017) (providing comprehensive guidance regarding the text and interpretation of Article 6 of the European Convention on Human Rights).

Kingdom, as well as Australia and Canada. Elsewhere, however, there is little evidence of international human rights law's footprint; instead, domestic responses to exonerations and miscarriages of justice have largely driven reforms.[91]

Before setting forth our proposal to remedy this omission, we first explain how a right to claim innocence can be derived from existing international standards and can also satisfy the standard for recognition as a new, freestanding human right.

II. TOWARD A NEW INTERNATIONAL HUMAN RIGHT TO CLAIM INNOCENCE

This section lays the foundation for protecting post-conviction innocence claims in international law. After reviewing the advantages that flow from identifying a legal claim as an internationally protected right, we consider where the right to claim innocence fits within typologies for recognizing "new" human rights. For example, can the right be derived from an interpretation of rights that already govern criminal trials, appeals, and compensation for miscarriages of justice?[92] Does it constitute a new, standalone human right?[93] Or can the right be recognized by drawing upon both perspectives? We conclude by discussing the implications of recognizing the right to claim innocence under each approach.

A. THE ADVANTAGES OF RECOGNIZING A RIGHT IN INTERNATIONAL LAW

The growing number of countries that allow defendants to raise post-conviction innocence claims reveals that national innocence organizations have been quite effective in convincing governments to recognize and expand such mechanisms. These developments have occurred, as we have shown, with only limited influence from international law. It is, thus, fair to ask whether the transnational innocence movement needs international human rights law. Or, to pose the question slightly less provocatively, what would defendants and innocence groups gain from the recognition of an express right to claim innocence in international law?

We answer these questions *infra*, drawing upon a rich literature that identifies the symbolic, strategic, normative, and enforcement benefits of explicitly recognizing a right in international law—for the individuals who

91. *See generally* Garrett, *supra* note 1 (describing the role, across a range of jurisdictions, that wrongful convictions played in relaxing barriers to consideration of new evidence of innocence); *see also* Roach, *supra* note 33, at 381.

92. For further information, see Mart Susi, *Novelty in New Human Rights: The Decrease in Universality and Abstractness Thesis*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 31 (Andreas von Arnauld & Kerstin von der Decken eds., 2020).

93. *See id.* at 25.

claim rights, for the civil society groups who advocate for recognition, and for society more broadly.[94]

1. Symbolic Benefits

Perhaps most basically, identifying something as an international human right acknowledges the need to prioritize its realization.[95] It reframes a mere political aspiration as a mandatory entitlement that can be achieved, particularly via legal claims and accountability mechanisms.[96] This reframing extends beyond the individuals and groups who benefit from the right. International laws and processes have expressive values that can influence state preferences, shaping normative beliefs about the nature of a problem and the need to address it.[97]

International recognition can also engender a range of "paradigm shift[s]" that enhance the legitimacy and power of rights-holders.[98] These include changing discourse from "one of charity to one of entitlement"[99] and enhancing expectations of compliance.[100] In the context of wrongful convictions, these shifts can result in defendants being viewed not as passive recipients of government clemency or mercy, but as rights-holders who are entitled to present new evidence of innocence to appropriate decisionmakers.[101]

2. Strategic Benefits

Express recognition as an international human right also has numerous strategic advantages. These include serving as a tool for social

94. *See* Andreas von Arnauld & Jens T. Theilen, *Rhetoric of Rights*, in THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS 39–48 (Andreas von Arnauld & Kerstin von der Decken eds., 2020) (outlining five functions of human rights rhetoric).

95. Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 24, 36 (1994).

96. Benjamin Mason Meier, Georgia Lyn Kayser, Urooj Quezon Amjad & Jamie Bartram, *Implementing an Evolving Human Right Through Water and Sanitation Policy*, 15 WATER POL'Y 116, 117 (2013).

97. Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77, 97 (2007).

98. *See* Marthe Fredvang & Simon Biggs, *The Rights of Older Persons: Protection and Gaps Under Human Rights Law* 18–19 (Ctr. for Pub. Pol'y, Social Policy Working Paper No. 16, 2012), https://social.un.org/ageing-working-group/documents/fourth/Rightsofolderpersons.pdf.

99. *See* Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L.Q. 957, 973 (2004).

100. *See* Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 128, 131 (2001); Leary, *supra* note 95, at 39; *see also* Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275, 300–01 (2009) ("[H]uman rights . . . carry power and legitimacy that motivate governments to create and sustain programs to put those rights into action.").

101. *See* Bluemel, *supra* note 99, at 973; Meier et al., *supra* note 96, at 117 (finding that the rights-language changes the conception of individuals as being "passive recipients of government benevolence"); Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations It Creates*, 4 NW. J. INT'L HUM. RTS. 331, 341 (2005) ("Establishing water as a right puts people in the center of development as opposed to passive recipients.").

movements;[102] raising the visibility of individuals who have experienced injustice; increasing education and awareness;[103] promoting the identification of shared goals; building broader alliances and more effective advocacy strategies, both within a single state and across borders;[104] and enhancing the institutional, legal, financial, and other support needed to realize the relevant right. These advantages, both individually and in combination, have the potential to further strengthen the transnational innocence movement.

Recognition also locates the right within existing international legal frameworks that contain well-understood obligations for states, such as the duty to respect, protect, and fulfill the right.[105] These frameworks also identify specific duty-bearers—such as state agencies and officials—who become the focus of legal and political advocacy, alongside non-governmental actors who may also be amenable to rights-based claims. This identification enhances the ability of rights-holders and their supporters to hold these actors accountable for violations and pressure them to take proactive steps to realize the right and remedy violations.[106]

3. Normative Benefits

Recognition of a right as protected by international law can also help to close domestic rights protection gaps. Although we have highlighted the transnational innocence movement's successes, it is also worth underscoring that some countries continue to adhere to traditional finality rules that make it difficult or impossible to raise new evidence of factual innocence.[107] Moreover, several states that have created procedures for introducing such evidence have, as previously explained, not done so comprehensively or sufficiently. As a result, the ability to raise innocence claims following a conviction—and the likelihood of exonerations—varies widely across national jurisdictions, even for similarly situated defendants.

---

102. Andrew Keane Woods, *Discounting Rights*, 50 N.Y.U. J. INT'L L. & POL. 509, 516 (2018) ("Rights can also be a language for articulating grievances, a tool for building a social movement, a specific aspirational goal for the country[,] . . . a general aspirational goal[,] . . . and more.").

103. *See* Edward Halle, The Rights of Older Persons and the Need for a New Convention 38 (May 9, 2018) (unpublished manuscript) (https://ssrn.com/abstract=3176330) [https://perma.cc/CD3R-TPG5]; Fredvang & Biggs, *supra* note 98, at 18.

104. *See* Meier et al., *supra* note 96, at 123.

105. *See* Arjun Sengupta, *Right to Development as a Human Right*, 36 ECON. & POL. WKLY. 2527, 2530 (2001); Tatyana A. Margolin, *Abortion as a Human Right*, 29 WOMEN'S RTS. L. REP. 77, 79 (2007); Hardberger, *supra* note 101, at 361.

106. *See* Ling-Yee Huang, Note, *Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water*, 20 FLA. J. INT'L L. 353, 361 (2008); INGA T. WINKLER, *Benefits of Understanding Water as a Human Right*, *in* THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION 212, 217, 224 (2012).

107. *See, e.g.*, Garrett, *supra* note 1, at 1187 ("[T]here is no established standard in India for reversing a conviction based on new evidence of innocence."); *id.* at 1207 (noting that in Mexico "remedies involving newly discovered evidence of innocence remain extremely narrow").

International recognition of a right to claim innocence can help to remedy these deficiencies in several ways. It can identify minimum standards of protection that should apply regardless of which national model a state follows, such as ensuring recognition of factual innocence claims alongside legal ones. It can also facilitate consistent interpretations of similar legal standards and encourage the spread of policy innovation across borders.[108] As legislatures, courts, and administrative bodies monitor and respond to developments elsewhere, these trends may, over time, generate an influential set of best practices for other states to follow.

4. Enforcement Benefits

Lastly, international recognition can encourage enforcement of a right.[109] National courts in some countries give direct effect to international human rights standards; in others, courts interpret constitutions and statutes to avoid conflicts with those standards.[110] This is true not only for treaties and customary law, but also for nonbinding international norms.[111]

A related advantage concerns monitoring and enforcement before global and regional bodies. The system of international human rights protection encompasses multiple venues, including litigation before regional courts and commissions, review of complaints and State party reports by treaty bodies, fact-finding and reporting by the U.N. special procedures, and periodic review of all U.N. members before the U.N. Human Rights Council.[112] Recognition of a right enables individuals and civil society groups to engage with this extensive network of monitoring and enforcement mechanisms.[113] Such engagement, in turn, can pressure governments to modify their laws and policies, incorporate rights protections into domestic legal systems, and provide meaningful redress for violations.[114] Several recent studies have

108. *See* Bluemel, *supra* note 99, at 972 (finding that the recognition of a right can "provide greater clarity and consistency in interpretation, leading to greater State compliance and clearer complainant rights to remedies"); Halle, *supra* note 103, at 37 (observing that human rights can bring "clarity, coherence and standard" regarding the protection of rights).

109. Cassel, *supra* note 100, at 128–29.

110. Yonatan Lupu, Pierre-Hugues Verdier & Mila Versteeg, *The Strength of Weak Review: National Courts, Interpretive Canons, and Human Rights Treaties*, 63 INT'L STUD. Q. 507, 511 (2019).

111. *See, e.g.*, Armin von Bogdandy & René Urueña, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT'L L. 403, 432–33 (2020) (discussing application of nonbinding human rights norms by national courts in Latin America); Machiko Kanetake, *UN Human Rights Treaty Monitoring Bodies Before Domestic Courts*, 67 INT'L & COMPAR. L.Q. 201, 215 (2018) (discussing how national courts have applied nonbinding decisions and recommendations of U.N. treaty bodies).

112. *See, e.g.*, Sarah Joseph & Joanna Kyriakakis, *The United Nations and Human Rights*, *in* RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 1, 5–26 (Sarah Joseph & Adam McBeth eds., 2010).

113. *See* Melissa Thorme, *Establishing Environment as a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301, 301 (1991); Cassel, *supra* note 100, at 129; Huang, *supra* note 106, at 359, 361; Margolin, *supra* note 105, at 80.

114. Halle, *supra* note 103, at 39; Fredvang & Biggs, *supra* note 98, at 18.

found international human rights laws and institutions to be effective in achieving these outcomes.[115]

As applied to the right to claim innocence, the combined effect of symbolic, strategic, normative, and enforcement benefits can create a positive feedback loop that, over time, leads to a reduction in the number of wrongful convictions globally. However, simply asserting the existence of an international right to claim innocence does not guarantee this result. To gain widespread acceptance, such a claim must be carefully grounded in existing frameworks for recognizing human rights. We describe *infra* the two leading frameworks for international recognition: the derivative rights and freestanding rights approaches. We then explain how global and regional treaties that mandate guarantees relating to criminal proceedings—the presumption of innocence, fair trials and appeals, and compensation for miscarriages of justice—provide a solid normative foundation for recognizing an international human right to claim innocence under either of these frameworks.

B. DERIVATIVE VS. FREESTANDING APPROACHES TO RECOGNIZING NEW HUMAN RIGHTS

Evolution and expansion are two hallmarks of international human rights law. The number and scope of protected rights and freedoms have enlarged over time through a range of processes, including the adoption of new treaties, the interpretation of existing international agreements, and the articulation of nonbinding human rights norms, or soft law. There are, nonetheless, ongoing debates over how to categorize these expansions,[116] the degree to which they can accurately be labeled as novel,[117] and whether they are

115. *See generally* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009) (finding that "treaties can affect domestic politics in ways that tend to exert important influence over how governments behave towards their own citizens"); Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties,* 114 AM. J. INT'L L. 1 (2020) (documenting a positive relationship between states reporting to human rights treaty monitoring bodies and improvements in domestic human rights practices); Christopher J. Fariss, *The Changing Standard of Accountability and the Positive Relationship Between Human Rights Treaty Ratification and Compliance*, 48 BRIT. J. POL. SCI. 239 (2017) (relying on data to show "the ratification of human rights treaties is associated with higher levels of respect for human rights); KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 141 (2017) (analyzing evidence "suggest[ing] that overall there is *less* violence and *fewer* human rights violations in the world than there were in the past").

116. *See, e.g.*, HURST HANNUM, RESCUING HUMAN RIGHTS 58 (2019) (describing processes of normative "interpretation, extension, and creation"); Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 498 (2008) (referencing process of "affirmation," "reformulation," "extension," and "innovation").

117. *See, e.g.*, Lorna McGregor, *Looking to the Future: The Scope, Value and Operationalization of International Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1281, 1295 (2019) (drawing a distinction between "the creation of entirely new legal rights and the implementation of existing rights"). *See also* Susi, *supra* note 92, at 21; Clifford Bob, *Introduction: Fighting for New Rights*, *in* THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 1, 4 (Clifford Bob ed., 2009) (attributing expansion to the prioritization of "long neglected" rights).

desirable or even permissible.[118]

Within these debates, labeling an international right as "new" often refers to normative shifts that enable a claim or demand to gain the status of a separate or stand-alone human right.[119] However, "newness" also encompasses processes that identify a right as novel in scope because it is newly implied or newly derived from existing guarantees.[120] This section briefly outlines the two major processes for identifying "new" rights—derivation from existing rights, and freestanding rights[121]—to set the stage for analyzing the right to claim innocence under both approaches.

The process of deriving a "new" right involves "identifying previously unarticulated aspects of old human rights"[122] or articulating "newly recognized aspects of existing rights."[123] Also referred to as "auxiliary rights,"[124] "implied rights,"[125] or "intersectional rights,"[126] derived rights are developed out of necessity—such as a need to ensure the realization of other rights or as a "necessary extension" of existing rights[127]—and reinforced by the

118. *See, e.g.*, John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1167, 1174 (2019); HANNUM, *supra* note 116, at 57.

119. *See* Susi, *supra* note 92, at 21 ("The claim of 'novelty' starts before and ends after the recognition of a new human right in the family of so-called stand-alone human rights.").

120. Başak Çalı, *The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 277 (Andreas von Arnauld & Kerstin von der Decken eds., 2020) (describing pathways for "[d]eriving a new human right under international human rights law").

121. *See* Danwood M. Chirwa, *Access to Water as a New Right in International, Regional and Comparative Constitutional Law*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 55–56 (Andreas von Arnauld & Kerstin von der Decken eds., 2020); *see also* Pierre Thielbörger, *Something Old, Something New, Something Borrowed and Something Blue: Lessons to Be Learned from the Oldest of the 'New' Rights – the Human Right to Water*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 74 (Andreas von Arnauld & Kerstin von der Decken eds., 2020) ("Thus, both the way in which the right to water was construed (namely through legal derivation) as well as the right's normative content (being partially civil-political, partially socio-economic in nature) certainly deserve to be considered a novelty in international human rights law.").

122. Kerstin von der Decken & Nikolaus Koch, *Recognition of New Human Rights: Phases, Techniques and the Approach of 'Differentiated Traditionalism'*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 7, 13 (Andreas von Arnauld & Kerstin von der Decken eds., 2020).

123. Holning Lau, *Gender Recognition as a Human Right*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 193, 193 (Andreas von Arnauld & Kerstin von der Decken eds., 2020) ("Sexual orientation and gender identity rights are only *new* in the sense that they are newly recognized aspects of existing rights.").

124. *See, e.g.*, CARL WELLMAN, THE PROLIFERATION OF RIGHTS: MORAL PROGRESS OR EMPTY RHETORIC? 19 (1999).

125. *See* Çalı, *supra* note 120, at 277.

126. *See* Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT'L L. 1, 49 (2015) (describing "intersectional rights" as "not truly demands for new human rights," but rather "demands for more focused attention to neglected issues within human rights").

127. *See* Stephen P. Marks, *Normative Expansion of the Right to Health and the Proliferation of Human Rights*, 49 GEO. WASH. INT'L L. REV. 97, 109 (2016).

ambiguous scope of existing guarantees.[128]

There are different means by which such derivative processes occur. Evolutive interpretation that recognizes human rights treaties as "living instrument[s]" is one of the most common methods.[129] Irrespective of the technique used, however, the rights derivation approach focuses on the relationship between the "parent"[130] right and the "offspring"[131] right.[132] This relationship can take a number of forms, including (as we later show for the right to claim innocence) through "combining different elements of several different parent rights."[133] In practice, claims of "newness" for derivative rights are often muted. Proponents of derivative rights often describe them in ways that acknowledge their novelty while emphasizing their close connections to established rights.[134]

The path to recognizing a separate, freestanding right is more difficult, both as a conceptual and a practical matter.[135] The relationship between stand-alone rights and existing guarantees can be quite attenuated. Stand-alone rights are often asserted precisely because established rights fall far short of the protections needed, such as by not extending to certain marginalized groups.[136] To provide such protection, the new right "strengthens a specific aspect of the established human right to the degree that its separation . . . is justified."[137] Thus, a stand-alone right emerges because the need for "adequate protection" cannot be achieved through evolutionary interpretation or progressive implementation of existing rights.[138]

There are no definitive criteria for recognizing new stand-alone human rights. However, the U.N. General Assembly and commentators have proposed various "quality control" standards to assess new rights claims. We

---

128. Simon Rice, *Bentham Redux: Examining a Right of Access to Law*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC, *supra* note 92, at 541, 548.

129. *See generally* Birgit Schlütter, *Aspects of Human Rights Interpretation by the UN Treaty Bodies*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 261 (Helen Keller & Geir Ulfstein eds., 2012); Malgosia Fitzmaurice, *Interpretation of Human Rights Treaties*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 739, 739 (Dinah Shelton ed., 2013).

130. *See* PIERRE THIELBÖRGER, THE RIGHT(S) TO WATER: THE MULTI-LEVEL GOVERNANCE OF A UNIQUE HUMAN RIGHT 69 (2014).

131. *See* von der Decken & Koch, *supra* note 122, at 13.

132. *See* Thielbörger, *supra* note 121, at 73.

133. *Id.*

134. *See, e.g.*, Lau, *supra* note 123, at 193; Shaver, *supra* note 126, at 49.

135. *See* Mart Susi, *The Right to Be Forgotten*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC, *supra* note 92, at 287, 288 (arguing for a framework of novelty, recognition, and/or rhetoric in assessing whether a new stand-alone right exists).

136. Susi, *supra* note 92, at 26.

137. *Id.* at 25.

138. *Id.* at 26 (finding that a new "stand-alone" human right emerges because of the need for "adequate protection which is not achievable through broadening the scope of or simply interpreting the respective established right is justified").

analyze these standards *infra* and apply them to assess claims for a new, freestanding right to claim innocence.

C. THE RIGHT TO CLAIM INNOCENCE AS A DERIVATIVE RIGHT

This section applies the derivative rights approach to show that existing human rights treaties and international jurisprudence can be applied to protect a right to claim innocence. Since its inception, international human rights law has protected a wide range of fairness guarantees in criminal proceedings. These guarantees were first set forth in the Universal Declaration of Human Rights ("UDHR") and later defined and extended in the ICCPR and in regional human rights agreements, such as the ECHR. Several provisions of these international instruments—in particular, the rights to life, fair trial, appeal, a remedy, and compensation for miscarriages of justice—provide a solid normative foundation for recognizing a derivative right to assert a claim of factual innocence.

As currently interpreted, however, these rights, even when viewed cumulatively, do not adequately protect such a right. On the contrary, features that are central to raising factual innocence claims are strikingly absent from, or insufficiently developed through, this suite of existing protections. These gaps include the obligation of governments to establish a mechanism for defendants to introduce such evidence on direct appeal or in post-conviction judicial or administrative proceedings; the evidentiary standards applicable in such proceedings; and the types of remedies that must be provided to individuals whose innocence claims are upheld.[139]

1. The Right to Life and Restrictions on Capital Punishment

The right to life has long been recognized as inherent, non-derogable, and essential for the enjoyment of all other rights and freedoms. Numerous treaties require human life to be protected by law and prohibit states from arbitrary deprivations of life.[140] Early civil and political rights treaties nevertheless recognized that capital punishment is not per se prohibited.[141] However, as a growing number of countries have abolished the death penalty, human rights standards governing capital punishment have also evolved.

---

139. We discuss how these gaps might be filled in Part III *infra*.

140. *See* International Covenant on Civil and Political Rights art. 6(1), Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."); *see also* Org. of African Unity [OAU], *African Charter on Human and Peoples' Rights* art. 4, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (Oct. 21, 1986); Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

141. *See, e.g.*, ECHR, *supra* note 140, at art. 2(1) ("No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.").

This evolution is reflected in additional protocols and supplementary treaties that expressly abrogate capital punishment, as well as in capacious interpretations of the right to life by international tribunals and review bodies.

The latter development is particularly reflected in the jurisprudence of the U.N. Human Rights Committee ("UNHRC"), a body of eighteen independent experts that monitors compliance with the ICCPR by evaluating reports from States parties, reviewing individual complaints, and issuing authoritative interpretations. In General Comment No. 36 on the right to life, adopted in 2018,[142] the UNHRC explained that the ICCPR sets out "specific safeguards for ensuring that in States parties which have not yet abolished the death penalty, it must not be applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits."[143] Those limits include violations of the ICCPR's fair trial and due process guarantees, such as reliance on forced confessions, the inability of the accused to question relevant witnesses, disregard of the presumption of innocence, and restrictions on the right to appeal.[144]

The UNHRC has long held that imposing a sentence of death following a criminal proceeding infected by such procedural flaws is an arbitrary deprivation of life. *Burdyko v. Belarus*,[145] a 2015 decision, provides a representative example. The defendant in the case was subjected to physical and psychological pressure to confess to capital crimes, denied the assistance of a lawyer for pre-trial investigations, and shackled and kept in a metal cage during the subsequent criminal trial.[146] In addition to finding violations of the ICCPR's torture and fair trial provisions, the UNHRC held that Belarus had breached the right to life by sentencing the applicant to death after an unfair trial. The UNHRC reiterated its longstanding position that a sentence of death may be imposed only in accordance with "the procedural guarantees [protected by the ICCPR], including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal."[147]

In General Comment No. 36, building on *Burdyko* and earlier decisions,

142. U.N. Hum. Rts. Comm., *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter *General Comment No. 36*].

143. *Id.* ¶ 5.

144. *Id.* ¶ 41. ICCPR Article 6(4)—the right to seek pardon or commutation of a death sentence—is also relevant. ICCPR, *supra* note 140, art.6(4). Individuals sentenced to death must be able "to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances." *General Comment No. 36*, *supra* note 142, ¶ 47.

145. U.N. Hum. Rts. Comm., Communication No. 2017/2010, U.N. Doc. CCPR/C/114/D/2017/2010 (Sept. 25, 2015).

146. *Id.* ¶¶ 8.2–8.5.

147. *Id.* ¶ 8.6.

the UNHRC recognized for the first time an explicit link between wrongful convictions, post-conviction review, and the right to life:

> The execution of sentenced persons whose guilt has not been established beyond reasonable doubt also constitutes an arbitrary deprivation of life. States parties must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases, to review procedural barriers to reconsideration of convictions and to re-examine past convictions on the basis of new evidence, including new DNA evidence.[148]

This statement is noteworthy for moving beyond the procedural guarantees that support legal innocence claims to focus on how states should respond to defendants who allege factual innocence. The statement also lays a strong normative foundation for recognizing the right to claim innocence as part of the right to life. Further development of the content of this right would, for example, identify the processes that states should adopt to reconsider capital convictions obtained in violation of these procedural guarantees and challenged in light of post-conviction evidence of factual innocence.[149]

2. The Right to a Fair Trial and to Appeal

Numerous international instruments protect a range of guarantees relating to the criminal process. The UDHR recognizes a right to a "fair and public hearing" and a "right to be presumed innocent until proved guilty," as well as a right not to be found guilty of "any act or omission which did not constitute a penal offence . . . at the time when it was committed" or to receive a "heavier penalty" than that which applied at the time the offense was committed.[150] The more detailed list of criminal procedure rights in Article 14 of the ICCPR and Article 6 of the ECHR provide, *inter alia*, that everyone shall have the right "to be presumed innocent until proved guilty according

148. *See General Comment No. 36*, *supra* note 142, ¶ 43 (footnote omitted). In support of this interpretation, the UNHRC cited to its 2014 Concluding Observations on the report of the United States, in which the Committee expressed concern at "the high number of persons wrongly sentenced to death, despite existing safeguards, and by the fact that 16 retentionist states do not provide for compensation for persons who are wrongfully convicted, while other states provide for insufficient compensation." U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

149. *See, e.g.*, Cornell Ctr. on the Death Penalty Worldwide, Submission to the United Nations Human Rights Committee Regarding General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, on the Right to Life, 6–7 (Oct. 6, 2017), https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/CornellCenterontheDeathPenaltyWorldwide.docx (urging the UNHRC to "consider adding cautionary statements with regard to other noted risk factors for wrongful convictions, including the use of torture or coercion to obtain confessions, faulty police investigation methods, and a lack of training and resources for defense counsel").

150. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 10–11 (Dec. 10, 1948) [hereinafter UDHR].

to law,"[151] "to a fair and public hearing,"[152] and to receive "adequate . . . facilities"[153] for preparing a criminal defense, including access to "exculpatory material" and "material establishing innocence" in the prosecution's possession.[154]

However, while these fair trial rights mandate procedural equality and fairness, they do not guarantee that a domestic court "will actually reach the correct result in one's case."[155] It thus remains possible that an innocent person will be convicted of a criminal offense. What concrete protection does international human rights law offer if new evidence of innocence arises after a first-instance conviction? The answer is somewhat uncertain, as the discussion of the right to appeal reveals.

A "primary function of the modern right of appeal is to protect against miscarriages of justice."[156] International human rights law emphasizes this function by requiring appellate review of the factual or legal bases of a conviction. For example, the UNHRC has explained that the right to appeal in ICCPR Article 14(5) is satisfied only if an appellate court can "review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case."[157] In the European human rights system, "review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law," provided that the appeals tribunal has "an effective role in reviewing the trial

151. ICCPR, *supra* note 140, art.14(2); ECHR, *supra* note 140, art. 6(2). "[T]he presumption of innocence is inherent in any proper conception of the relationship between the state and its citizens in an open and democratic society." Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 123 S. AFR. L.J. 63, 73 (2006) (internal quotations omitted). The presumption "imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle." U.N. Hum. Rts. Comm., *General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 30, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007), [hereinafter *General Comment No. 32*]; *see also* Telfner v. Austria, App. No. 33501/96, ¶ 15 (Eur. Ct. H.R. Mar. 20, 2001), http://hudoc.echr.coe.int/eng?i=001-59347 (finding a violation of Article 6(2) of the ECHR when a domestic court violated the presumption of innocence in that it wrongly placed the bur-den of proof on the defence").

152. ICCPR, *supra* note 140, art.14(1); ECHR, *supra* note 140, art. 6(1).

153. ICCPR, *supra* note 140, art. 14(3)(b).

154. *General Comment No. 32*, *supra* note 151, ¶ 33; *see also* Papageorgiou v. Greece, App. No. 59506/00, ¶ 36 (Eur. Ct. H.R. May 9, 2003), http://hudoc.echr.coe.int/eng?i=001-61091 (finding a violation of Article 6(2) of the ECHR when a domestic court "refus[ed] to order production of the originals of documents used as evidence for the prosecution [of the applicant]").

155. *See* SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 457 (3d ed. 2013).

156. Marshall, *supra* note 14, at 3.

157. *General Comment No. 32*, *supra* note 151, ¶ 48. However, a "full retrial or a 'hearing' " is not required, so long as the reviewing court "can examine the factual dimensions of the case," including "evidence submitted at the trial and referred to in the appeal." *General Comment No. 32*, *supra* note 151, ¶ 48.

procedures."[158] In countries "where an appellate court acts not merely as a court of revision but has to examine a case as to the facts and the law and make a fresh re-assessment of the issue of guilt or innocence," the accused must be allowed to introduce evidence and testimony "for the purpose of proving that he did not commit the act allegedly constituting a criminal offence."[159]

However, the right to appeal, as presently interpreted, offers only partial protection when claims of factual innocence are raised after a conviction. This is shown by recent decisions of the ECtHR and the UNHRC which consider whether domestic courts must review evidence of factual innocence after an individual has been convicted and sentenced.

In the ECtHR judgment of *Lalmahomed v. Netherlands*, the applicant was charged with failing to present an identity document to the police.[160] Lalmahomed contested the charge during an initial appearance, explaining that he had been acquitted of several previous offenses because someone else was misusing his identity.[161] However, he did not show up at a subsequent hearing, and a Dutch trial court convicted him *in absentia*.[162] Lalmahomed promptly challenged that conviction, but the Dutch Court of Appeal rejected the challenge, concluding that the case file did not support his claim "that his identity details [had been] systematically misused by someone else and that he [had] been acquitted by the courts several times already because of that."[163]

Lalmahomed then filed an application with the ECtHR, arguing that the denial of leave to appeal violated the right of access to a court protected by ECHR Article 6.[164] He submitted copies of the previous acquittals that were part of the official record but were not, for unexplained reasons, included in the case file before the Court of Appeal.[165] The ECtHR concluded that the Netherlands had violated Article 6 because the appellate tribunal had failed

158. Shvydka v. Ukraine, App. No. 17888/12, ¶¶ 49, 51 (Eur. Ct. H.R. Oct. 30, 2014), http://hudoc.echr.coe.int/eng?i=001-147445. The right to appeal in criminal cases does not appear in the ECHR itself. It was added in 1984 with the adoption of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, 1525 U.N.T.S. 195 [hereinafter Protocol No. 7]. Article 2 of Protocol No. 7 guarantees the right to appeal in terms that are identical to ICCPR Article 14(5). *Id.* art. 2. States that have not ratified Protocol No. 7 but provide appeals in criminal cases as a matter of domestic law, "must comply with the requirements of [ECHR] article 6(1) in guaranteeing an effective right of access to the courts." WILLIAM A. SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 286 (2015).

159. Cani v. Albania, App. No. 11006/06, ¶ 53 (Eur. Ct. H.R. Mar. 6, 2012), http://hudoc.echr.coe.int/eng?i=001-109359.

160. Lalmahomed v. Netherlands, App. No. 26036/08, ¶ 7 (Eur. Ct. H.R. Feb. 22, 2011).

161. *Id.* ¶ 8.

162. *Id.* ¶ 11.

163. *Id.* ¶ 13.

164. *Id.* ¶ 26.

165. *Id.* ¶ 29.//

to consider the factual evidence supporting "the applicant's claim that his identity had been misused."[166] According to the ECtHR, "the absence from the case file of [the record of acquittals] meant that the denial of leave to appeal . . . could not be based on a full and thorough evaluation of the relevant factors."[167]

The *Lalmahomed* decision applies the right to appeal to a factual innocence claim where the evidence in support of that claim appears in the trial record. However, other situations in which the right arises remain unresolved. For example, it is uncertain if the ECtHR would reach a similar result in cases in which a defendant seeks to introduce fresh evidence of innocence obtained after a first-instance conviction.[168]

The uncertainty of whether the right to appeal automatically extends to separate collateral proceedings challenging a conviction on grounds of factual innocence is shown by a recent decision of the UNHRC. In *Litvin v. Ukraine*,[169] the applicant's son was convicted of murder and rape.[170] The trial court and the Ukrainian Supreme Court dismissed the defendant's allegations that he had been tortured into confessing and was deprived of the right to gather evidence to refute the prosecution's case.[171] After an appellate court affirmed the conviction, the defendant retained several forensic experts whose reports cast doubt on his identity as the assailant, questioned whether the victim had been raped, and supported his allegations of torture.[172] The defendant then filed a petition with the Ukrainian Prosecutor's Office, relying on provisions of the Ukrainian Criminal Procedure Code which authorize the reopening of criminal cases based on "newly discovered facts."[173] The office refused to open an investigation, and the Supreme Court later rejected the defendant's application to review his conviction, finding no grounds to reconsider the case.[174]

In her petition to the UNHRC, the defendant's mother raised numerous violations of the ICCPR. The UNHRC agreed with the complaints concerning her son's interrogation and the procedural errors, but it dismissed the alleged violation of the right to appeal:

---

166. *Id.* ¶ 46.
167. *Id.* ¶ 47.
168. Such review is common in countries in which appellate courts reexamine both the facts and the legal issues relating to a prosecution and make de novo determinations of guilt or innocence. *See* Marshall, *supra* note 14, at 22–24 (summarizing de novo appellate review in France, Germany, and Italy).
169. U.N. Hum. Rts. Comm., Communication No. 1535/2006, U.N. Doc. CCPR/C/102/D/1535/2006 (July 29, 2011).
170. *Id.* ¶ 2.7.
171. *Id.* ¶ 2.8–2.9.
172. *Id.* ¶ 2.192.20.
173. *Id.* ¶ 2.22.
174. *Id.* ¶ 2.22, 2.23.

> As to the author's claim that the refusal of the General Prosecutor to reconsider the criminal case of her son based on newly discovered facts after the Supreme Court decided the cassation appeal amounts to a violation of article 14, paragraph 5, of the [ICCPR], the Committee considers that the scope of article 14, paragraph 5 does not extend to a review of a conviction and sentence based on newly discovered facts once this sentence has become final.[175]

The *Litvin* decision has been cited for the proposition that the right to appeal "confers no right to a review of one's conviction in the light of fresh evidence,"[176] highlighting a key protection gap in the existing interpretation of the ICCPR. However, the persuasiveness of this interpretation of Article 14(5) is very much open to question, not least because it is in tension with the body's own subsequent statement that governments—at least in capital cases—should "re-examine past convictions on the basis of new evidence, including new DNA evidence."[177]

3. The Right to a Remedy

The right to appeal to correct errors of the criminal process is a specific application of a general international law principle: everyone whose rights have been violated is entitled to a remedy. In practice, the right to a remedy supports recognizing a derivative right of defendants to assert claims of factual innocence, although international law has yet to identify the full scope of protections associated with such a right.

The right to a remedy is expressly guaranteed by the UDHR[178] and by most global and regional human rights treaties,[179] and it has been reaffirmed and amplified in soft law, including a 2005 U.N. General Assembly Resolution.[180] In general, a remedy should be "full and effective" and "proportional to the gravity of the violation" and of the injury suffered.[181] Remedial

175. *Id.* ¶ 9.4

176. *See* JOSEPH & CASTAN, *supra* note 155, at 515.

177. *See General Comment No. 36*, *supra* note 142, ¶ 43.

178. *See* UDHR, *supra* note 150, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

179. ICCPR Article 2.3(a) requires States parties "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." ICCPR, *supra* note 140, art. 2.3(a). ECHR Article 13 contains essentially identical language. *See* ECHR, *supra* note 140, art. 13. Article 2.3(b) of the ICCPR further specifies that remedies must be provided by the "competent judicial, administrative[,] legislative[] or other competent authority" in the state's legal system, with a preference for judicial remedies. ICCPR, *supra* note 140, art. 2.3(b).

180. *See* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (Dec. 16, 2005) [hereinafter Basic Principles and Guidelines].

181. *Id.* ¶ 18.

measures should include, whenever possible, restoring the situation that existed before the violation occurred.[182]

In the criminal context, "often the most appropriate" remedy for a fair trial right violation not corrected on appeal is a retrial or reopening of the proceedings.[183] Nearly all European countries, for example, have established mechanisms to reopen domestic criminal proceedings following an ECtHR judgment finding a prosecution or conviction in violation of the ECHR.[184] However, states have also provided restitution in criminal cases by reducing or suspending enforcement of a sentence, unconditionally releasing a defendant, and providing compensation.[185]

The right to remedy has been interpreted to require reopening of criminal proceedings in response to legal innocence claims. A recent UNHRC decision, *Saidov v. Tajikistan*,[186] is illustrative. The case concerned a former government official (Saidov) convicted of illegally forming an opposition political party.[187] The proceedings involved numerous violations of pre-trial and fair trial rights, including the courts' refusal to consider evidence of Saidov's innocence.[188] The UNHRC concluded that the obligation to make "full reparation" for these violations required the state, "*inter alia*, a) [sic] to quash Mr. Saidov's conviction, release him, and if necessary, conduct a new trial, in accordance with the principles of fair hearings, presumption of innocence and other procedural safeguards; (b) and provide Mr. Saidov with adequate compensation."[189]

Additional support for reopening criminal proceedings is found in Article 4 of Protocol No. 7 to the ECHR, which codifies the double jeopardy, or *ne bis in idem*, principle.[190] The first paragraph of Article 4 defines the

182. *Id.* ¶ 19.

183. *See* Ferreira v. Portugal (No. 2), App. No. 19867/12, ¶ 52 (Eur. Ct. H.R. Grand Chamber July 11, 2017), http://hudoc.echr.coe.int/eng?i=001-175646.

184. *See id.* ¶¶ 34–39; *see also* Alice Donald & Anne-Katrin Speck, *The European Court of Human Rights' Remedial Practice and Its Impact on the Execution of Judgments*, 19 HUM. RTS. L. REV. 83, 94 (2019) (discussing ECtHR jurisprudence "concerning the re-opening of criminal proceedings following an unfair trial").

185. IVANA ROAGNA, FLORIAN BALLHYSA & BLERINA BULICA, COUNCIL OF EUR., THE RIGHT TO A FAIR TRIAL AND RE-OPENING OF CRIMINAL PROCEEDINGS: TRAINING MANUAL ON ARTICLE 6 ECHR 19 (2017).

186. U.N. Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2680/2015, U.N. Doc. CCPR/C/22/D/2680/2015 (July 16, 2018).

187. *See id.* ¶¶ 9.2–9.7.

188. *See id.* ¶ 2.72.8.

189. *Id.* ¶ 11. These remedies are consistent with those the Committee has indicated in other cases involving criminal proceedings. *See, e.g.*, U.N. Hum. Rts. Comm., Communication No. 2304/2013, ¶ 9, U.N. Doc. CCPR/C/115/D/2304/2013 (Dec. 9, 2015); Hum. Rts. Comm., Guidelines on Measures of Reparation Under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 7, U.N. Doc. CCPR/C/158 (Nov. 30, 2016).

190. *See* Protocol No. 7, *supra* note 158, art. 4.

scope of the right not to be tried or punished twice.[191] The second paragraph provides an exception that permits the reopening of a case "if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."[192] The Explanatory Report to Protocol No. 7 clarifies that this exception "does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person."[193]

In *Mihalache v. Romania*, the ECtHR considered in dictum whether the exception applies to "situations where an accused has been found guilty and a reopening of proceedings might work to his advantage."[194] Citing the Explanatory Report, the Court asserted that "the nature of the defect must be assessed primarily in order to ascertain whether there has been a violation of the defence rights and therefore an impediment to the proper administration of justice."[195]

Taken together, the *Saidov* and *Mihalache* decisions underscore international law's focus on the procedural violations that provide the basis for legal innocence claims. While these cases do not explicitly address post-conviction claims of factual innocence, the core principles underlying the right to a remedy also provide a strong foundation for affording individuals who raise claims of factual innocence a meaningful opportunity to assert those claims in a domestic proceeding that can grant appropriate relief—including by re-opening criminal proceedings—if the claim is upheld.

4. The Right to Compensation for Miscarriages of Justice

International law provides another remedy for human rights violations in criminal proceedings: the right to compensation for miscarriages of justice. This provision appears in the ICCPR and in regional human rights treaties, which we analyze *infra*. Yet international law has lagged on specifying how this right applies to factual innocence claims—in particular, in not expressly requiring states to establish procedures for defendants to raise wrongful conviction claims and to determine whether miscarriages of justice have occurred. However, recent developments suggest a move toward recognizing a right to raise both legal and factual post-conviction innocence claims as

191. *See id.* art. 4 § 1.
192. *See id.* art. 4 § 2.
193. Council of Eur., *Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. 117, ¶ 31 (Nov. 22, 1984) [hereinafter *Explanatory Report*].
194. Mihalache v. Romania, App. No. 54012/10, ¶ 133 (Eur. Ct. H.R. July 8, 2019), http://hudoc.echr.coe.int/eng?i=001-194523.
195. *Id.*

part of the right to compensation.

The foundational provision recognizing a right to compensation appears in Article 14(6) of the ICCPR, which provides as follows:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[196]

Similar provisions appear in two regional human rights treaties. Article 3 of Protocol No. 7 to the ECHR, adopted in 1984, follows the same wording of ICCPR Article 14(6), except that compensation shall be awarded either "according to the law or the practice of the State concerned."[197] Article 10 of the American Convention on Human Rights contains a more succinct articulation: "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice."[198] The African Charter on Human and Peoples' Rights lacks a corresponding provision. However, the African Commission on Human and People's Rights has adopted nonbinding principles and guidelines that closely track the right to compensation as set forth in the ICCPR.[199]

The drafting history sheds some light on the scope of this compensation right. Article 14(6) has been labeled as "at the time of its drafting, the most controversial provision" among the ICCPR's fair trial rights.[200] Summing up the competing views, the U.N. Secretary-General noted: "It was argued . . . that the payment of compensation was a matter for the exclusive discretion of the executive and that national approaches varied considerably; [conversely,] that the right to compensation . . . was basic and should be made enforceable against the State . . . ."[201] One reason for this controversy

196. ICCPR, *supra* note 140, art.14(6). A few ICCPR state parties, mostly in the Global South, have filed reservations to Article 14(6). The reservations accept the right to compensation in principle but assert that it was not possible to implement the provision at the time of ratifying the ICCPR. *See* Mujuzi, *supra* note 14, at 216 n.2.

197. *See* Protocol No. 7, *supra* note 158, art. 3.

198. American Convention on Human Rights art. 10, Nov. 22, 1969, 1144 U.N.T.S. 143.

199. Principle 10(2)(b) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) is "a verbatim reproduction of Article 14(6) of the ICCPR except that it is silent on the issue of whether such a person would also qualify for compensation even if 'it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.' " Mujuzi, *supra* note 14, at 235.

200. MANFRED, NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: COMMENTARY 269 (1993).

201. MARC J. BOSSUYT, GUIDE TO THE *TRAVAUX PRÉPARATOIRES* OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 311.

was a significant disagreement among states as to whether a "miscarriage of justice" requires a showing of factual innocence or can be demonstrated by other fair trial violations.[202]

The Explanatory Report to Protocol No. 7 is similarly ambiguous, underscoring the difficulty of protecting the right to claim factual innocence via the right to compensation for miscarriages of justice. The report initially describes a miscarriage of justice as "some serious failure in the judicial process involving grave prejudice to the convicted person."[203] Even so, it later asserts that compensation is required "only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent," in contrast to an "appellate[] court [that] had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge."[204]

The UNHRC and ECtHR have interpreted the meaning of "miscarriage of justice" in two decisions. In *Dumont v. Canada*,[205] the applicant was convicted of rape based primarily on the victim's testimony.[206] The victim changed her statement after the trial, claiming that she had misidentified the perpetrator.[207] The revised statement was not considered on appeal, but a court later quashed the applicant's conviction following a review by a board of inquiry.[208]

Dumont then filed a petition pursuant to the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons, which authorizes the Canadian government to award compensation to an exonerated defendant if "a new fact [has] come to light that shows that a miscarriage of justice has taken place."[209] According to the Guidelines, "compensation should only be granted to those persons who did not commit the crime for which they were convicted."[210] Applying this standard, the government denied the petition and Dumont challenged the denial in court.[211] After proceedings relating to the compensation claim remained unresolved for several years, Dumont filed

---

202. According to one recent study, the fact that delegates twice rejected proposals to condition compensation upon a finding of actual innocence indicates that the right extends to other types of miscarriages of justice. *See* Mujuzi, *supra* note 14, at 221. However, the basic normative disagreements among states over whether to include this right in the ICCPR makes it difficult to draw any firm conclusions.

203. *Explanatory Report*, *supra* note 193, ¶ 23.

204. *Explanatory Report*, *supra* note 193, ¶ 25.

205. U.N. Hum. Rts. Comm., Communication No. 1467/2006, U.N. Doc. CCPR/C/98/D/1467/2006 (May 21, 2010).

206. *Id.* ¶ 2.1.

207. *Id.*

208. *Id.* ¶ 13.2.

209. *Id.* ¶ 3.1.

210. *Id.* ¶ 16.1 n.10.

211. *Id.* ¶ 3.2.

a complaint with the UNHRC.[212]

The UNHRC held that Canada had violated Article 14(6) together with Article 2(3) of the ICCPR, which guarantees the right to an effective remedy.[213] The principal basis for this conclusion was the lack of a meaningful domestic mechanism for Dumont, following his acquittal, to "launch[] a new investigation in order to review the case and to possibly identify the real perpetrator."[214] As a result of this "gap" in the law—as well as the multi-year delay in the subsequent civil proceedings—Canada had deprived Dumont of "an effective remedy to enable him to establish his innocence . . . in order to obtain the compensation provided for in article 14, paragraph 6."[215]

The UNHRC also considered what qualifies as a "miscarriage of justice."[216] Canada argued that no miscarriage had occurred, because the victim's revised statement merely cast doubt on Dumont's conviction but did not prove that he was actually innocent.[217] Since the government had not created an effective procedure for exonerated defendants to apply for compensation, the UNHRC did not take a "position on the accuracy of the State party's interpretation."[218] One member of the Committee dissented on this point, concluding that Article 14(6) "does not require the convicted person to prove his or her innocence."[219] Consistent with that interpretation, the dissent would have required Canada to revise the Guidelines to "abolish the obligation for the convicted person to give proof of innocence in order to receive compensation for a miscarriage of justice."[220]

In the European human rights system, the meaning of "miscarriage of justice" has arisen in cases applying the presumption of innocence in ECHR Article 6(2). The ECtHR has held that the presumption, in addition to protecting individuals prior to and during criminal trials, continues after an acquittal.[221] For example, government officials may not make public statements implying that an individual is guilty of the crime for which she was

212. *Id.* ¶ 13.4.

213. *Id.* ¶ 23.6. Article 2(3) requires states to provide a remedy for violations of the ICCPR. ICCPR, *supra* note 140, art. 2(3).

214. U.N. Hum. Rts. Comm., Communication No. 1467/2006, ¶ 23.5, U.N. Doc. CCPR/C/98/D/1467/2006 (May 21, 2010).

215. *Id.* ¶ 23.6.

216. *Id.* ¶ 23.4–23.6.

217. *Id.* ¶ 23.4.

218. *Id.* ¶ 23.5.

219. *Id.* Appendix ¶ 4 (partly dissenting individual opinion by Mr. Fabián Omar Salvioli). Although Canada relied on the drafting history (discussed *supra*) to argue that "proof of factual innocence is a requirement" for compensation, the dissent reasoned that "such an interpretation is incompatible with both the letter and the spirit of" Article 14(6). *Id.* Appendix ¶¶ 7–8.

220. *Id.* Appendix ¶ 12.

221. *See generally* Orr v. Norway, App. No. 31283/04 (Eur. Ct. H.R. May 15, 2008) (applying article 6(2) to victim's claim against a defendant who had been acquitted of a rape charge).

acquitted. This includes statements in judicial or administrative proceedings in which the individual seeks compensation for a miscarriage of justice.

The ECtHR Grand Chamber addressed the tension between the post-acquittal presumption of innocence and the right to compensation in *Allen v. United Kingdom*.[222] The defendant in *Allen* was convicted of manslaughter of her four-year-old son based on medical evidence that the child had died of non-accidental shaking of the brain, known as Shaken Baby Syndrome.[223] However, a post-conviction report revealed that the child's death may have been due to other causes.[224] The UK courts reversed Allen's conviction but denied her application for compensation, holding that while the new medical evidence rendered her conviction "unsafe," reasonable jurors could differ on whether she should have been convicted.[225]

The Grand Chamber concluded that the decision to deny Allen's compensation claim did not imply that she should have been convicted and, thus, did not violate the presumption of innocence.[226] In reaching this result, the ECtHR briefly considered the right to compensation for miscarriages of justice.[227] The United Kingdom has not ratified Protocol No. 7, and thus the Grand Chamber could not directly interpret the right to compensation protected by Article 3 of that Protocol. However, the Court made two statements relevant to that provision. The first recognized that domestic courts have discretion "to interpret the legislation [giving effect to the compensation right and] . . . to conclude that more than an acquittal was required in order for a 'miscarriage of justice' to be established."[228] Second, the Grand Chamber remarked that the narrow view of Article 3 suggested in the Protocol's Explanatory Report—that proof of factual innocence is necessary to claim compensation—"must now be considered to have been overtaken by the Court's intervening case-law on Article 6 § 2."[229] This dictum suggests that, in a future case, the ECtHR may adopt the view of the dissenting member of the UNHRC in *Dumont*—that the right to compensation for miscarriages of

222. *See generally* Allen v. United Kingdom, App. No. 25424/09 (Eur. Ct. H.R. Grand Chamber July 12, 2013).

223. Allen v. United Kingdom, App. No. 25424/09, ¶ 10–11 (Eur. Ct. H.R. Grand Chamber July 12, 2013).

224. *Id.* ¶ 13; *see* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U.L. REV. 1, 5, 18 (2009).

225. Allen v. United Kingdom, App. No. 25424/09, ¶¶ 13–42 (Eur. Ct. H.R. Grand Chamber July 12, 2013).

226. *Id.* ¶ 134.

227. *Id.* ¶ 129–33.

228. *Id.* ¶ 129. The United Kingdom, which is a party to the ICCPR, has adopted legislation to implement Article 14(6) and provide a mechanism for compensating defendants who have been wrongfully convicted. *See* Criminal Justice Act 1988, c. 33, § 133 (UK).

229. Allen v. United Kingdom, App. No. 25424/09, ¶ 133 (Eur. Ct. H.R. Grand Chamber July 12, 2013).

justice applies to egregious violations of fair trial rights as well as to claims of factual innocence.

5. Summing Up the Derivative Rights Approach

International human rights law is deeply concerned with ensuring a fair criminal process, and it includes an extensive list of guarantees relating to that process. A clear, explicit, and comprehensive right to assert post-conviction claims of factual innocence is, however, missing from these guarantees.[230] This section has shown, however, that the recent case law of international human rights bodies provides a strong basis for deriving such a right from closely related treaty provisions, including the rights to life, to a fair trial and appeal, to a remedy, and to compensation for miscarriages of justice. The UNHRC's decision in *Dumont v. Canada* comes closest to recognizing the right to claim innocence through a purposive interpretation of the latter two treaty provisions.

The derivative rights approach is not, however, the only way to close international law's innocence gap. As we now explain, a strong argument can also be made that the right to claim innocence satisfies the criteria for assessing whether to recognize a new, freestanding human right

230. International criminal tribunals provide procedures to review judgements based on newly discovered facts, but they do not recognize a right to assert post-conviction claims of factual innocence. See Int'l Crim. Tribunal for Rwanda, ICTR Rules of Procedure and Evidence, Rule 120, U.N. Doc. ITR/3/Rev/1 (May 13, 2015), https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf [https://perma.cc/U3VD-TG8Y] (permitting either the defense or the prosecutor to file a motion for review of judgment when there is a newly discovered fact that was not known at the time of the proceeding that "could not have been discovered through the exercise of due diligence); United Nations, Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian L. Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, Rule 119, U.N. Doc. IT/32/Rev.50 (July 8, 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf [https://perma.cc/Z5Z3-W2JV] (same). The International Residual Mechanism for Criminal Tribunals authorizes the same procedure, and, in addition, requires the moving party to show that the new fact "could have been a decisive factor in reaching the decision." United Nations, International Residual Mechanism for Criminal Tribunals, Rules of Procedure and Evidence, Rule 146 (May 13, 2015), https://www.irmct.org/sites/default/files/documents/MICT-1-Rev-7-en.pdf [https://perma.cc/A456-A7GN]. The Rome Statute also permits a convicted person or related persons to apply to the Appeals Chamber for a revision of a conviction or sentence, inter alia, when there is new evidence discovered that was not available at the time of the trial, the unavailability is not attributable to the moving party, and the evidence is "sufficiently important" that if it had been proved at trial, it would have resulted in a different verdict. Int'l Crim. Ct., Rome Statute of the International Criminal Court, Art. 84, U.N. Doc. A/CONF.183/9 (July 17, 1998), https://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf; see Int'l Crim. Ct., Rules of Procedure and Evidence, Rule 159, ICC-PIDS-LT-02-002/13 (2013), https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf [https://perma.cc/FFK3-7WWZ] (laying out the procedures for filing an application for revision under Article 84 of the Rome Statute).

D. THE RIGHT TO CLAIM INNOCENCE AS A FREESTANDING RIGHT

Although there is no single standard for recognition of a new human right, several common elements can be identified.[231] In brief, these criteria require that a new right be consistent with existing rights, fundamental, precise, and enforceable, and that it enjoy broad international support.[232] We explore the contours of the right to claim innocence in light of these standards.

First, a new right should be "consistent with the existing body of international . . . law"[233] and "compatible with the theoretical foundations of human rights."[234] However, it should also "not merely [be] repetitive of[] the existing body of international human rights law,"[235] but instead be "independently justifiable" because it fills a gap in existing norms.[236]

We have previously discussed how a new right to claim innocence aligns with existing criminal process guarantees. But such a right would extend beyond the currently identified scope of these guarantees. In particular, it would clarify (and, in some instances, require) the mechanisms needed to provide meaningful redress for legal innocence claims and extend those mechanisms to factual innocence claims in all cases—for example, not just when a factual innocence claim is part of the trial record. This close nexus satisfies the first criterion of consistency.

A second requirement is that a new stand-alone right must be "fundamental."[237] This has been variously described as requiring the right to be of

---

231. These criteria seek to "balance dynamism" in human rights protection against the risks of undue proliferation. Bridget Lewis, *Quality Control for New Rights in International Human Rights Law: A Case Study of the Right to a Good Environment*, 33 AUSTL. Y.B. INT'L L. 55, 57–60 (2015).

232. The U.N. General Assembly adopted a standard for recognizing new human rights in 1986. *See* G.A. Res. 41/120, ¶ 4 (Dec. 4, 1986) (stating that "international instruments in the field of human rights . . . should . . . (a) Be consistent with the existing body of international human rights law; (b) Be of fundamental character and derive from the inherent dignity and worth of the human person; (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations; (d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; [and] (e) Attract broad international support"). For other approaches to developing criteria for recognizing new rights, see Lewis, *supra* note 231, at 60–79; B.G. Ramcharan, *The Concept of Human Rights in Contemporary International Law*, 1983 CAN. HUM. RTS. Y.B. 267; Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 615 (1984); James W. Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification*, 18 YALE J. INT'L L. 281, 288 (1993); BRIDGET LEWIS, ENVIRONMENTAL HUMAN RIGHTS AND CLIMATE CHANGE: CURRENT STATUS AND FUTURE PROSPECTS 95–148 (2018).

233. G.A. Res. 41/120, *supra* note 232, ¶ 4(a).

234. Lewis, *supra* note 231, at 60–71 (identifying this as one of five criteria for recognizing new rights, alongside the new right being "independently justifiable," being precise, specifying rights-holders and duty-bearers, and being politically supported).

235. Alston, *supra* note 232, at 615.

236. Lewis, *supra* note 231, at 60–62; *see also* Çalı, *supra* note 120, at 278 (warning that new rights may face skepticism if they "do[] not add any new value to already existing rights").

237. G.A. Res. 41/120, *supra* note 232, ¶ 4(b).

"great importance for human beings,"[238] to "demonstrate universal importance,"[239] to "reflect a fundamentally important social value,"[240] and to "be relevant, inevitably to varying degrees, throughout a world of diverse value systems."[241] An emphasis on the fundamental nature of the new right can also assuage concerns that a right is not sufficiently universal[242] or that it "creates undue burdens" of implementation.[243]

As reviewed in Part I, remedies for wrongful convictions serve the most basic purpose of any criminal legal system: to ensure that individuals who have not committed an offense are not convicted and punished. The right to claim innocence has been recognized as an exception to finality at the national level precisely because it supports this fundamental principle.

A third substantive requirement is precision.[244] This encompasses precision in normative content so that the right "give[s] rise to identifiable rights and obligations."[245] It also includes precision in "identifying rights-holders and duty-bearers."[246] To satisfy this criterion, in Part III we identify with granularity the core elements of an express right to claim innocence and discuss the different institutions and actors that can help to realize this right.

Precision is also linked to concerns about ensuring that a new right is feasible and enforceable,[247] including "through realistic and effective implementation machinery."[248] With respect to the right to claim innocence, this fourth criterion can be satisfied by giving individuals access to treaty bodies, regional courts, and other institutions that already adjudicate claims alleging violations of the rights to life, fair trial, appeal, remedy, and compensation. In Part III, we further explain how the right can be tailored to the three national models for remedying wrongful convictions.

---

238. *See* Eva Brems, *Birthing New Human Rights: Reflections Around a Hypothetical Human Right of Access to Gestational Surrogacy*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 326, 329 (Andreas von Arnauld & Kerstin von der Decken eds., 2020) (emphasis omitted).

239. Çalı, *supra* note 120, at 278.

240. Alston, *supra* note 232, at 615.

241. *Id.*

242. *See* Brems, *supra* note 238, at 329 ("[I]t is widely understood that human rights should protect interests that are of *great importance* for human beings (threshold criterion) and that are *universally valid* (universality criterion).").

243. *See* Çalı, *supra* note 120, at 278.

244. *See* G.A. Res. 41/120, *supra* note 232, ¶ 4(c).

245. *See* Alston, *supra* note 232, at 615; *see also* Lewis, *supra* note 231, at 71–75 (arguing that a right "must be capable of definition precise enough to enable it to be attainable and capable of enforcement").

246. *See* Lewis, *supra* note 231, at 75–77.

247. *See* Çalı, *supra* note 120, at 280; Lewis, *supra* note 231, at 71.

248. *See* G.A. Res. 41/120, *supra* note 232, ¶ 4(d).

Finally, a new, freestanding right should have "support"[249]—which has been variously described as encompassing "[s]ufficient [p]olitical [s]upport,"[250] "broad international support,"[251] acceptance by "states and international bodies,"[252] and compatibility "with the general practice of states."[253] Significantly, the right to claim innocence does not introduce a new protected population, subject, or field to international law. Nor is it a right that is unprotected at the national level; as we have shown, countries with very different legal and political systems have adopted remedies in this area, albeit with gaps that international human rights law can help to fill and harmonize.

Importantly, we do not argue that a stand-alone right to claim innocence has been recognized by the United Nations or by other international bodies. We have rather sought to identify concrete gaps that the new right would fill. This approach is consistent with the view of scholars that a claim or demand which has yet to receive formal legal recognition at the international level can nevertheless be justified as a new, separate right.[254]

E. PROS AND CONS OF DERIVATIVE VS. FREESTANDING APPROACHES

In practice, identifying—and garnering support for—a new human right requires more than a mechanical application of substantive standards. Here, we consider additional factors that may inform whether a right to claim innocence should be recognized as a derivative or a stand-alone right in international law. In particular, we compare the advantages and disadvantages of each pathway to recognition across three elements: feasibility, protection, and resources. In Part III, we consider a related question—how a new right to claim innocence fares under critiques sounding in so-called rights inflation.

Deriving new rights, such as the right to claim innocence, from existing ones is often a path of lesser resistance. It reflects a cautious and "[]less ambitious[] approach,"[255] but one with an immediate payoff—namely, that "the

249. *See* G.A. Res. 41/120, *supra* note 232, ¶ 4(e).
250. *See* Lewis, *supra* note 231, 77–79.
251. *See* G.A. Res. 41/120, *supra* note 232, ¶ 4(e).
252. *See* Bob, *supra* note 117, at 4.
253. *See* Alston, *supra* note 232, at 615.
254. *See* Susi, *supra* note 92, at 28 ("Even if it has not yet established itself as a self-standing right, we can still speak of a new human right, and can add the qualification 'under the process of contestation.' "); *see also* Alston, *supra* note 232, at 615 (noting that the right should "be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law"); von der Decken & Koch, *supra* note 122, at 20 (noting that the desirability of new rights being necessary and being "firmly grounded in law" should be constantly weighed against an understanding that human rights themselves require an "inherent dynamism").
255. *See* Thielbörger, *supra* note 121, at 73.

new right will be part of *lex lata* instantly,"[256] since there is no requirement for states to separately accept the norm.[257] Conversely, insisting that a very new right exists may backfire and undermine progress toward recognizing the right.[258] Acceptance under the derivative rights approach is also aided by the normative determinacy that often comes with relying on established legal guarantees.[259]

Derivative approaches can also enhance protection by emphasizing human rights as "indivisible and interdependent."[260] Extending existing rights to the wrongfully convicted through a derivative approach "is conceptually compatible with the idea that all persons are equal and have equal rights."[261] Deriving the right to claim innocence from existing rights also avoids wasted resources, since it can be difficult to justify expending political capital on developing a whole new framework when it is possible to interpret existing protections to secure the right.[262]

As for the stand-alone pathway, the feasibility concerns that often arise with new, freestanding rights are notably less pronounced for the right to claim innocence. Somewhat unusually, as shown in Part I, national practice on the right is more advanced than international recognition. As a result, barriers that might otherwise deter governments from accepting a new, freestanding right may be lower, since international law recognition can help clarify legal obligations[263] and "enhance the profile of [a] right" that many states have actually already accepted.[264]

As for the protection element, the derivative approach, while useful for emphasizing interdependence of existing rights guarantees, may leave gaps and inconsistent approaches.[265] A derived right to claim innocence is

256. *See* von der Decken & Koch, *supra* note 122, at 19.

257. *See* Tiina Pajuste, *The Status of the Human Rights of Older Persons*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 183, 187 (Andreas von Arnauld & Kerstin von der Decken eds., 2020).

258. *See* Lau, *supra* note 123, at 206.

259. *See* Luis E. Rodríguez-Rivera, *The Right to Environment: A New, Internationally Recognised, Human Right*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 153, 154 (Andreas von Arnauld & Kerstin von der Decken eds., 2020) (listing reasons that a stand-alone right might not be recognized, including that it has an "*inherent indeterminacy*," has a "*redundancy effect*," is "*non-justiciable* and *non-enforceable*," or would "*devalue* or *debase* the human rights currency").

260. *See* Jérémie Gilbert, *The Human Right to Land: 'New Right' or 'Old Wine in a New Bottle'?*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 97, 101 (Andreas von Arnauld & Kerstin von der Decken eds., 2020).

261. *See* Pajuste, *supra* note 257, at 188.

262. *See* Rodríguez-Rivera, *supra* note 259, at 154.

263. *See* Pajuste, *supra* note 257, at 187.

264. Chirwa, *supra* note 121, at 59.

265. *See* Pajuste, *supra* note 257, at 186.

necessarily limited by the contours of the "parent" right(s),[266] with the risk that it may be viewed as "ancillary" or subordinate to other criminal process guarantees, such as the right to an appeal.[267] A stand-alone right, in contrast, "would prevent cases and situations falling through the cracks and holes"[268] and underscore the right's overall importance.

Lastly, using political and social resources to recognize a freestanding right to claim innocence may have the salutary effect of highlighting the achievements of the transnational innocence movement. Framing a new right in derivative terms risks obscuring these origin stories, including how civil society groups have pushed for recognition in diverse national and international settings.[269] Seen from this perspective, framing the right to claim innocence as a separate right also has a strong communicative effect, signaling to rights-holders "that they can count on [the] protection"[270] of international law.

III. CLOSING INTERNATIONAL LAW'S INNOCENCE GAP

We have thus far shown that international human rights law has an important, surprising, and remediable gap: the absence of an explicit and fully articulated right of defendants to raise wrongful conviction claims based on newly acquired evidence of factual innocence. This gap is important because an obligatory mechanism for raising innocence claims is closely linked to—and consistent with the values underlying—core human rights guarantees relating to the criminal process. The gap is surprising because a growing number of national jurisdictions have created such mechanisms, but in diverse ways and with only limited input from human rights treaties. The gap is also remediable, since recognizing such a right would be consistent with the two principal ways that other "new" human rights have been accepted in international law.

In this Part, we turn from analysis to prescription, exploring the substantive content of an international right to claim innocence. We argue that the right should be articulated in general terms that define its core elements while preserving sufficient flexibility for states to adapt it to their criminal laws and to the diverse national models for raising innocence claims described in Part I.

We begin by offering a draft text of the right to claim innocence and

266. *See* von der Decken & Koch, *supra* note 122, at 13.
267. *See* Gilbert, *supra* note 260, at 101.
268. *See* Stefan Martini, *Strong New Branches to the Trunk: Realising the Right to Health Decentrally*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 124, 133 (Andreas von Arnauld & Kerstin von der Decken eds., 2020).
269. *See* Susi, *supra* note 92, at 23.
270. *See* Martini, *supra* note 268, at 132.

explain how the text is situated in relation to other criminal process guarantees. We then discuss several issues relating to the international definition of the right, as well as national-level considerations. We conclude by considering and rejecting a potential objection to our proposal—that human rights are overly inflated and should not be further expanded.

A. DRAFT TEXT OF A NEW RIGHT TO CLAIM INNOCENCE

The text of an international right to claim innocence could be drafted concisely as follows:

> After a person has, by a final decision, been convicted of a criminal offense, the person shall have the right to seek relief from that conviction, including on the ground that newly discovered evidence of innocence shows that the conviction lacks factual support.

As articulated, the right complements and fits neatly alongside existing criminal process protections. Article 14 of the ICCPR provides a helpful illustration. As previously explained, Article 14(5) provides that a person "shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"; Article 14(6) requires that compensation be provided to an individual who has suffered "a miscarriage of justice"; and Article 14(7) prohibits a person who has been convicted or acquitted of a crime from being "tried or punished again" for the same offense.[271] The text set forth *supra* would augment this list of key criminal justice guarantees. The text also leaves open the possibility of creating procedures to review post-conviction claims of legal innocence, such as violations of fair trial rights, as well as other procedural errors.

We emphasize, however, that we are not proposing an amendment to the ICCPR or any other human rights treaty. On the contrary, we expect that the right to claim innocence will appear, at least initially, in guidelines, declarations, and other soft law standards promulgated by treaty monitoring bodies, U.N. special procedures, and other international and regional institutions, with input from human rights NGOs, national innocence projects, and experts in international and criminal law.[272] Nonetheless, these documents, no less than binding treaty provisions, must describe the content of the right with precision to encourage governments to implement it in domestic law.[273]

---

271. ICCPR, *supra* note 140, art.14(5)–(7).

272. A recent example of protecting a new right through soft law is the effort to have the U.N. Human Rights Council recognize the right to a healthy environment. See, e.g., THE TIME IS NOW! GLOBAL CALL FOR THE UN HUMAN RIGHTS COUNCIL TO URGENTLY RECOGNISE THE RIGHT TO A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT 4 (Sept. 10, 2020), https://www.ciel.org/wp-content/uploads/2020/09/Global-Call-for-the-UN-to-Recognize-the-Right-to-a-Healthy-Environment-English.pdf [https://perma.cc/PR25-MW3Q] (urging all states to support resolutions recognizing "the right to a safe, clean, healthy, and sustainable environment").

273. *See* Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 386–88,

B. DEFINING THE RIGHT

The core of the right is a legal entitlement to access, and to receive appropriate redress from, a domestic mechanism that reviews claims based on evidence of innocence obtained after a final conviction. Such a mechanism should satisfy the procedural and substantive components of the right to a remedy.[274] In particular, the mechanism must have the capacity to review innocence claims on the merits and the authority to provide full and meaningful reparation, including compensation and the possibility of nullifying convictions.[275] In addition, the mechanism must be non-discriminatory, both in terms of the procedures governing access and the substantive outcomes it produces.

These considerations inform our discussion of several definitional issues raised by the draft text we have proposed. A preliminary issue concerns the meaning of the phrase "final decision." In many instances, such decisions will be made following a criminal trial. However, it is important that the right not be limited to trials. In the United States, for example, the bulk of criminal cases are plea bargained. For the right to be effective, all negotiated or summary determinations of guilt should be eligible for subsequent innocence review.[276]

A second definitional question is when evidence is "newly discovered." This term does not require that evidence be wholly different from that presented during the original criminal proceeding. It is not limited to a "new or newly discovered fact"[277] and includes new technology, testing, or scientific research applied to evidence introduced at trial.[278]

391–94 (1999) (proposing texts of admissibility clauses to regulate forum shopping among global and regional human rights bodies while noting that treaty amendments would be unlikely and identifying alternative ways to implement reforms).

274. *See, e.g.*, Basic Principles and Guidelines, *supra* note 180, ¶ 12 ("A victim of a gross violation of international human rights law . . . shall have equal access to an effective judicial remedy as provided for under international law."); Pablo de Greiff (Special Rapporteur), *Report of the Special Rapporteur for the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 48, U.N. Doc. A/HRC/36/50 (Aug. 21, 2017) (emphasizing access "to a meaningful criminal justice system with the prompt exercise of judicial power within a reasonable amount of time"); *see also* CLOONEY & WEBB, *supra* note 14, at 831–900 (extensively reviewing the remedies that international law requires for violations of fair trial rights).

275. *See, e.g.*, Comm. Against Torture, *General Comment No. 3 (2012): Implementation of Article 14 by States Parties*, ¶ 5, U.N. Doc. CAT/C/GC/3, (Dec. 13, 2012).

276. For a discussion of this issue in the United States, see Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671, 727 (2020); Stephens, *supra* note 44, at 320–23.

277. In this respect, the proposed right to claim innocence goes beyond the right to compensation for a miscarriage of justice, which applies if a conviction has been overturned as a result of "a new or newly discovered fact." *See* ICCPR, *supra* note 140, art. 14(6).

278. For example, in the prosecution discussed in *Allen v. United Kingdom,* newly contested medical evidence concerning shaken baby syndrome was found not to constitute new facts. Such evidence was nevertheless considered under the UK's post-conviction review mechanism. Allen v. Kingdom, App. No.

The phrase "newly discovered" also raises the question of whether national jurisdictions can disregard post-conviction evidence of innocence whose non-discovery can be attributed to the defendant or to his or her counsel. The treaty-based right to compensation for miscarriages of justice includes such a limitation but places the burden of proof on the government.[279] A similar requirement is appropriate for the proposed right to claim innocence. However, courts and other review bodies should be mindful of the fact that true "equality of arms"[280] in domestic criminal law systems is often illusory and that attribution to a defendant should be proven, not inferred.

A third definitional issue concerns the term "innocence." Our focus on factual innocence suggests that the right must apply, at a minimum, in two situations—when evidence is presented that the wrong person was convicted or that no crime occurred at all. The draft text we propose is more open-ended, however. It adds the word "including" to underscore that the right can also apply to violations of procedural and other fair trial guarantees that provide the basis for legal innocence claims.

Our proposed text intentionally eschews the phrase "miscarriage of justice." Section II.C described the unsettled meaning of this phrase in international human rights law. National practice reveals a similar lack of clarity. "Miscarriage of justice" has been used to refer to incorrect criminal verdicts and to an array of grounds that permit plain error review or excuse other procedural barriers to an appeal or post-conviction relief.[281] Scholars have similarly proposed a range of broad definitions of the phrase that include both procedural and innocence-related errors in criminal cases.[282]

25424/09, ¶¶ 1517 (Eur. Ct. H.R. Grand Chamber July 12, 2013). Similarly, in the United States, six states have enacted new post-conviction statutes that expressly authorize relief based on new scientific developments. *See* CAL. PENAL CODE § 1473 (West 2021); CONN. GEN. STAT. § 52-582 (West 2018); MICH. COMP. LAWS ANN. § 6.502(G)(2) (West 2021); NEV. STAT. ANN. §§ 34.900–990 (West 019); TEX. CODE CRIM. PROC. ANN. art. 11.073(b) (West 2015); WYO. STAT. ANN. § 7-12-403 (West 2018).

279. *See* ICCPR, *supra* note 140, art.14(6) (denying compensation for miscarriages of justice where "it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to" the defendant).

280. *See* OMKAR SIDHU, THE CONCEPT OF EQUALITY OF ARMS IN CRIMINAL PROCEEDINGS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3 (2017).

281. For examples of U.S. courts using the phrase, largely in the plain error context, see, for example, McQuiggin v. Perkins, 569 U.S. 383, 393 (2013) (permitting petitioners who can make a "miscarriage of justice" showing to overcome the AEDPA one-year statute of limitations); United States v. Buchanan, 933 F.3d 501, 509 (6th Cir. 2019) (holding that reversal based on a plain error is appropriate only if "jury instructions [are] so clearly erroneous as to likely produce a grave miscarriage of justice"); Commonwealth v. Curtis, 632 N.E.2d 821, 82527 (Mass. 1994) (holding that the standard for review for post-appeal motion for a new trial is "substantial risk of a miscarriage of justice").

282. An apt example appears in the following definition:

> A miscarriage occurs as follows: whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the

In the draft text *supra*, the word "innocence" is qualified by the phrase "shows that the conviction lacks support." This recognizes that "innocence" does not have a legal meaning in most jurisdictions; instead, courts considering innocence claims assess whether a conviction cannot be sustained in light of the new evidence presented.[283] We anticipate that national judges will operationalize the "lacks support" standard in light of various factors, such as the elements of the crime in question, the evidence introduced at trial, the support offered for a post-conviction claim, and the standard for reviewing such claims.

Although the "lacks support" standard is flexible enough to allow for some variation across jurisdictions, the focus must remain on the present—whether a factfinder would now convict the person in light of the new evidence provided. This temporal requirement helps to overcome an undue focus on finality and guilt, in which courts conclude that sufficient evidence to convict in the past makes it unnecessary to consider any new evidence of innocence.[284]

Issues are also likely to arise regarding how persuasive new evidence of innocence must be to find that a conviction "lacks support." For example, many states in the United States apply a "more likely than not" standard to determine whether a reasonable jury would convict with the benefit of the new evidence.[285] However, other states have adopted "would have changed the outcome" standards,[286] or "clearly convincing" standards that require extremely high levels of proof.[287] Outside of the United States, review standards range from an "unsafe" conviction standard, a "reasonable probability" standard, and a "more likely than not" standard to still higher standards.[288]

Our proposed text avoids prescribing a single standard of review. Given

---

rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers, or sixth, by State law itself.

Clive Walker, *Miscarriages of Justice in Principle and Practice*, *in* MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 31, 33 (Clive Walker & Keir Starmer eds., 1999). For a criticism of this definition as "overbroad and indeterminate," see Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967, 1036 (2005). For a discussion of practice in the UK, see generally Steven Greer, *Miscarriages of Criminal Justice Reconsidered*, 57 MOD. L. REV. 58 (1994).

283. *See supra* Section I.C.

284. For a canonical account of the perils of this "guilt-based" reasoning in the context of harmless error review, see Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1171 (1995).

285. *See* Schlup v. Delo, 513 U.S. 298, 330 (1995) (adopting a "more likely than not" standard for excusing otherwise applicable procedural bars based on new evidence of innocence).

286. *See* 42 PA. CONS. STAT. ANN. § 9543 (West 2018).

287. *See, e.g.*, N.H. REV. STAT. ANN. § 651–D:2(III) (West 2021) (requiring clear and convincing evidence to obtain post-conviction DNA testing); VA. CODE ANN. § 19.2-327.13 (West 2021) (same).

288. The U.S. Supreme Court has suggested that "extraordinary" or "truly persuasive" proof would be required to make out a constitutional claim of innocence in a capital post-conviction case. See Herrera v. Collins, 506 U.S. 390, 417 (1993).

the diversity of existing approaches, it is appropriate to allow countries some discretion to tailor the evaluation of innocence claims to familiar national practices. We anticipate that some countries may not adopt sufficiently robust standards and that some judges may interpret standards that are adequate on paper in ways that make it very difficult to obtain relief.[289] We expect that these problems will be highlighted as national innocence projects publicize wrongful convictions and exonerations, creating pressure for additional reforms.

C. ADAPTING THE RIGHT TO NATIONAL MODELS

In addition to the definitional questions just discussed, recognition of an international right to claim innocence raises important institutional issues. These include, most notably, which national actors are authorized to review innocence claims and grant appropriate remedies. As Part I explains, countries have developed appellate, post-conviction, and administrative models to carry out such reviews. The right we propose is consistent with all three models and others that may be developed. In particular, states can designate courts, administrative bodies, executive branch officials, or some combination thereof to review innocence claims.

The choice of institution implicates a range of practical considerations. These include the existence and scope of hearings, whether the right is protected by due process or other procedural guarantees, whether claimants can obtain discovery (and from whom), whether claimants have a right to representation by counsel, and whether the state provides resources for investigations. We leave these issues to be developed in the future. For present purposes, we highlight several higher-level considerations relevant to each of the three national models.

If a country follows the post-conviction model, the right to claim innocence would be litigated in a collateral proceeding after direct appeals have been exhausted. One advantage of this approach, in terms of receptivity to innocence claims, is that the jurisdiction has already created procedures to assert new grounds for relief outside of the trial record after appeals are complete. Another is that claims can be addressed either to a new judicial body or to the same judge who presided over the trial.[290] One potential challenge of the post-conviction model is that collateral proceedings are often narrow or discretionary. This need not be the case, however, and jurisdictions have broadened post-conviction rules to permit claims based on newly discovered

289. *See supra* Section I.B. (discussing examples in which countries modified judicial standards to make relief more robust or accessible).

290. In the United States, several states require post-conviction petitions to be heard by the judge who conducted the trial or accepted the guilty plea. *See, e.g.*, CAL. PENAL CODE § 1405(f) (West 2015); W. VA. CODE ANN. § 15-2B-14(e) (West 2019).

evidence of innocence.[291] States may need to modify these procedures to ensure that the right satisfies the four overarching characteristics previously identified.

Countries that follow the appellate model place heavy reliance on rules of finality and often limit claims to evidence presented at trial. Nonetheless, many appellate model jurisdictions have modified these rules to permit new evidence to be considered. In civil law countries in particular, reopening a case to assess new facts does not pose onerous practical or logistical hurdles. It should thus be relatively straightforward to amend revision processes to facilitate consideration of new evidence of innocence. In contrast, common law countries in which there is a right to a jury trial (or hybrid judge and lay juries) may face greater resistance to allowing the adjudication of new proceedings.

Countries that adhere to an administrative model authorize a review commission or similar body to evaluate innocence claims. One advantage of this approach is that the commission, as an arm of the government, may have significantly broader ability to access evidence and investigate innocence claims, including from law enforcement files. These powers are especially important for *pro se* and indigent persons in custody, who face great obstacles in conducting their own investigations. However, in many countries the commission or administrative agency ultimately refers cases to court, with the result that judicial interpretation of the definitional issues discussed *supra* will remain essential to the meaningful protection of the right.

This Section has focused on institutional issues raised by the three principal national models for reviewing wrongful convictions. We expect, however, that closing international law's innocence gap will help to promote convergence across these models and perhaps engender new types of review mechanisms. We also anticipate that countries which have not created any mechanism to remedy wrongful convictions will be more likely to do so once a right is recognized internationally. This provides another justification for initially articulating the right in soft law instruments, which can be quickly and easily adapted as countries interpret and apply the right to diverse national contexts.

D. A REJOINDER TO THE "RIGHTS INFLATION" CRITIQUE

Our review of the two key pathways for recognizing an international right to claim innocence—and of the opportunities and limits of each

291. *See, e.g.*, CAL. PENAL CODE § 1473 (West 2021); CONN. GEN. STAT. § 52-582 (West 2018); MICH. COMP. LAWS ANN. § 6.502(G)(2) (West 2021); NEV. STAT. ANN. §§ 34.900–990 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 11.073(b) (West 2015); WYO. STAT. ANN. § 7-12-403 (West 2018) (recent state statutes permitting challenges based on new scientific evidence).

approach—also provides important insights into recent critiques based on so-called rights inflation. These critiques caution against too readily recognizing "new" human rights because of concerns variously described as the proliferation, "bloating,"[292] "hypertrophy,"[293] "inflation,"[294] and "overproduction"[295] of rights. In this section, we respond to this challenge by explaining why the right to claim innocence does not implicate these concerns. We also highlight how consideration of this new right shows that broader debates over the potential benefits and costs of recognizing "new" human rights are insufficiently precise.

Opponents of rights inflation raise a series of objections. These include concerns that expanding international norms undermines "core" human rights,[296] delegitimizes existing guarantees,[297] generates ambiguity in the normative content of rights,[298] creates compliance problems by allowing states to selectively choose which rights to respect,[299] and overloads international supervisory machinery.[300] The proliferation of rights is also said to mask complex political questions[301] in ways that generate "alienation or resentment,"[302] circumvent political debate,[303] and create inconsistencies and

292. *See* Tasioulas, *supra* note 118, at 1183.

293. *See* ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 143 (2014).

294. *See* MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 90 (Amy Gutmann ed., 2001).

295. *See* Shaver, *supra* note 126, at 44.

296. *See* IGNATIEFF, *supra* note 294, at 90 (describing "defensible core of rights" as those "strictly necessary to the enjoyment of any life whatever" and limiting those rights to "civil and political freedoms").

297. *See* POSNER, *supra* note 293, at 137 (arguing that expansion makes human rights "seem frivolous and thus throw the enterprise into disrepute"); Ron Dudai, *Human Rights in the Populist Era: Mourn then (Re)Organize*, 9 J. HUM. RTS. PRAC. 16, 18 (2017) (warning of "diluting the human rights label").

298. *See* Dudai, *supra* note 297, at 18 (stating that protections are "less and less clear and coherent"); Eric Posner, *The Case Against Human Rights*, GUARDIAN (Dec. 4, 2014), https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights [https://perma.cc/4JEG-HVDP] (highlighting a "huge number of vaguely defined rights").

299. *See* Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 280–81 (2017) (describing "fundamental changes" that arose from proliferation, including "mak[ing] it harder to generate compliance with many norms of international law").

300. *See* Rosa Freedman & Jacob Mchangama, *Expanding or Diluting Human Rights?: The Proliferation of United Nations Special Procedures Mandates*, 38 HUM. RTS. Q. 164, 190–91 (2016) (noting that some nations have at various times used expanding economic and social rights as a "smokescreen" to divert attention from violations of civil and political rights).

301. *See* John Tasioulas, *Are Human Rights Taking Over the Space Once Occupied by Politics?*, NEW STATESMAN (Aug. 26, 2019), https://www.newstatesman.com/2019/08/are-human-rights-taking-over-space-once-occupied-politics [https://perma.cc/LVV5-V3TG] (arguing that "[t]here is a persistent tendency to present more and more political demands as human rights, but on very dubious grounds").

302. *See id.*

303. *See* Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 409, 439 (2016) ("[S]ubstituting the adversarial absolutism of rights language for the often more fruitful path of dialogue and open political debate may make it less likely that society will be able to arrive at viable solutions.").

conflicts between rights.[304] These arguments often focus on economic, social, and cultural rights,[305] but they have been used to discredit the "positive" aspects of some civil and political rights as well.[306]

Many of these critiques—such as the concern that international rights will run roughshod over local political processes—implicitly assume that domestic practices or rights protections lag behind international legal norms. For the right to claim innocence, in contrast, it is international law that is playing catch-up. Additionally, it is entirely possible to define this right in a way that draws inspiration from, and is compatible with, a range of national criminal process models.

Our review of the right to claim innocence also shows that rights inflation critiques often fail to meaningfully distinguish the types of processes that lead to "new" rights or how such processes can themselves mitigate concerns about rights inflation. For example, it is difficult to see how the international human rights enterprise will be "diminished by over-printing"[307] in the context of derivative rights that, by definition, operate within the confines of existing rights guarantees and are limited by the parent right(s) from which they evolve.[308] As we have shown, framing the right to claim innocence as a derived right helps to concretize several longstanding criminal process guarantees (such as the right to claim compensation for miscarriages of justice) that implicitly assume the existence of domestic mechanisms to adjudicate factual and legal innocence claims.

The processes of derivation that apply to the right to claim innocence also alleviate other inflation critiques. For example, reliance on existing guarantees minimizes concerns about circumventing political or social processes to push through new international norms. Derivation also enables a reading together of rights to clarify definitions and avoid normative inconsistencies that may exist within or across countries.[309] The emphasis on indivisibility and interdependence that comes with derivative approaches, in

304. *See* EMILIE M. HAFNER-BURTON, MAKING HUMAN RIGHTS A REALITY 107 (2013) ("[A]s the [human rights] system has expanded its . . . obligations . . . many inconsistencies have emerged between provisions [which] . . . . create problems for the interpretation of the law.").

305. *See, e.g.*, Freedman & Mchangama, *supra* note 300, at 190–91 (arguing that states promote "new" economic, social, and cultural rights to "divert attention away from [their] gross and systemic violations" of civil and political rights).

306. *See* JAMES GRIFFIN, ON HUMAN RIGHTS 212–13 (2008) (arguing that the "ballooning" of the right to life to encompass a "basic welfare provision" and "a fully flourishing life" obscures what the right demands of states and what individuals can expect to be protected).

307. *See* Dudai, *supra* note 297, at 18.

308. *See, e.g.*, von der Decken & Koch, *supra* note 122, at 13 (noting that where rights are derived from existing rights, "the new right remains limited by the old right"); Gilbert, *supra* note 260, at 99 (stating that the limiting effect of parent rights can render new rights "invisible under human rights law").

309. *See* Lorna McGregor, Daragh Murray & Vivian Ng, *International Human Rights Law as a Framework for Algorithmic Accountability*, 68 INT'L & COMPAR. L.Q. 309, 326–27 (2019).

turn, reduces opportunities for governments to weaken compliance by picking and choosing among rights. Relying on existing guarantees also brings with it access to built-in monitoring and enforcement mechanisms that reduce the opportunities for noncompliance and weaken the international human rights system. Finally, grounding the right to claim innocence on foundational principles—such as the rights to a remedy and to a fair trial—makes it difficult to argue that recognizing such a right "ends up eroding the legitimacy" of these core guarantees.[310]

While rights derivation processes make it especially difficult to sustain most rights inflation critiques, recognition of the right to claim innocence as a stand-alone right provides additional nuance to the rights inflation debate. As previously explained, one justification for a freestanding right to claim innocence is the widespread national-level support for remedying wrongful convictions. The fact that domestic mechanisms are ahead of international recognition lowers barriers to acceptance by all governments and undermines rights inflation critiques that argue that rights are used to circumvent domestic preferences. Stand-alone recognition also achieves other salutary goals, such as signaling the normative importance of the new right, avoiding protection gaps that result from relying solely on existing guarantees, enhancing the clarity of state obligations, and highlighting the influence of a range of stakeholders.

In sum, recognizing a right to claim innocence showcases the legitimacy of an international legal system that appropriately evolves in response to new concerns and new types of violations. Seen from this perspective, "[t]he universality of human rights is characterised by a constant fixing and unfixing of what universal rights concepts are."[311] This evolution is central to the meaningful, continued protection of fundamental entitlements for all individuals.

---

310. *Cf.* IGNATIEFF, *supra* note 294, at 90.

311. KATHRYN MCNEILLY, HUMAN RIGHTS AND RADICAL SOCIAL TRANSFORMATION: FUTURITY, ALTERITY, POWER 63 (2017).

CONCLUSION

Explicit recognition of an international right to claim innocence would close an important gap in existing human rights law, one that a wide range of countries are attempting to fill in response to a surge of wrongful convictions and advocacy efforts by the transnational innocence movement.

Post-conviction claims of *factual innocence*—allegations that the wrong person was convicted or that no crime occurred at all—are closely linked to several human rights that protect individuals charged with criminal offenses. Treaties and other international instruments have long recognized the violation of these guarantees as a basis for *legal innocence* claims—including assertions that unfair trials, insufficient evidence, or basic procedural errors require overturning a conviction. Nevertheless, international law has not developed a comprehensive or consistent set of protections for another foundational principle—that individuals who have been wrongfully convicted in a factual sense have a right to seek the same remedy.

This Article makes three contributions to support the full recognition of this right. First, we explain how innocence claims fit within, and have been adapted to, a range of civil and common law criminal systems, focusing on three national models—post-conviction, appellate, and administrative. Second, we develop the normative, analytical, and empirical case for an international right to claim innocence, explaining the benefits of doing so in light of the leading approaches for recognizing "new" human rights. Third, we offer a draft text of the new right, address key definitional issues, and respond to anticipated arguments against "rights inflation" in international law.

We conclude by emphasizing the broader implications of our proposal. Across the world, there is a convergence in thinking about criminal procedure issues in human rights terms. Despite nationalist and populist backlash, many governments and civil society groups are increasingly aware of the connections between racial and economic injustice and the criminal process. Safeguarding the accuracy of the criminal legal system is one way to help achieve these essential goals.

The universality of human rights must evolve to take account of new demands and new concerns. International law's innocence gap is partly a historical byproduct of when leading human rights instruments were drafted. Such an instrument adopted today would likely not omit this right, given the growing recognition in many countries that wrongful convictions are an urgent yet inadequately addressed concern. The time has therefore come to close international law's innocence gap and provide meaningful remedies for the wrongfully convicted.