

PRETRIAL AND PREVENTIVE DETENTION OF SUSPECTED TERRORISTS: OPTIONS AND CONSTRAINTS UNDER INTERNATIONAL LAW

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This article analyzes the grounds, procedures and conditions required by International Human Rights Law and International Humanitarian Law for pretrial detention of suspected terrorists for purposes of criminal law enforcement, and for their preventive detention for security and intelligence purposes. Recognizing the difficulties in securing sufficient admissible evidence to prosecute terrorists within the tight time limits imposed by international law, the Article nonetheless suggests that indefinite detention, solely or primarily for purposes of intelligence interrogation, is probably not lawful under U.S. or international law. Preventive detention for security purposes, on the other hand, is generally permitted by international law, provided that it is based on grounds and procedures previously established by law; is not arbitrary, discriminatory or disproportionate; is publicly registered and subject to fair and effective judicial review; and that the detainee is not mistreated and is compensated for any unlawful detention. In Europe, however, even with these safeguards, preventive detention for security purposes is generally not permitted, unless a State in time of national emergency formally derogates from its obligation to respect the right to liberty under the European Convention on Human Rights. The Article concludes that if preventive detention of suspected terrorists for security purposes is to be allowed at all, its inherent danger to liberty must be appreciated, its use kept to an absolute minimum, and the European model should be followed, that is, such detention should be permitted only by formal derogation in time of national emergency, and then only to the extent and for the time strictly required.

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I. DETAINING SUSPECTED TERRORISTS: SCENARIOS UNDER INTERNATIONAL LAW

On what grounds, by what procedures, and within what limits under international law, may the United States lawfully detain suspected terrorists in order to interrogate or prosecute them, or to prevent them from planning future attacks? The actual detention practices of the United States in response to the terrorist attacks of September 11, 2001 (9/11) are now largely matters of public record. Suspected terrorists have been detained in the United States for purposes of deportation and criminal justice (whether as suspects or as material witnesses). They have been captured overseas on the battlefield, in occupied territory or elsewhere, and then detained by the military or CIA for purposes of interrogation and preventive security. A minority have eventually been held for military trial. Detentions of suspected terrorists have taken many forms, including the following examples.

Prosecutions. Caught on a flight to the United States with a lit match in his explosive-laden sneaker, so-called “shoe bomber” Richard Reid pled guilty and was sentenced to prison.¹ Al Qaeda collaborator Zacarias Moussaoui pled guilty to conspiracy to commit terrorist offenses and was sentenced to life in prison.² However, most successful federal prosecutions since 9/11 have targeted not terrorists, but persons who provide material support to terrorist groups.³ These prosecutions have been relatively successful, despite recurrent problems of prosecutorial misconduct⁴ and difficulties in reconciling the rights of the accused with the government’s need to maintain confidential information.⁵

Material Witnesses. Where additional time was needed to investigate a suspect, prosecutors appear to have held some suspects temporarily as material witnesses in other criminal cases.⁶

Deportation. More than a thousand foreign citizens were detained in the United States in connection with the 9/11 investigation, including nearly

¹ See *United States v. Reid*, 369 F.3d 619, 619-20 (1st Cir. 2004).

² *United States v. Moussaoui*, 483 F.3d 220, 223 n.1 (4th Cir. 2007).

³ See Adam Liptak, *Impressions of Terrorism, Drawn from Court Files*, N.Y. TIMES, Feb. 19, 2008, at A15.

⁴ See, e.g., Philip Shenon, *Ex-Prosecutor ‘Crossed Over the Line,’ Jury is Told*, N.Y. TIMES, Oct. 31, 2007, at A16.

⁵ See *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

⁶ See *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002), *rev’d*, 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005).

800 for civil immigration violations.⁷ Even after immigration judges ordered some of them deported, some were kept in continued detention pending FBI clearance.⁸

Battlefield. The military detained suspected Taliban and Al Qaeda fighters at Bagram Air Base and elsewhere in Afghanistan.⁹

Occupied Territory. The military detained suspected terrorists and other suspected security risks (along with common criminals) at Abu Ghraib and other prisons in Iraq.¹⁰

Military Detention for Prosecution. The military detained at least two dozen, and perhaps as many as 80 prisoners, at the United States Naval Base in Guantanamo Bay, Cuba, for prosecution before military commissions.¹¹ As of this writing, military commissions have tried only two prisoners, one of whom pled guilty and the other of whom was convicted only of a lesser charge.¹²

Military Detention of Foreign Citizens for Security and Interrogation. The military detained hundreds of other suspected foreign terrorists at Guantanamo,¹³ most captured in the Afghan war or neighboring Pakistan, but some picked up in countries far from any recognized battlefield.¹⁴ These prisoners were held without charges and without access to lawyers or courts until the Supreme Court ruled in 2004 that federal courts have jurisdiction to hear petitions for habeas corpus brought on their behalf.¹⁵ Many were then afforded access to counsel¹⁶ and to formal

⁷ ELEANOR ACER, LAWYERS COMM. FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* x-xi, 34 (2003).

⁸ See, e.g., Richard A. Serrano, *Rights Ensnarled in Dragnet: Immigration Statutes Used to Hold Suspects Indefinitely and Detain Material Witnesses*, SEATTLE TIMES, Sept. 27, 2001, at A6.

⁹ See generally JOHN SIFTON, ASIA DIVISION, HUMAN RIGHTS WATCH, "ENDURING FREEDOM:" ABUSES BY U.S. FORCES IN AFGHANISTAN (2004), in 16 HUMAN RIGHTS WATCH 3 (2004).

¹⁰ See, e.g., Douglas Jehl & Kate Zernike, *The Reach of War: Abu Ghraib; Scant Evidence Cited in Long Detention of Iraqis*, N.Y. TIMES, May 30, 2004, at A1.

¹¹ By mid-July 2008 only twenty or so Guantanamo prisoners had been referred for trial by military commission. W. Glaberson & E. Lichtblau, *Guantanamo Detainee's Trial Opens, Ending a Seven-Year Legal Tangle*, N.Y. TIMES, July 22, 2008, at A12.

¹² *Id.*; W. Glaberson, *Panel Sentences Bin Laden Driver to Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1.

¹³ Glaberson & Lichtblau, *supra* note 11.

¹⁴ See, e.g., *Boumediene v. Bush*, 127 S. Ct. 1478, 1479-80 (2007) (Breyer, J., dissenting from denial of cert.) (noting that petitioner prisoners are "natives of Algeria, and citizens of Bosnia, seized in Bosnia" and other detainees are citizens of other "friendly nations," and "many were seized outside of any theater of hostility"), *reh'g and cert. granted*, 127 S. Ct. 3078 (2007); *rev'd and remanded*, 128 S. Ct. 2229 (2008).

¹⁵ *Rasul v. Bush*, 542 U.S. 466 (2004).

administrative review by Combatant Status Review Tribunals composed of military officers.¹⁷ In 2005 and 2006, however, Congress purported to deny them habeas corpus, offering instead an alternative statutory mechanism for limited judicial review.¹⁸ In 2008 the Supreme Court ruled that foreign citizens detained as enemy combatants at Guantanamo are constitutionally guaranteed the privilege of habeas corpus, and that the alternative statutory review was not an adequate substitute.¹⁹ The Court then vacated and remanded a separate case, involving the adequacy of the administrative review, to the United States Court of Appeals for the District of Columbia Circuit.²⁰ As of mid-July 2008 some 265 prisoners were still detained at Guantanamo.²¹

Military Detention of U.S. Citizens. The military also attempted to detain at least two U.S. citizens indefinitely on security grounds, without criminal charges and without access to lawyers, at military brigades in the United States.²² That practice ended after the Supreme Court held in 2004 that due process of law requires, at minimum, that detained Americans be informed of the grounds for their detention and have an opportunity to rebut the grounds before an impartial decision maker,²³ possibly with assistance of counsel.²⁴

¹⁶ See *Bismullah v. Gates*, 501 F.3d 178, 188-90 (D.C. Cir. 2007), *reh'g denied*, 503 F.3d 137 (D.C. Cir. 2007), *reh'g en banc denied*, 514 F.3d 1291 (D.C. Cir. 2008), *cert. granted and judgment vacated*, 128 S. Ct. 2960 (2008).

¹⁷ Memorandum from the Deputy Sec'y of Defense to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

¹⁸ See Detainee Treatment Act of 2005, Pub. Law 109-148, § 1005(e), 119 Stat. 2739 (2005); *see also* Military Commissions Act of 2006, Pub. L. 109-366, § 7, 120 Stat. 2600 (2006).

¹⁹ *Boumediene v. Bush*, 128 S. Ct. 2229, 2240, 2274 (2008). The Court noted that under Article 1, Section 9, clause 2 of the Constitution, the writ may be suspended when required by the public safety in cases of rebellion or invasion. *Id.* at 2240. *See also* *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (*en banc*) (allowing indefinite detention in the U.S. as an enemy combatant of a Qatari citizen suspected of terrorism, provided the government can prove its allegations in further habeas proceedings), *petition for cert. filed*, Sept. 19, 2008.

²⁰ *Gates v. Bismullah*, 128 S. Ct. 2960 (2008) (mem.).

²¹ *Glaberson & Lichtblau*, *supra* note 11.

²² *See Padilla v. Hanft*, 547 U.S. 1062, 1062-63 (2006) (Kennedy, J., concurring in denial of *cert.*); *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004).

²³ *Hamdi*, 542 U.S. at 533.

²⁴ *Id.* at 539.

Secret CIA Detention Overseas. The CIA detained, and continues to detain, suspected Al Qaeda leaders and top operatives incommunicado in secret detention centers overseas.²⁵

Except for detentions pending deportation, the purposes of these post-9/11 detentions fall into two broad categories: criminal law enforcement and preventive detention for security and intelligence purposes. This article analyzes the permissible grounds, procedures and conditions of both categories of detention under International Human Rights Law (IHRL) and (in cases of armed conflict) under International Humanitarian Law (IHL).²⁶ Where IHRL allows States to “derogate” from, that is, to suspend, the right to personal liberty, in war or other national emergency,²⁷ the limits on detentions under derogation are analyzed as well.

The focus of this article is on detention. Related issues, such as the rights of suspected terrorists in criminal trials,²⁸ or their right not to be sent to countries where they would likely be tortured,²⁹ are not addressed.

There are four main international law settings in which suspected terrorists may be detained. They are: (1) peacetime, (2) public emergencies short of war, in which States derogate from the right to liberty, (3) armed conflicts of an international character, and (4) armed conflicts of a non-international character. IHRL governs the first two settings: peacetime and public emergencies short of war. IHRL and IHL, read together and in harmony, govern the other two situations: armed conflict, both international and non-international. Thus, there are basic substantive and procedural

²⁵ Amnesty International, *USA: Off the Record: U.S. Responsibility for Enforced Disappearances in the “War on Terror,”* AI Index No. AMR 51/093/2007, June 6, 2007; M. Mazzetti, *Officials Say C.I.A. Kept Qaeda Suspect in Secret Detention*, N.Y. TIMES, Mar. 15, 2008, at A6.

²⁶ Battlefield detentions and detentions of prisoners of war (POWs) are excluded from this analysis. Immediate detention of captured combatants on or near the battlefield involves military exigencies requiring separate legal analysis. Detained prisoners of war are protected by special provisions of the Geneva Conventions. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva III]. However, detention of enemy combatants who are suspected terrorists, and who do not qualify for the special treatment accorded prisoners of war by IHL, is not excluded from the analysis here.

²⁷ *See infra* Part II.

²⁸ International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

²⁹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3.1, Dec. 10, 1984, S. Treaty Doc. No. 100.20, 1465 U.N.T.S. 85 [hereinafter CAT].

international law norms that govern detentions of suspected terrorists in all situations.³⁰

Part II below identifies the sources and applicability of relevant IHRL and IHL. Part III summarizes the “consensus” of IHRL and IHL instruments governing detentions of suspected terrorists in all four settings. Part IV addresses detentions for purposes of criminal prosecution. Part V considers preventive detention for security purposes. Part VI discusses minimum requirements for treatment of all detainees and the right of compensation for all persons unlawfully detained. A concluding section reviews the options for detaining suspected terrorists, and asks whether preventive detention for security purposes, outside the context of armed conflict, should be permitted at all.

II. RELEVANT INTERNATIONAL LAW

This article derives the elements of the IHRL consensus on norms governing detention of suspected terrorists from the following instruments.

- International Covenant on Civil and Political Rights (ICCPR),³¹ joined by 162 State Parties including the U.S.,³²
- Universal Declaration of Human Rights³³ (UDHR) (largely evidence of customary international law),³⁴

³⁰ The International Committee of the Red Cross (ICRC) has recently adopted the principles and safeguards proposed by an ICRC Legal Adviser, which take a similar view. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 380 (2005). Throughout this Article the common principles and safeguards thus identified by the ICRC are noted. The ICRC's new institutional guidelines, originally published as Pejic's Article, “set out a series of broad principles and specific safeguards that the ICRC believes should, at a minimum, govern any form of detention without criminal charges.” *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30IC/07/8.4 at 11, available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/\\$File/30IC_8-4_IHLchallenges_Report&Annexes_ENG_FINAL.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/$File/30IC_8-4_IHLchallenges_Report&Annexes_ENG_FINAL.pdf) [hereinafter ICRC Guidelines] (document prepared by the ICRC for the 30th International Conference of the Red Cross and Red Crescent).

³¹ ICCPR, *supra* note 28.

³² See Office of the United Nations High Commissioner for Human Rights, ICCPR, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited Aug. 22, 2008).

³³ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., UN Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

³⁴ See, e.g., Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 394 (1985).

- United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment (CAT),³⁵ joined by 145 State Parties including the U.S.,³⁶
- United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment³⁷ (BP) (arguably evidence of customary international law),³⁸
- Regional instruments:
 - European Convention on Human Rights (ECHR),³⁹ joined by 47 State Parties,⁴⁰
 - American Convention on Human Rights (ACHR),⁴¹ joined by 24 State Parties,⁴²
 - American Declaration of the Rights and Duties of Man (ADHR),⁴³ an authoritative interpretation of the human rights commitments in the Charter of the Organization of American States (OAS),⁴⁴ a treaty to which the U.S. is a party; the Declaration is used by the Inter-American Commission on Human Rights as the yardstick to monitor American States that are not parties to the ACHR,⁴⁵

³⁵ CAT, *supra* note 29.

³⁶ See Office of the United Nations High Commissioner for Human Rights, CAT, <http://www2.ohchr.org/english/bodies/ratification/9.htm> (last visited Aug. 8, 2008).

³⁷ G.A. Res. 43/173, 76th plen. mtg., UN Doc. A/RES/43/174 (Dec. 9, 1988) [hereinafter BP].

³⁸ Many provisions of the BP appear as well in numerous IHRL instruments, including those reviewed in this Article.

³⁹ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 232 [hereinafter ECHR].

⁴⁰ See Council of Europe, Ratification Table, http://www.coe.int/T/e/com/about_coe/member_states/default.asp (last visited Aug. 8, 2008).

⁴¹ American Convention on Human Rights Organization of American States Treaty, Nov. 22, 1969, B-32, O.A.S.T.S. 36 [hereinafter ACHR].

⁴² See Organization of American States, American Convention on Human Rights “Pact of San Jose, Costa Rica,” Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* <http://www.oas.org/juridico/English/signs/b-32.html> (last visited Aug. 8, 2008) (ratification table).

⁴³ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Int’l Conference of Am. States, 9th Conference, OEA/Ser.L/V/I.4 Rev. XX (May 2, 1948) [hereinafter ADHR].

⁴⁴ Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R. (Ser. A) No. 10, ¶ 43 (July 14, 1989).

⁴⁵ Statute of the Inter-American Commission on Human Rights, art. 1(2)(b), O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (BP Americas), adopted by the Inter-American Commission on Human Rights in 2008,⁴⁶
- African Charter on Human and Peoples' Rights (ACHPR),⁴⁷ joined by 53 State Parties.⁴⁸

In international armed conflict, this IHRL consensus is complemented by two IHL treaties: the Fourth Geneva Convention of 1949 on Protection of Civilians (Geneva IV),⁴⁹ joined by 194 State Parties including the U.S.,⁵⁰ and Additional Geneva Protocol I of 1977 (Geneva Protocol I),⁵¹ with 167 State Parties.⁵² During non-international armed conflict, Common Article 3 of the 1949 Geneva Conventions (Common Article 3)⁵³ and Additional Geneva Protocol II of 1977 (Geneva Protocol II),⁵⁴ with 163 State Parties,⁵⁵ govern in addition to IHRL.

IHRL and IHL apply in differing ways in the four international law settings. During peacetime IHRL applies to State Parties that have joined IHRL treaties, and to other States to the extent IHRL norms are recognized as customary international law. Despite unpersuasive objections by the United States⁵⁶ and Israel,⁵⁷ IHRL governs detentions of suspected terrorists

⁴⁶ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-Am. C.H.R., Res. 1/08 (Mar. 13, 2008) [hereinafter BP Americas].

⁴⁷ African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), 21 I.L.M. 58 (1982) [hereinafter ACHPR].

⁴⁸ See African Union, ACHPR, <http://www.africa-union.org/root/AU/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (last visited Aug. 8, 2008) (ratification table).

⁴⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

⁵⁰ This information is correct as of February 20, 2008. See Ratification Table at [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/) (last visited Aug. 8, 2008) [hereinafter Ratification Table].

⁵¹ Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Geneva Protocol I].

⁵² See Ratification Table, *supra* note 50.

⁵³ Common Article 3 is the identical Article 3 in each of the four 1949 Geneva Conventions, e.g., Geneva IV, *supra* note 49, art. 3.

⁵⁴ Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, U.N. Doc. A/32/144 Annex II, reprinted in 16 I.L.M. 1442, 1444 [hereinafter Geneva Protocol II].

⁵⁵ See Ratification Table, *supra* note 50.

⁵⁶ *Rasul v. Bush*, Brief for the Respondents, 2003 U.S. Briefs 334, at 38-39. The Government has taken the position that foreign citizen prisoners held outside the United States have no "substantive rights." See, e.g., *In re Guantanamo Detainee Cases*, 355 F.

outside a State's territory, so long as the detainees are within the effective custody and control of the State.⁵⁸

During public emergencies short of armed conflict, IHRL treaties continue to apply, subject to any derogation from the right to liberty lawfully made by State Parties.⁵⁹

During armed conflict, not only IHL, but also IHRL, applies. Contentions to the contrary by the United States⁶⁰ and Israel⁶¹ are not persuasive. For example, two IHRL treaties, the ECHR and ACHR, both expressly permit derogations from certain human rights in time of war.⁶² If they did not apply in war at all, no such treaty provisions would be necessary. In addition, the Convention Against Torture, to which the U.S. is a party, expressly prohibits torture even in a "state of war."⁶³

After canvassing the authorities, the International Court of Justice explained the relation of IHRL and IHL in international armed conflict as follows: some rights are exclusively matters of IHL, some are exclusively matters of IHRL, and some are matters of both IHL and IHRL. Where both

Supp. 2d 443, 454 (D.C. 2005), *vacated on other grounds sub nom* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd and remanded*, 128 S. Ct. 2229 (2008).

⁵⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Op., 2004 I.C.J. 136, ¶ 110 (July 9) [hereinafter *Palestinian Wall*].

⁵⁸ *Id.* ¶ 111 (explaining that ICCPR is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"); U.N. Human Rights Committee, General Comment no. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter HRC GC 31].

Extraterritorial application of the ECHR does not extend, however, to extraterritorial detentions carried out by State forces acting for the United Nations under a Chapter VII Security Council mandate. *See* Behrami v. France, App. No. 71412/01, 45 Eur. Ct. H.R. 41 (2007) (Grand Chamber), ¶¶ 144-52. In contrast, the ICCPR does apply to those "within the power or effective control of the forces of a State Party acting outside its territory, . . . such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." *Id.* ¶ 10.

See also R. (on the application of Al-Skeini et al.) v. Sec'y of State for Defence, (2007) U.K.H.L. 26, ¶¶ 6, 33, 84, 92, 99 & 151 (stating there is no jurisdiction under ECHR over killings of Iraqis shot by British patrols in Iraq, but jurisdiction over killing of Iraqi prisoner in British military detention).

⁵⁹ ICCPR, *supra* note 28, art. 4.1; ECHR, *supra* note 39, art. 15.1; ACHR, *supra* note 41, art. 27.1.

⁶⁰ Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba, 41 I.L.M. 1015, 1019 (2002) ("It is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in armed conflict.").

⁶¹ *Palestinian Wall*, Advisory Op., 2004 I.C.J. 136, ¶ 102.

⁶² ECHR, *supra* note 39, art. 15.1; ACHR, *supra* note 41, art. 27.1.

⁶³ CAT, *supra* note 29, art. 2.2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war . . . may be invoked as a justification of torture.").

apply, IHL supplies the *lex specialis*,⁶⁴ that is, the specific norm that prevails in the face of a more general IHRL norm.⁶⁵

However, the fact that IHL is *lex specialis* does not mean that it always prevails over IHRL. IHL not only sets its own standards for detention, but also expressly adopts IHRL norms, where those set higher bars. The “minimum”⁶⁶ IHL requirements for detention are set forth in Article 75 of Geneva Protocol I, a treaty ratified by the overwhelming majority of States.⁶⁷ Article 75 also represents customary international law, binding even those States, including the U.S., which are not parties to Geneva Protocol I.⁶⁸ It appears in a section of Geneva Protocol I whose rules are “additional” to “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict,”⁶⁹ meaning IHRL.⁷⁰ Moreover, it provides that it does not limit “any other more favourable provision granting greater protection, under any applicable rules of international law”⁷¹

Thus, whenever IHRL grants greater protection than IHL to persons detained in international armed conflict, IHL mandates that the detainees benefit from any more favorable provisions of IHRL.

In non-international armed conflict, Geneva Protocol II recognizes that persons may be deprived of liberty for reasons related to the armed conflict,⁷² and mandates that they be treated humanely,⁷³ but does not specify the grounds or procedures for detention. In the resulting absence of IHL *lex specialis*, IHRL norms govern the grounds, substantive limits and procedures for detention in non-international armed conflict.

This conclusion is reinforced by the Preamble to Geneva Protocol II, which recalls that “international instruments relating to human rights offer a basic protection to the human person.”⁷⁴ The authoritative Commentary by the International Committee of the Red Cross (ICRC) notes that such

⁶⁴ *Palestinian Wall*, Advisory Op., 2004 I.C.J. 136, ¶ 106.

⁶⁵ *Lex specialis* is short for *lex specialis derogate generali*, or, roughly translated from the Latin, “the special rule overrides the general rule.” Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 115, 132 (Malcolm D. Evans ed., 2d ed. 2006).

⁶⁶ Geneva Protocol I, *supra* note 51, art. 75.1.

⁶⁷ Geneva Protocol I has 167 State Parties. Ratification Table, *supra* note 50.

⁶⁸ Brief for Louise Doswald-Beck et al., as Amici Curiae Supporting Petitioner at 6-7 & nn.15-16, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

⁶⁹ Geneva Protocol I, *supra* note 51, art. 72.

⁷⁰ ICRC Guidelines, *supra* note 30, at 378.

⁷¹ Geneva Protocol I, *supra* note 51, art. 75.8.

⁷² Geneva Protocol II, *supra* note 54, art. 2.

⁷³ *Id.* arts. 4-6.

⁷⁴ *Id.* second preambular paragraph.

human rights instruments include the ICCPR, the Convention Against Torture, and regional human rights treaties.⁷⁵

In war or other emergency threatening the life of a nation, some IHRL rights—such as the rights not to be tortured or enslaved—cannot be suspended.⁷⁶ However, States may derogate from certain rights,⁷⁷ subject to the following limitations.

- Only certain rights are subject to derogation. These include the right to liberty of person,⁷⁸ but not the right of the detainee to seek prompt judicial review of the lawfulness of the detention.⁷⁹
- The nature, geographical scope and duration of the derogation must be no more than “strictly required” to meet the exigencies of the situation.⁸⁰
- The derogation must be non-discriminatory.⁸¹ For example, it may not impermissibly discriminate against foreign citizens.⁸²
- The derogation must not violate other norms of international law,⁸³ such as IHL, which continues to apply even if a State derogates from an IHRL treaty guarantee of the right to personal liberty.
- The derogating State must file a document with the treaty depository informing other State Parties of the articles from which it has derogated and the reasons why.⁸⁴

⁷⁵ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 [hereinafter ICRC COMMENTARY], *Commentary on Protocol II*, ¶¶ 4428-30 (Yves Sandoz et. al. eds., 1987).

⁷⁶ *E.g.*, ICCPR, *supra* note 28, art. 4.2 (providing that no derogation is allowed from provisions providing for right to life; freedom from torture and cruel, inhuman, or degrading treatment or punishment; freedom from slavery, slave trade, and servitude; freedom from imprisonment for debt; freedom from retroactive criminal laws; right to legal personality; and freedom of thought, conscience, religion, and belief).

⁷⁷ *Id.* art. 4.1 (“In time of public emergency which threatens the life of the nation”); ECHR, *supra* note 39, art. 15.1 (“[I]n time of war or other public emergency threatening the life of the nation”); ACHR, *supra* note 41, art. 27.1 (“In time of war, public danger, or other emergency that threatens the independence or security of a State Party”).

⁷⁸ *E.g.*, ICCPR, *supra* note 28, art. 4.2.

⁷⁹ *See infra* note 130.

⁸⁰ Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), ¶ 4, CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter HRC GC 29].

⁸¹ *See, e.g.*, ICCPR, *supra* note 28, art. 4.1 (allowing derogation, provided, among other conditions, that the measures taken “do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”).

⁸² *A. v. Sec’y of State for the Home Dep’t.*, [2004] UKHL 56, ¶ 67.

⁸³ *See, e.g.*, ICCPR, *supra* note 28, art. 4.1 (allowing States to derogate from ICCPR rights, provided, among other conditions, that the measures taken “are not inconsistent with their other obligations under international law”).

⁸⁴ *See, e.g., id.* art. 4.3.

Because of these restrictions on derogation, as discussed below, derogating from the right to personal liberty does not give a State *carte blanche* to detain suspected terrorists.

III. CONSENSUS OF IHRL AND IHL NORMS ON DETENTION

A consensus of norms in IHRL instruments, supplemented by IHL norms during armed conflict, provides a minimum core of protections for persons detained as suspected terrorists, in each of the four international law settings.⁸⁵ These core protections are as follows.

Grounds.⁸⁶ Under IHRL the detention must not be arbitrary, and must be based on grounds previously established by law. Under IHL, detentions of foreign citizen non-combatants are permitted only where “absolutely necessary” to security,⁸⁷ or where “necessary, for imperative reasons of security.”⁸⁸

Substantive Restrictions.⁸⁹ The detention must be proportional, that is, no more restrictive or prolonged than strictly required by the exigencies of the security situation. It must also be non-discriminatory, including as between citizens and foreigners.

Procedures.⁹⁰ The detention must be based on procedures previously established by law and:

- Must be registered,
- Must not be incommunicado for more than a few days,
- Must inform the detainee of the reasons for detention and, if she is foreign, of her right to communicate with her consulate for assistance,
- Must be subject to prompt and effective judicial control, at least on the initiative of the detainee, and
- Must afford the detainee a fair judicial hearing on the lawfulness of the detention.

⁸⁵ Most elements of this consensus may also represent customary international law, binding even when the instruments themselves are not binding or where binding treaties have not been ratified by some States. However, one would have to analyze the extent of State practice and *opinio juris* to determine whether all elements of the consensus amount to customary law. See generally Thirlway, *supra* note 65, at 121-27 (explaining formation of customary international law).

⁸⁶ See *infra* Part V.b–c.

⁸⁷ Geneva IV, *supra* note 49, art. 42.

⁸⁸ *Id.* art. 78.

⁸⁹ See *infra* Part V.b–c.

⁹⁰ See *infra* Part VI.

Treatment of Detainee.⁹¹ The conditions of detention must be humane, and the detainee must be provided with access to regular medical evaluation and treatment.

Compensation.⁹² The detainee must have a right to be compensated for unlawful detention.

Other International Law. Under IHRL the detention must comply with all other applicable requirements of international law, including IHL in armed conflict.⁹³ Likewise, under IHL the detention must respect any “more favourable” provisions of IHRL.⁹⁴

Additional safeguards protect persons detained for purposes of criminal prosecution. They must be promptly informed of the criminal charge,⁹⁵ their detention must be no more restrictive or prolonged than justified by such “essential reasons” as the risks of flight, repetition of the offense, or interference with justice,⁹⁶ and they must in any event be brought to trial with reasonable expedition.⁹⁷

In Europe, additional restrictions are imposed on preventive detentions for security purposes. Such detentions are permitted in Europe, if at all, only by temporary and limited derogation from the right to liberty.⁹⁸

The following Parts elaborate on the legal and policy implications of the consensus of IHRL and IHL norms in the contexts of detention for criminal law enforcement (Part IV) and preventive detention for security purposes (Part V).

IV. DETENTION OF SUSPECTED TERRORISTS FOR PURPOSES OF CRIMINAL PROSECUTION

A. UNDER IHRL

Prosecution of suspected terrorists, as opposed to prosecutions of those who provide “material support” to terrorist groups,⁹⁹ can be exceedingly difficult for a number of reasons. The grounds for suspicion may be based on inadmissible intelligence information. For instance, intelligence

⁹¹ See *infra* Part VII.

⁹² See *infra* Part VII.

⁹³ See, e.g., ICCPR, *supra* note 28, art. 4.1 (in derogation).

⁹⁴ See *supra* notes 69-70 and accompanying text.

⁹⁵ ICCPR, *supra* note 28, art. 9.2.

⁹⁶ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 233 (2d rev. ed. 2005).

⁹⁷ ICCPR, *supra* note 28, art. 9.3.

⁹⁸ See *infra* Part V.e.

⁹⁹ Liptak, *supra* note 3.

agencies may be reluctant to allow prosecutors to reveal the nature and targeting of electronic and other means of surveillance, or the identities of human intelligence agents, or the fact that these agents have infiltrated or otherwise have access to information about terrorist groups. Information received from foreign intelligence agencies may have been procured by torture, rendering it inadmissible in court.¹⁰⁰ Secretive terrorist operatives may leave little evidentiary trail, perhaps enough to raise a reasonable suspicion but not enough to show probable cause, let alone guilt beyond a reasonable doubt. Interrogation may be frustrated because terrorists are trained to resist standard interrogation techniques. Witnesses may fear to testify. Proving international terrorism may require witnesses from overseas, who may be unwilling or unable to come to court.

Prosecutions do sometimes succeed. Shoe bomber Richard Reid, Zacarias Moussaoui, and the 1993 World Trade Center bombers were all convicted and sentenced to prison.¹⁰¹ So, too, was Jose Padilla, although the wide conspiracy net used to convict him, on very little evidence, is troubling.¹⁰² German courts eventually found a way to convict Mounir El Motassadeq, after initially acquitting him, because the U.S. refused at first to provide statements from Al Qaeda prisoners in secret CIA prisons, before finally agreeing to provide summaries of the interrogations.¹⁰³ Still, the difficulties remain daunting.

When prosecutions are attempted, pretrial detention must comply with the consensus of IHRL and IHL norms summarized in Part III above. Most countries easily meet the requirement that the grounds¹⁰⁴ and procedures¹⁰⁵

¹⁰⁰ See *A. v. Sec'y of State for the Home Dep't.* (No 2), [2005] UKHL 71, [2006] 2 AC 221.

¹⁰¹ See *United States v. Moussaoui*, 483 F.3d 220, 220 n.1 (4th Cir. 2007); *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004); *United States v. Yousef*, 327 F.3d 56, 78, 80 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

¹⁰² E.g., John Farmer, Op-Ed., *A Terror Threat in the Courts*, N.Y. TIMES, Jan. 13, 2008, 4-14.

¹⁰³ Associated Press, *9/11 Suspect's Acquittal Is Overturned*, CHI. TRIB., Nov. 17, 2006, at 14; John Crewdson, *Only 9/11 Conviction Tossed Out in Germany; Judges Cite Lack of Cooperation by U.S. Government*, CHI. TRIB., Mar. 5, 2004, at 1; *U.S. Offers Evidence for Sept. 11 Retrial*, CHI. TRIB., May 14, 2005, at 6.

¹⁰⁴ ICCPR, *supra* note 28, art. 9.1; ACHR, *supra* note 41, art. 7.2 (“No one shall be deprived of his physical liberty except for the reasons . . . established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”); ACHPR, *supra* note 47, art. 6 (“No one may be deprived of his freedom except for reasons . . . previously laid down by law.”); ADHR, *supra* note 43, art. XXV (“No person may be deprived of his liberty except in the cases . . . established by pre-existing law.”).

Pejic asserts the general principle that “[i]nternment/administrative detention must conform to the principle of legality.” Pejic, *supra* note 30, at 383. In this context, the principle of legality “means that a person may be deprived of liberty only for reasons

for pretrial detention be previously established by law. Prosecutions in US federal court plainly meet these requirements.¹⁰⁶ Detention for trial by military commission, however, may not.¹⁰⁷

IHRL also prohibits “arbitrary” pretrial detention.¹⁰⁸ This prohibition incorporates the principle of proportionality. Detention is not permitted except to the extent necessary to achieve a purpose relevant to the criminal prosecution, such as avoiding flight, repeating the offense or interference with witnesses.¹⁰⁹ The ICCPR states that pretrial detention must not be the “general rule.”¹¹⁰ The Human Rights Committee elaborates that pretrial

(substantive aspect) and in accordance with procedures (procedural aspect) that are provided for by domestic and international law.” *Id.*

¹⁰⁵ ICCPR, *supra* note 28, art. 9.1 (“No one shall be deprived of his liberty except . . . in accordance with such procedures as are established by law.”); ACHR, *supra* note 41, art. 7.2 (“No one shall be deprived of his physical liberty except . . . under the conditions established beforehand by the constitution . . . or by a law . . .”); ACHPR, *supra* note 47, art. 6 (“No one may be deprived of his freedom except for . . . conditions previously laid down by law.”); ADHR, *supra* note 43, art. XXV (“No person may be deprived of his liberty except . . . according to the procedures established by pre-existing law.”); BP, *supra* note 37, princ. 2 (“[D]etention . . . shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.”); BP Americas, *supra* note 46, princ. IV. The ICRC treats this procedural requirement as the procedural aspect of the more generally applicable “principle of legality.” ICRC Guidelines, *supra* note 30, at 383.

Although, as noted in the preceding text, the ECHR does not allow security detention except, perhaps, by derogation. ECHR Article 5.1 states generally, “No one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law.” ECHR, *supra* note 39. In view of the emphasis in *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A, no. 3) 15, ¶ 37 (1961), on the procedural “safeguards” for the Irish security detention under derogation from Article 5, one might expect the European Court, if it were to allow a security detention under derogation today, to require that it be done pursuant to a procedure prescribed by law.

¹⁰⁶ *E.g.*, 18 U.S.C. § 3041 (2008) (granting federal judges and magistrates the power to order pretrial detention).

¹⁰⁷ *E.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding that military commission’s structures and procedures violated Uniform Code of Military Justice).

¹⁰⁸ ICCPR, *supra* note 28, art. 9.1; UDHR, *supra* note 33, art. 9; ACHR, *supra* note 41, art. 7.3; ACHPR, *supra* note 47, art. 6; BP Americas, *supra* note 46, princ. III.1. The ADHR Article XXV is entitled “Right of Protection from Arbitrary Arrest.” ADHR, *supra* note 43, art. XXV. Although protection against arbitrary detention is not explicit in ECHR Article 5, it is doubtless implicit. *E.g.*, *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, ¶ 76 (“Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness and to ensure the rule of law.”).

¹⁰⁹ NOWAK, *supra* note 96, at 233; BP Americas, *supra* note 46, princ. III.2.

¹¹⁰ ICCPR, *supra* note 28, art. 9.3; BP Americas, *supra* note 46, princ. III.2.

detention must be the exception, not the rule.¹¹¹ Even so, when there is enough evidence to initiate criminal proceedings against terrorists, prosecutors should be able to justify pretrial detention. Most courts readily accept that alleged terrorists, especially international terrorists, pose a flight or danger risk.

A more problematic norm for prosecuting terrorists is the requirement that pretrial detainees be brought “without delay” before a judge to determine the lawfulness of their detention, and to order release if the detention is not lawful.¹¹² The Human Rights Committee interprets “without delay” in this context to mean not more than a “few days.”¹¹³

This leaves prosecutors scant time after arrest to assemble sufficient admissible evidence to persuade a judge to order pretrial detention. Because of this time squeeze, British legislation in the 1980s allowed suspected terrorists in Northern Ireland to be detained for up to seven days before being brought before a judge. This practice was challenged before the European Court of Human Rights, for failure to bring suspects “promptly” before a judge. In defending the seven-day maximum period of police detention, the British government argued that:

[I]n view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was . . . indispensable [T]hey drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces. . . .

[T]he Government pointed out the difficulty, in view of the acute sensitivity of some of the information on which the suspicion was based, of producing it in court. Not only would the court have to sit in camera but neither the detained person nor his legal advisers could be present or told any of the details. This would require a fundamental and undesirable change in the law and procedure of the United Kingdom under which an individual who is deprived of his liberty is entitled to be represented by his legal advisers at any proceedings before a court relating to his detention. If entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse . . . and could lead to unanswerable criticism of the judiciary.¹¹⁴

¹¹¹ U.N. Human Rights Committee, General Comment No. 8, Right to Liberty and Security of Persons, Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, Annex V, ¶ 3 (June 30, 1982) [hereinafter HRC GC 8].

¹¹² ICCPR, *supra* note 28, art. 9.4.

¹¹³ HRC GC 8, *supra* note 111, ¶ 2.

¹¹⁴ *Brogan v. United Kingdom*, 11 Eur. H.R. Rep. 117, ¶ 56 (1988).

In response, the European Court accepted that “the investigation of terrorist offences undoubtedly presents the authorities with special problems.”¹¹⁵ It further agreed that, “subject to the existence of adequate safeguards, the context of terrorism . . . has the effect of prolonging the period during which the authorities may . . . keep a person suspected of serious terrorist offences in custody before bringing him before a judge”¹¹⁶ Even so, these difficulties could not justify “dispensing altogether with ‘prompt’ judicial control.”¹¹⁷ The Court held that even a detention as brief as four days and six hours, without the suspect’s being brought before a judge, failed to meet the test of “promptly.”¹¹⁸

Both U.S. law and IHRL,¹¹⁹ for good reason, guarantee suspects in serious criminal cases the right to counsel. This right, however, poses a further obstacle to prosecuting suspected terrorists. In the U.S. at least, counsel routinely advise suspects in custody not to talk to police or prosecutors. Thus prosecutors must obtain the evidentiary basis for pretrial detention, and for eventual trial, from other sources, subject to all the difficulties noted above.

Prompt access to counsel may also disrupt the psychodynamics of the interrogation process. Successful interrogation may turn on the suspect’s developing a degree of rapport, even a relationship of dependency, with the interrogator. That process takes time. If suspects believe they can turn instead to their lawyers and to the courts for assistance, some argue that they are less likely to provide useful information to interrogators.¹²⁰

These points were detailed by the Director of the Defense Intelligence Agency (DIA), Vice Admiral Lowell E. Jacoby, in support of an unsuccessful effort by the government to deny counsel access to Jose Padilla, a U.S. citizen held in military detention. Admiral Jacoby explained:

DIA’s approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of

¹¹⁵ *Id.* ¶ 61.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶ 62.

¹¹⁹ *See, e.g.*, FED. R. CRIM. P. 44(a) (providing for right to counsel “at every stage of the proceeding from initial appearance through appeal”); BP Americas, *supra* note 46, princ. V (“All persons deprived of liberty shall have the right to . . . legal counsel . . . without delays . . . from the time of their capture or arrest and necessarily before their first declaration before the competent authority.”).

¹²⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 598 (2004) (Thomas, J., dissenting).

situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences on the interrogation process.¹²¹

The District Court was not persuaded. In the absence of any examples of interrogations disrupted by access to counsel, or of specific information about Padilla's interrogation, the Court viewed the Admiral's statements as "speculative."¹²² They were not "wrong"; indeed, they were "plausible," albeit not convincing.¹²³ In any event they could not overcome Padilla's statutory right to counsel.¹²⁴

For suspects detained for purposes of criminal prosecution in the U.S., IHRL adds no new obstacles in this respect because the suspect is already entitled by the U.S. Constitution to a lawyer's assistance while in custodial interrogation.¹²⁵ But it is not clear that this constitutional safeguard protects foreign suspects detained outside the U.S.¹²⁶ In such cases IHRL, which protects persons outside the U.S. who are in the effective custody and control of the U.S.,¹²⁷ makes it difficult to interrogate a suspect long enough to get good information before allowing him assistance of counsel and bringing him "without delay" before a judge.

B. UNDER DEROGATION

One might imagine that by derogating from the right to liberty, or at least from the requirement to bring suspects "without delay" before a judge, a State could escape from the tight time periods allowed by IHRL for police interrogation before suspected terrorists must be afforded access to counsel and court. But derogation does not gain police much more time.

¹²¹ Padilla v. Rumsfeld, 243 F. Supp. 2d. 42, 49 (S.D.N.Y. 2003).

¹²² *Id.* at 51-52.

¹²³ *Id.* at 53.

¹²⁴ *Id.* at 53-54.

¹²⁵ Escobedo v. Illinois, 378 U.S. 478, 487 (1964).

¹²⁶ Compare United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (holding that Fourth Amendment protection against unreasonable searches and seizures does not protect aliens outside the U.S.) with Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008) (holding that constitutional privilege of habeas corpus protects alien prisoners detained under de facto U.S. sovereignty at Guantanamo).

¹²⁷ HRC GC 31, *supra* note 58, ¶ 10.

Derogation is not a *carte blanche*. Measures adopted under derogation—such as pretrial detention without judicial control—must be no more long-lasting than “strictly required” by the exigencies of the emergency justifying derogation.¹²⁸

A threshold obstacle is that a detainee’s right to go before a judge, secured by the writ of habeas corpus in common law systems, is non-derogable. Although the ICCPR does not list the rights to liberty and to appear before a judge as non-derogable,¹²⁹ the U.N. Human Right Committee takes the view that the right of access to a court is essential to guarantee *other* non-derogable rights, such as the right not to be tortured. Therefore, in the Committee’s view, the right of access to a judge is itself non-derogable.¹³⁰ This view is in accord with the language of the ACHR¹³¹ and with the jurisprudence of the Inter-American Court of Human Rights.¹³²

Even if the right of access to a court is non-derogable, States may nonetheless attempt to derogate from the requirement that such access be afforded “promptly,” or at least as promptly as would ordinarily be required. If they succeed, this would allow police additional time to detain a suspect before bringing him before a judge.

Additional time, yes, but not much. After British police detentions of terrorists for periods as brief as four and a half days were invalidated by the European Court, the UK derogated from the right to liberty under the ECHR in order to authorize detention of terrorist suspects for up to seven days without judicial supervision. In *Brannigan v. United Kingdom*,¹³³ the European Court upheld this derogation measure. The Court stressed the availability of safeguards, especially the detainee’s access to habeas corpus, his absolute and legally enforceable right of access to a lawyer within forty-

¹²⁸ See *supra* note 80 and accompanying text.

¹²⁹ ICCPR, *supra* note 28, art. 4.2.

¹³⁰ HRC GC 29, *supra* note 80, ¶ 16.

¹³¹ ACHR, *supra* note 41, art. 27.2 (establishing that States may not derogate from the “judicial guarantees essential for the protection of . . . [non-derogable] rights.”).

¹³² Habeas Corpus in Emergency Situation, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (Ser. A) No. 9 (Oct. 6, 1987) (stating that habeas corpus is non-derogable).

¹³³ 17 Eur. H.R. Rep. 539 (1993). The British statute did not purport to authorize security detention in the sense used in this Article, i.e., not related to criminal prosecution. Rather, the statute extended the time during which police could detain a suspect while gathering evidence for criminal prosecution. *Id.* ¶ 13-17. But nothing in the court’s opinion suggests that it would have allowed a longer detention, or one with fewer procedural safeguards, if there had been no connection to a possible criminal prosecution. Thus *Brannigan*’s strict scrutiny of the length and procedures for police detention may be taken to apply, with at least equal force, to security detentions where no criminal prosecution is contemplated.

eight hours of detention, his right to inform a friend or relative of his detention, and his right to have access to a doctor.¹³⁴

This was not much of a victory for police and prosecutors. Britain's derogation gained only a few additional days before suspects had to be brought before a judge. Even this extension depended in part on the suspect's right to see a lawyer within forty-eight hours, as well as his right to file a habeas petition.

Although it upheld British police detentions of up to seven days, the European Court later ruled that the detentions without judicial control authorized by Turkish derogations were too lengthy. In *Aksoy v. Turkey*,¹³⁵ the Court found that a detention of a suspected terrorist for fourteen days without judicial supervision was "exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture."¹³⁶ Moreover, the Government failed to adduce any "detailed reasons . . . as to why the fight against terrorism . . . rendered judicial intervention impracticable."¹³⁷ In subsequent cases the Court ruled against Turkey's detentions of as few as eleven days without judicial supervision.¹³⁸

Whether or not a State derogates from the right of detainees to be brought promptly before a judge, then, the strict time limits for police detention allowed by IHRL may make prosecution of suspected terrorists very difficult. When police catch the suspect in the act, as in the shoe bomber case discussed above, a conviction or guilty plea may be obtained anyway. But in many cases, the obstacles to prosecution may lead States to look for other, more practical ways to remove suspected terrorists from the streets.

V. PREVENTIVE DETENTION FOR SECURITY PURPOSES:

In part to avoid legal constraints on pretrial detention of suspected terrorists for prosecution, the U.S. and other States have resorted to preventive detention of suspected terrorists as threats to security.

¹³⁴ *Id.* ¶ 62-64.

¹³⁵ [1996-IV] Eur. Ct. H.R. 2260.

¹³⁶ *Id.* at 2282, ¶ 78.

¹³⁷ *Id.*

¹³⁸ *Sen v. Turkey*, [2003] Eur. Ct. H.R. 41478/98, ¶ 28 (2003), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=671607&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (holding that eleven days detention without judicial intervention not justified under derogation from Article 5); *Demir v. Turkey*, [1998] Eur. Ct. H.R. 21380/93, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696107&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (holding that sixteen to twenty-three days incommunicado detention without judicial supervision not justified under derogation from Article 5).

A. DETENTION FOR INTERROGATION

Suspects detained for security purposes are also interrogated for intelligence purposes. However, it is important to distinguish preventive detention for purposes of security from detention for purposes of interrogation. Indefinite detention solely or primarily for purposes of intelligence interrogation is probably not lawful under U.S. or international law.¹³⁹ In the U.S., in response to an argument that the Congressional resolution authorizing use of military force after 9/11 does not authorize indefinite detention, a Supreme Court plurality commented, “Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”¹⁴⁰

IHL also forbids indefinite detention for purposes of interrogation. In the opinion of the Chairperson of the U.N. Working Group on Arbitrary Detention and the U.N. Special Rapporteur on the independence of judges and lawyers, “The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the . . . Geneva Conventions.”¹⁴¹ An ICRC lawyer has likewise argued that detention should never be permitted “for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security.”¹⁴²

In peacetime, IHRL does not explicitly forbid detention solely for purposes of intelligence interrogation. But detention solely or primarily for purposes of intelligence gathering may be “arbitrary” and thus violate IHRL. The two U.N. experts mentioned above concluded that at Guantanamo, “Information obtained from reliable sources and the interviews . . . with former Guantanamo Bay detainees confirm, . . . that the objective of the ongoing detention is not primarily to prevent combatants

¹³⁹ This excludes persons subject to finite detentions for interrogation as possible material witnesses in connection with criminal proceedings, which in the U.S. are governed by statute. *See generally* 18 U.S.C. § 3144 (2007); *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005). The concept of “security detention” used here corresponds to the IHL terms used interchangeably by the ICRC, namely *internment* and *administrative detention*, except that they are used only for detentions in “armed conflict and in other situations of violence.” ICRC Guidelines, *supra* note 30, at 376.

¹⁴⁰ *Hamdi v. Rumsfeld*, 542 U.S. 509, 521 (2004).

¹⁴¹ Chairperson of the Working Group on Arbitrary Detentions et al., *Report: Situation of Detainees at Guantanamo Bay*, ¶ 23 & n.23, delivered to the U.N. Comm. on Human Rights, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) [hereinafter *Guantanamo Bay*] (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 17(3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force for the United States Feb. 2, 1956) [hereinafter *Geneva III*]; Geneva IV, *supra* note 49, art. 31); *see also* Geneva IV, *supra* note 49, arts. 42 (permitting detention only if “absolutely necessary” for security), 78 (allowing detention only if “necessary, for imperative reasons of security”).

¹⁴² Pejic, *supra* note 30, at 380.

from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaida network.”¹⁴³ This finding was one factor in their determination that “the ongoing detention of Guantanamo Bay detainees as ‘enemy combatants’ does in fact constitute an arbitrary deprivation of the right to personal liberty.”¹⁴⁴

If detention solely or primarily for interrogation is to be permitted at all—a doubtful proposition—the IHRL proportionality standard discussed in detail below suggests, at minimum, that both the probability of obtaining, and the security value of expected intelligence, must be very high to warrant prolonged detention.

B. PREVENTIVE DETENTION FOR SECURITY UNDER IHRL.

The general consensus of IHRL instruments on security detention was summarized a quarter century ago by the Human Rights Committee, which interpreted the ICCPR as follows:

[I]f so-called *preventive detention* is used, for reasons of public security . . . it must not be arbitrary, and must be based on grounds and procedures established by law . . . information of the reasons must be given . . . and court control of the detention must be available . . . as well as compensation in the case of a breach¹⁴⁵

The prohibition on “arbitrary” detention has both a substantive and a procedural dimension. The substantive dimension requires, among other things, that detentions be *proportional* to their security justification.¹⁴⁶ In his treatise on the ICCPR, Manfred Nowak reports that the majority of delegates in the ICCPR drafting debates stressed that the concept of “arbitrary” contained “elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American principle of due process of law.”¹⁴⁷ Taking into account this “historical background,” Nowak concludes that “the prohibition of arbitrariness is to be interpreted broadly. Cases of deprivation of liberty . . . must not be manifestly disproportional, unjust or unpredictable”¹⁴⁸

Even under derogation from the right to liberty, IHRL treaty derogation provisions require that security detention must be proportional, that is, no more restrictive or long-lasting than “strictly required” by the

¹⁴³ *Guantanamo Bay*, *supra* note 141, ¶ 23.

¹⁴⁴ *Id.* ¶ 20.

¹⁴⁵ HRC GC 8, *supra* note 111, ¶ 4.

¹⁴⁶ BP Americas, *supra* note 46, princ. III.2.

¹⁴⁷ NOWAK, *supra* note 96, at 225, ¶ 29.

¹⁴⁸ *Id.* at 225, ¶ 30.

exigencies of the situation.¹⁴⁹ This is consistent with IHL substantive standards, which allow security detention of foreign nationals in a party's territory only if "absolutely necessary" to security,¹⁵⁰ or in occupied territory only if "necessary, for imperative reasons for security."¹⁵¹

Interpreting the ECHR "proportionality" requirement for derogations, the British Law Lords explain:

In determining whether a limitation is arbitrary or excessive, the court must ask itself:

Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.¹⁵²

Prevention of terrorism is plainly a "sufficiently important" legislative goal to justify limiting personal liberty. Preventive detention is "rationally connected" to the goal. The issue is whether the means, deprivation of a fundamental right to liberty,¹⁵³ are "no more than is necessary."

The prohibition of arbitrary detention also has a procedural dimension. In a 2002 legal opinion on U.S. security detentions, the U.N. Working Group on Arbitrary Detention considered two persons allegedly detained on U.S. territory for fourteen months in solitary confinement, without being officially informed of any charges, without being able to communicate with their families, and without a court being asked to rule on the lawfulness of their detention. The Working Group found their detentions "arbitrary," in view of ICCPR articles 9 and 14, which "guarantee, respectively, the right

¹⁴⁹ ICCPR, *supra* note 28, art. 4.1 ("to the extent strictly required by the exigencies of the situation"); ECHR, *supra* note 39, art. 15.1 (same); ACHR, *supra* note 41, art. 27.1 ("to the extent and for the period of time strictly required by the exigencies of the situation"). The Inter-American Commission on Human Rights recognizes that deprivation of liberty may be justified in connection with the "administration of state authority" outside the criminal justice context where such measures are "strictly necessary." Inter-Am. C.H.R., *Report on Terrorism and Human Rights*, OAE/Ser.L/V/II.116, doc. 5, rev. 1 corr., ¶ 124 (Oct. 22, 2002) [hereinafter *Report on Terrorism and Human Rights*].

¹⁵⁰ Geneva IV, *supra* note 49, art. 42.

¹⁵¹ *Id.* art. 78.

¹⁵² *A. v. Sec'y of State for the Home Dep't.*, [2004] UKHL 56, ¶ 30.

¹⁵³ *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *A.*, [2004] UKHL 56, ¶ 190 (Lord Walker, J.) (noting "one of the most fundamental human freedoms—freedom from imprisonment for an indefinite period, without indictment, trial or conviction on a criminal charge").

to a review of the lawfulness of detention by a competent judicial authority and the right to a fair trial.”¹⁵⁴

The Working Group also addressed the situation of persons detained at Guantanamo Bay. In the absence of a determination of their prisoner of war status by a competent tribunal, and without the procedural guarantees of ICCPR articles 9 and 14 having been afforded to detainees not determined to be POWs, the Working Group found the Guantanamo detentions to be “arbitrary.”¹⁵⁵

In sum, detentions are prohibited as “arbitrary” by IHRL, either because they are disproportionate or otherwise substantively unreasonable, or because they are procedurally deficient.

C. SECURITY DETENTION UNDER IHL

In international armed conflict, Geneva IV allows internment of foreign nationals in a State’s territory only if “absolutely necessary” to security, or in occupied territory only if “necessary, for imperative reasons of security.”¹⁵⁶

These demanding standards, however, apply only to “protected persons” under Geneva IV.¹⁵⁷ They do not apply to the detaining State’s nationals, or to citizens of neutral or co-belligerent States that maintain normal diplomatic relations with the detaining State.¹⁵⁸ These citizens were omitted from protection because the 1949 Geneva Conventions, which predate modern IHRL, assumed that sovereign States could be left unencumbered to protect their own citizens. Not until after IHRL treaties were adopted in the 1960s and 1970s¹⁵⁹ did Article 75 of Additional Geneva Protocol I of 1977 grant even minimal protections to non-enemy citizens who are “detained or interned for reasons related to the armed conflict.”¹⁶⁰

Yet Article 75 did not specify the permissible grounds for such detention. Detainees who are not “protected persons” under IHL are thus left to the protection of IHRL with respect to the grounds of detention, namely that the detention not be arbitrary and that it be proportional and based on grounds and procedures previously established by law. The

¹⁵⁴ U.N. Comm. on Human Rights, Report of the Working Group on Arbitrary Detention, ¶ 64, U.N. Doc. E/CN.4/2003/8 (Dec. 16, 2002).

¹⁵⁵ *Id.*

¹⁵⁶ Geneva IV, *supra* note 49, arts. 42, 78. The ICRC derives from these Articles the general principle that “Internment/administrative detention is an exceptional measure.” ICRC Guidelines, *supra* note 30, at 380.

¹⁵⁷ Geneva IV, *supra* note 49, arts. 42, 78.

¹⁵⁸ *Id.* art. 4.

¹⁵⁹ The ICCPR was adopted in 1966 and went into force in 1976. *See supra* note 28.

¹⁶⁰ Geneva Protocol I, *supra* note 51, art. 75.6.

resulting protection against unnecessary deprivation of liberty under IHRL is comparable to that which the 1949 Geneva Convention (Geneva IV) provides to “protected persons.”

Both aspects of the IHRL ban on arbitrary detentions—substantive and procedural—are consistent with IHL. The proportionality requirement is consistent with the Geneva IV detention standards of “absolutely necessary” or “necessary, for imperative reasons of security.” It is further consistent with the Geneva IV requirements of periodic review of the justification for detention,¹⁶¹ and of mandatory release as soon as the needs of security allow.¹⁶²

From the IHL standards for detention, and from IHL rules against collective punishment, the ICRC derives the general principle that “Internment or administrative detention can only be ordered on an individual case-by-case basis”¹⁶³ The IHRL requirement of proportionality is consistent with this IHL principle as well.

Security detention in international armed conflict must also be non-discriminatory,¹⁶⁴ including as between citizens and foreigners.¹⁶⁵ This does not mean that there can be no distinction based on nationality; as noted above, the very definition of “protected person” under Geneva IV turns on the nationality of the detainee. However, any difference in treatment based on nationality must be justified by “very weighty reasons.”¹⁶⁶ In the case of Geneva IV, these reasons reflect the relevant purpose of IHL in 1949—to protect citizens of one party to the conflict from detentions by an opposing party unless “absolutely necessary” to security—while leaving a State’s own citizens to its presumed solicitude, and leaving citizens of neutral or co-belligerent States to the shelter of “normal diplomatic relations.”¹⁶⁷

In non-international armed conflict, Additional Protocol II contemplates that persons may be deprived of liberty “for reasons related to

¹⁶¹ Geneva IV, *supra* note 49, arts. 43, 78.

¹⁶² *Id.* arts. 43, 132; Geneva Protocol I, *supra* note 51, art. 75(3). The ICRC asserts the general principle that “Internment/administrative detention must cease as soon as the reasons for it cease to exist.” ICRC Guidelines, *supra* note 30, at 382.

¹⁶³ ICRC Guidelines, *supra* note 30, at 381.

¹⁶⁴ ICCPR, *supra* note 28, arts. 2.1, 26; ACHR, *supra* note 41, arts. 1.1, 24; ADHR, *supra* note 43, art. II; ACHPR, *supra* note 47, arts. 2, 3; BP, *supra* note 37, 5.1; BP Americas, *supra* note 46, princ. II. The ICRC likewise adopts the general principle that “Internment/administrative detention can only be ordered on an individual case-by-case basis, without discrimination of any kind.” ICRC Guidelines, *supra* note 30, at 381.

¹⁶⁵ *See* A v Sec’y of State for the Home Dep’t., [2004] UKHL 56, ¶¶ 45-69; HRC GC 29, *supra* note 80, ¶ 8.

¹⁶⁶ A., [2004] UKHL 56, ¶ 48; *Gaygusuz v. Austria*, 23 Eur. Ct. H.R. 364, ¶ 42 (1996).

¹⁶⁷ Geneva IV, *supra* note 49, art. 4.

the armed conflict,”¹⁶⁸ but does not spell out on what grounds this may occur. IHRL therefore governs in this IHL vacuum: the detention must not be arbitrary and must be proportional and based on grounds previously established by law.

D. SECURITY DETENTION OUTSIDE OF EUROPE

Outside Europe, the question is not whether security detention of suspected terrorists is permitted, but whether it meets the IHRL criteria summarized above, or satisfies comparable IHL criteria in wartime. The detention must not be arbitrary or disproportionate (i.e., it must be no more than strictly necessary to the objective of preventing terrorism), it must rest on grounds¹⁶⁹ and procedures¹⁷⁰ previously established by law, and it must not be discriminatory.¹⁷¹

Is prolonged or indefinite deprivation of the fundamental right of liberty, without criminal charge or conviction, ever a proportionate response to terrorism? If so, the proportionality of the detention, and hence its lawfulness under IHRL, depends in part on whether there is sufficient evidence against a particular suspect.¹⁷² But how much evidence is enough? Here we encounter a notable gap in current IHRL: the absence of a standard for the quantum or quality of evidence needed to justify a security detention. A standard of “some evidence” is palpably too low.¹⁷³ So is a standard of mere “reasonable suspicion,” which is the standard required by the Fourth Amendment to the U.S. Constitution for police to conduct a brief “stop and frisk.”¹⁷⁴ A standard of “credible evidence”

¹⁶⁸ Geneva Protocol II, *supra* note 54, art. 5.1.

¹⁶⁹ ICCPR, *supra* note 28, art. 9.1; ACHR, *supra* note 41, art. 7.2 (“No one shall be deprived of his physical liberty except for the reasons . . . established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”); ACHPR, *supra* note 47, art. 6 (“No one may be deprived of his freedom except for reasons . . . previously laid down by law.”); ADHR, *supra* note 43, art. XXV (“No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.”).

The ICRC asserts the general principle that “Internment/administrative detention must conform to the principle of legality.” In this context, the principle of legality “means that a person may be deprived of liberty only for reasons (substantive aspect) and in accordance with procedures (procedural aspect) that are provided for by domestic and international law.” ICRC Guidelines, *supra* note 30, at 383.

¹⁷⁰ ICCPR, *supra* note 28, art. 9.1.

¹⁷¹ *A.*, [2004] UKHL 56, ¶¶ 46, 67.

¹⁷² See *BP Americas*, *supra* note 46, princ. III.2 (noting that “sufficient evidentiary elements” are required for any preventive detention of liberty).

¹⁷³ *Hamdi v. Rumsfeld*, 542 U.S. 509, 537 (2004) (noting that the “some evidence” standard is “inadequate” because it is a “standard of review, not a standard of proof”).

¹⁷⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

should, at most, merely shift the burden to the detainee to refute the government's evidence.¹⁷⁵ A standard of "probable cause," enough to justify an arrest or search warrant under the Fourth Amendment, seems hardly sufficient for a prolonged deprivation of liberty. Arguably nothing less than a "preponderance of the evidence," the standard for civil liability, should be required to justify a prolonged or indefinite deprivation of liberty.¹⁷⁶

Whatever the standard for an initial, brief detention—perhaps "probable cause"—proportionality counsels that the standard should be higher for a prolonged detention. But how much higher? IHRL jurisprudence needs to fill this gap with a standard sufficiently respectful of the fundamental nature of the right to liberty.¹⁷⁷

E. SECURITY DETENTION IN COUNCIL OF EUROPE MEMBER STATES

In Europe the legal restrictions on security detention are stricter. ECHR Article 5, which guarantees the right to liberty, prohibits preventive detention for security purposes. If security detention in Europe is permitted at all, it is allowed only by derogation from Article 5.

In its very first judgment in 1961, the European Court of Human Rights upheld Ireland's security detention of an IRA activist, carried out by derogation from Article 5.¹⁷⁸ Four decades later, however, the British Law Lords interpreted the ECHR and ruled that a British law allowing security detention of foreign nationals, enacted by derogation from Article 5, failed the tests of proportionality and non-discrimination required of derogations, and was thus incompatible with the ECHR.¹⁷⁹ In light of the recent British ruling, as well as recent rulings of the European Court of Human Rights, it is unclear whether prolonged security detention can still be justified by derogation from the ECHR.

1. Right to Liberty Under the ECHR

Unlike the other IHRL instruments considered here, the ECHR enumerates an exclusive list of permissible grounds for detention. Article 5.1 provides, "No one shall be deprived of his liberty save in the following

¹⁷⁵ The Supreme Court plurality in *Hamdi* suggested that credible evidence should suffice to shift the burden to the detainee to rebut the evidence that he is an enemy combatant. 542 U.S. at 534.

¹⁷⁶ *Hamdi*, 542 U.S. at 550 (Souter and Ginsburg, JJ., concurring and dissenting) (citing standard used by army regulations for military tribunals to determine prisoner of war status).

¹⁷⁷ See *supra* note 154.

¹⁷⁸ *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A, no. 3), ¶ 15 (1961).

¹⁷⁹ *A. v. Sec'y of State for the Home Dep't.*, [2004] UKHL 56.

cases” and then lists six grounds.¹⁸⁰ Only two are plausibly relevant to security detention. However, neither was intended, or has been interpreted, to permit security detention.

The first is Article 5.1 (b), which authorizes detention “in order to secure the fulfillment of any obligation prescribed by law.” This refers, however, to a specific legal obligation, such as the duty to perform military service or file a tax return.¹⁸¹ It does not extend to “obligations to comply with the law generally, so that it does not justify preventive detention of the sort that a state might introduce in an emergency situation.”¹⁸²

The other facially relevant provision is Article 5.1(c), which authorizes detention “when it is reasonably considered necessary to prevent [a person’s] committing an offence.” However, this provision “concerns only detention in the enforcement of the criminal law.”¹⁸³

In the 1961 *Lawless* judgment, the European Court of Human Rights considered Ireland’s detention of an IRA activist for five months under a statute, activated only in emergencies, that authorized a Minister of State to order detention whenever the Minister “is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State.”¹⁸⁴ The Minister of Justice ordered Lawless detained because Lawless was, in his opinion, engaged in such activities.¹⁸⁵

¹⁸⁰ ECHR, *supra* note 39, art. 5.1 provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

¹⁸¹ DAVID JOHN HARRIS, MICHAEL O’BOYLE & COLIN WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 112-13 (1995).

¹⁸² *Id.* at 113 n.3 (citing *Lawless*, 1 Eur. Ct. H.R., ¶¶ 15, 51; *Guzzardi v. Italy*, 3 Eur. Ct. H.R. (ser. A, no. 39) 333, ¶ 101 (1980)).

¹⁸³ *Id.* at 117.

¹⁸⁴ *Lawless*, 1 Eur. Ct. H.R. at pt. III, ¶ 12(1).

¹⁸⁵ *Id.* at pt. VI, ¶ 20.

The European Court ruled that the security detention could not be justified by Article 5.1(c) of the ECHR.¹⁸⁶ Commenting on the ruling, one group of scholars explains that even though the language of Article 5.1(c):

[A]t first sight . . . could be read as authorizing a general power of preventive detention . . . [T]his interpretation was rejected in *Lawless v. Ireland*, as “leading to conclusions repugnant to the fundamental principles of the Convention.” . . . [T]he Court rejected the defendant government’s argument that the detention of the applicant, a suspected IRA activist, under a statute that permitted the internment of persons “engaged in activities . . . prejudicial to the . . . security of the state,” could be justified as being “necessary to prevent his committing an offence” . . . [T]he detention of an interned person under the statute was not effected with the purpose of initiating a criminal prosecution.¹⁸⁷

In this judgment, signed by eminent human rights jurist René Cassin, among other judges, the Court repudiated security detention in strong terms. If Article 5.1(c) were not read restrictively, the Court warned:

anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision . . . ; [whereas] [s]uch an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention¹⁸⁸

Correctly interpreted, then, as the Court explained in a later case involving a suspected *mafioso*, Article 5.1(c) does not authorize:

[A] policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the contracting [parties] a means of preventing a concrete and specified offence.¹⁸⁹

Thus, while article 5.1(c) may authorize “preventive detention” for purpose of criminal law enforcement in regard to a particular crime, it is not relevant to “security detention” in the sense of preventive detention for security purposes, rather than for purposes of criminal prosecution.

2. Derogation from the ECHR Right to Liberty

After rejecting security detention as a violation of the right to liberty, the Court in *Lawless* then considered whether the detention was justified by virtue of the Irish government’s derogation from Article 5, and concluded that it was.¹⁹⁰

¹⁸⁶ *Id.* ¶¶ 8-15.

¹⁸⁷ HARRIS, O’BOYLE & WARBRICK, *supra* note 181 (footnotes omitted) (citing *Lawless*, 1 Eur. Ct. H.R., ¶¶ 51-53).

¹⁸⁸ *Lawless*, 1 Eur. Ct. H.R., ¶ 14.

¹⁸⁹ *Guzzardi v. Italy*, 3 Eur. Ct. H.R. (ser. A, no. 39), 333, ¶ 102 (1980).

¹⁹⁰ *Lawless*, 1 Eur. Ct. H.R. at pt. VI, ¶¶ 20-47.

The substantive standard for derogation from the ECHR appears in Article 15.1:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.¹⁹¹

Pursuant to this provision, the Court framed the substantive question as whether the Irish security detention measure was “strictly required by the exigencies of the situation.”¹⁹² The Court noted that some members of the European Commission of Human Rights believed the security detention was not necessary because the Irish government could have used a variety of alternatives instead, including bringing an ordinary criminal prosecution or a prosecution before special criminal courts or military courts, or sealing the border between Ireland and Northern Ireland.

In the Court’s view, however, none of these means was adequate to deal with the situation confronting Ireland in 1957. The “military, secret and terrorist” nature of the IRA, the fear it inspired in witnesses, and the fact that most of its activities were cross-border raids into Northern Ireland, caused “great difficulties” in gathering evidence for any sort of criminal prosecution. Sealing the border would have imposed “extremely serious repercussions on the population as a whole.”¹⁹³

“Moreover,” the Court noted, the Irish security detention law had a number of “safeguards designed to prevent abuses in the operation of the system of administrative detention:”¹⁹⁴

- The Act was subject to constant supervision by Parliament, which not only received detailed reports but could also, at any time, annul the government’s declaration triggering the emergency powers of security detention.
- A “Detention Commission” consisting of a military officer and two judges had been set up, which could hear complaints from detainees and, if its opinion was favorable to release, was binding on the government.
- The ordinary courts could compel the Detention Commission to carry out its functions.
- The government publicly announced that it would release any detainee who gave an undertaking to respect the law and the security

¹⁹¹ ECHR, *supra* note 39, art. 15.1.

¹⁹² *Lawless*, 1 Eur. Ct. H.R. at pt. III, ¶ 31.

¹⁹³ *Id.* ¶ 36.

¹⁹⁴ *Id.* ¶ 37.

act. This was a government commitment which the European Court considered to be legally binding, and that led to the release of Lawless after he gave such an undertaking.¹⁹⁵

“Subject to the foregoing safeguards,” the Court concluded, the security detention appeared to be a measure strictly required by the exigencies of the situation.¹⁹⁶

One may question, however, whether the nearly half-century-old judgment in *Lawless* affords continuing assurance of the validity of prolonged security detention by derogation from the ECHR. In part the doubt arises from the very short time periods, no more than a week or so, now allowed by the European Court for police detention of suspected terrorists in criminal cases, even under derogations from the right to liberty.¹⁹⁷

In part, too, doubt arises from the rejection of security detention, even under derogation, in a recent judgment of the highest court of Britain, which interpreted the ECHR in light of the jurisprudence of the European Court. Following the terrorist attacks of September 11, 2001, the British government derogated from ECHR Article 5 in order to impose prolonged security detention on foreign nationals suspected of international terrorism, who could not or would not be deported.¹⁹⁸ Under the legislative scheme, foreign citizens suspected of involvement in international terrorism, but not equally suspect British citizens, could be indefinitely detained, until such time as the government or the detainee could find another country willing to accept them.¹⁹⁹

In *A. and Others v. Secretary of State*, decided in 2004, the House of Lords heard a challenge to this scheme, which they deemed to be a security detention system.²⁰⁰ The Law Lords evaluated the system in light of the derogation provisions of the ECHR,²⁰¹ which they considered to have the same effect as those of the ICCPR with regard to discrimination.²⁰² Even

¹⁹⁵ *Id.* ¶ 27.

¹⁹⁶ *Id.* ¶ 38.

¹⁹⁷ *See supra* Part IV.

¹⁹⁸ *A. v. Sec’y of State for the Home Dep’t.*, [2004] UKHL 56, (2004), ¶ 11.

¹⁹⁹ *Id.* ¶ 12.

²⁰⁰ *Id.* ¶ 55.

²⁰¹ *Id.* ¶ 16.

²⁰² *Id.* ¶¶ 46 (“The United Kingdom did not derogate from art 14 of the European Convention (or from art 26 of the ICCPR, which corresponds to it) . . .”), 62 (“The Attorney General . . . accepted that art 14 of the European Convention and art 26 of the ICCPR are to the same effect.”), 67 (“To do so was a violation of art 14. It was also a violation of art 26 of the ICCPR and so inconsistent with the United Kingdom’s other obligations under international law within the meaning of art 15 of the European Convention.”), 68(4) (“[A]rt 4(1) of the ICCPR, in requiring that a measure introduced in

though the British scheme had more procedural safeguards than those employed decades earlier by the Irish government in *Lawless*,²⁰³ the Law Lords adjudged it to be both disproportionate and discriminatory, and hence incompatible with the ECHR.²⁰⁴ Accordingly, as it was authorized to do by the Human Rights Act, the Court so advised the government.²⁰⁵

Whether indefinite security detention under derogation from the right to liberty could secure judicial approval in Europe today, as opposed to 1961 when *Lawless* was decided, is thus open to some doubt. Of the nine Law Lords who heard *A. v. Secretary of State*, only one voted to uphold the detention. Even he, however, seemed to imply that he might not sustain a system of security detention if it were applied to British citizens:

derogation from Covenant obligations must not discriminate, does not include nationality, national origin or “other status” among the forbidden grounds of discrimination However, by art. 2 of the ICCPR the states parties undertake to respect and ensure to all individuals within the territory the rights in the Covenant “without distinction of any kind, such as race . . . national or social origin . . . or other status”. Similarly, art. 26 guarantees equal protection against discrimination “on any ground such as race, . . . national or social origin . . . or other status”. This language is broad enough to embrace nationality and immigration status. It is open to states to derogate from arts. 2 and 26 but the United Kingdom has not done so. If, therefore, as I have concluded, art. 23 discriminates against the Appellants on grounds of their nationality or immigration status, there is a breach of arts. 2 and 26 of the ICCPR and so a breach of the UK’s “other obligations under international law” within the meaning of art. 15 of the European Convention.”).

ICCPR, *supra* note 28, art. 4.1 provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

²⁰³ As Lord Walker, dissenting in *A. v. Sec’y of State*, explained:

[T]he 2001 Act contains several important safeguards against oppression. The exercise of the Secretary of State’s powers is subject to judicial review by SIAC, an independent and impartial court, which under . . . the 2001 Act has a wide jurisdiction to hear appeals, and must also review every certificate granted . . . [for security detention] at regular intervals. Moreover the legislation is temporary in nature. Any decision to prolong it is anxiously considered by the legislature. While it is in force there is detailed scrutiny of the operation of . . . [security detentions] by the individual (at present Lord Carlisle QC) appointed [as ombudsman] There is also a wider review by the Committee of Privy Councillors All these safeguards seem to me to show a genuine determination that the 2001 Act, and especially Pt 4 [on security detentions], should not be used to encroach on human rights any more than is strictly necessary.

A., [2004] UKHL 56, ¶ 215.

²⁰⁴ *Id.* ¶¶ 43 (proportionality), 67 (discriminatory), 72 (declaration of incompatibility with ECHR on both grounds).

²⁰⁵ *Id.* ¶ 72.

[I]nterning British citizens without trial, and with no option of going abroad if they chose to do so, would be far more oppressive, and a graver affront to their human rights, than a power to detain in “a prison with three walls” a suspected terrorist who has no right of abode in the United Kingdom, and whom the government could and would deport but for the risk of torture if he were returned to his own country.²⁰⁶

The core flaw in the British system was discrimination. Foreign citizens suspected of international terrorism could be detained indefinitely, whereas British citizens could not. This disparity served also to highlight that the detention was disproportionate: if security did not require indefinite detention of British citizens suspected of terrorism, then why did it require indefinite detention of foreign citizens?

Not only heightened judicial sensitivity to the right to liberty, but also changing technology, may cast doubt on the continued validity of *Lawless*. The Law Lords in *A. v. Secretary of State* were intrigued by the attraction of electronic restraints as an alternative to imprisonment. They noted that when one security prisoner was released on bail, it was on condition:

[T]hat he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company.²⁰⁷

The Court hinted strongly that such a system of restraints would more likely survive its scrutiny: “The Appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.”²⁰⁸

When the legislation was subsequently revised, it incorporated conditions of this kind. But after several detainees thus placed under house arrest managed to abscond, some British police continue to call for extending the maximum period of detention prior to charging terrorism suspects, currently twenty-eight days, to allow for indefinite security detention.²⁰⁹ As of this writing, however, even a far more modest proposal

²⁰⁶ *Id.* ¶ 213 (Lord Walker of Gestingthorp).

²⁰⁷ *Id.* ¶ 35.

²⁰⁸ *Id.* See also BP Americas, *supra* note 46, princ. II.4 (“American States shall establish by law a series of alternative or substitute measures for deprivation of liberty.”).

²⁰⁹ *E.g.*, Mark Townsend & Jamie Doward, *Lock Terror Suspects Up Indefinitely Say Police*, OBSERVER, July 15, 2007, at 1. By late 2007, Prime Minister Gordon Brown was considering introducing legislation to extend the twenty-eight-day period to fifty-six days.

by Prime Minister Gordon Brown, to extend the twenty-eight day period to forty-two days in individual cases subject to parliamentary review, has yet to overcome opposition from his own party as well as the opposition in Parliament.²¹⁰

In sum, the ECHR does not permit security detention in ordinary times. Even in national emergencies, when States derogate from the right to liberty, the evolving jurisprudence of the European Court of Human Rights and the British House of Lords casts doubt on whether indefinite or prolonged security detention is ever a proportional response to terrorism.

VI. PROCEDURES FOR SECURITY DETENTION

Where security detention is allowed at all, the procedures for its use must be previously established by law.²¹¹ They must also include the following procedural safeguards:

A. REGISTRATION

The detention must be registered.²¹² There must be no “prisoners without a name in cells without a number.”²¹³ Indeed, under IHL, “[t]he

Sarah Lyall, *British Intelligence Chief Sharpens Intelligence Warning*, N.Y. TIMES, Nov. 6, 2007, at A3.

²¹⁰A. Travis, *Terrorism: Lords Say 42-Day Law Will Put Fair Trials at Risk*, THE GUARDIAN (London), Aug. 5, 2008, at 4; James Kirkup, *MP Promises Rebellion on 42-Day Detention*, DAILY TELEGRAPH, April 2, 2008, at 14.

²¹¹ ICCPR, *supra* note 28, art. 9.1 (“No one shall be deprived of his liberty except . . . in accordance with such procedures as are established by law.”); ACHR, *supra* note 41, art. 7.2 (“No one shall be deprived of his liberty except . . . under the conditions established beforehand by the Constitution . . . or by a law”); ACHPR, *supra* note 47, art. 6 (“No one shall be deprived of his freedom except for . . . conditions previously laid down by law.”); ADHR, *supra* note 43, art. XXV (“No person may be deprived of his liberty except . . . according to the procedures established by pre-existing law.”); BP, *supra* note 37, art. 2 (“[D]etention . . . shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.”). The ICRC treats this procedural requirement as the procedural aspect of the more generally applicable “principle of legality.” ICRC Guidelines, *supra* note 30, at 383.

Although as noted in the preceding text the ECHR does not allow security detention except, perhaps, by derogation. ECHR, *supra* note 39, art. 5.1 states generally, “No one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law.” In view of the emphasis in *Lawless* on the procedural “safeguards” for the Irish security detention under derogation from Article 5, one might expect the European Court, if it were to allow a security detention under derogation today, to require that it be done pursuant to a procedure prescribed by law. *See* *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A, no. 3), ¶ 15 (1961).

²¹² “The prohibitions against . . . unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their

entire system of detention . . . is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC.”²¹⁴

B. COMMUNICATIONS

The detention must not be *incommunicado* for more than a few days.²¹⁵ The prisoner should be entitled to communicate with family and counsel.²¹⁶

status as norms of general international law.” HRC GC 29, *supra* note 80, ¶ 13(b). BP, *supra* note 37, art. 12 provides:

1. There shall be duly recorded: (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody. 2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

See also BP Americas, *supra* note 46, princ. III.1 (“The law shall prohibit, in all circumstances, . . . secret deprivation of liberty since [it] . . . constitute[s] cruel and inhuman treatment.”), IX.1 (admission), IX.2 (registration).

²¹³ *See* JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (Toby Talbot trans., Knopf 1981).

²¹⁴ ICRC Guidelines, *supra* note 30, at 385. Asserting the generally applicable procedural safeguard of the “[r]ight to be registered and held in a recognized place of internment/administrative detention,” the ICRC explains that this reflects numerous IHL requirements of registration, notification to family and national authorities, and visits to places of detention. *Id.* at 384-85 (citing Geneva IV, *supra* note 49, arts. 106, 107, 136, 137, 138 & 143).

²¹⁵ BP Americas, *supra* note 46, princ. III.1 (“The law shall prohibit, in all circumstances, *incommunicado* detention of persons since . . . [it] constitute[s] cruel and inhuman treatment.”); BP, *supra* note 37, art. 15 (“Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”). The exceptions referenced provide as follows: BP, *supra* note 37, art. 16.4 requires that “Any notification referred to in the present principle [such as to consular authorities] shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.” BP Americas, *supra* note 46, art. 18.3 establishes that:

The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

Moreover:

[T]he mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee . . . to treatment respectful of his dignity.

Velasquez Rodriguez v. Honduras, Judgement, Inter-Am. Ct. H.R., (Ser. C) No. 4, ¶ 187 (July 29, 1988).

C. NOTICE OF REASONS AND CONSULAR RIGHTS

The detaining authorities must inform the detainee of the reasons for her detention²¹⁷ and, if she is foreign, of her right to communicate with her consulate for assistance.²¹⁸

²¹⁶ BP Americas, *supra* note 46, princ. V (counsel), XVIII (family and legal representatives), art. 19 (“A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”). The ICRC asserts that “[a]n internee/administrative detainee must be allowed to have contacts with—to correspond with and be visited by—members of his or her family.” ICRC Guidelines, *supra* note 30, at 389-90 (citing Geneva IV, *supra* note 49, arts. 106, 107, & 116 and Geneva Protocol II, *supra* note 54, art. 5(2)(b)). The ICRC acknowledges that IHL assures this right “in all but very exceptional circumstances,” citing Geneva IV, art. 5, which provides:

[w]here in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

Id. While this may foreclose the expansive “rights of communication” under GC IV—which include family visits—it does not by terms or by logic foreclose the more limited IHRL rights of communication in State Parties to IHRL treaties, which do not necessarily include family visits, but which do forbid prolonged incommunicado detention.

²¹⁷ ICCPR, *supra* note 28, art. 9.2 (“Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest . . .”). This part of Article 9.2 is applicable to all deprivations of liberty. See HRC GC 8, *supra* note 111, ¶ 1. Similar provisions are in ACHR, *supra* note 41, art. 7.4 (“Anyone who is detained shall be informed promptly of the reasons for his detention . . .”); BP, *supra* note 37, art. 10 (“Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest . . .”); and BP Americas, *supra* note 46, princ. V (citing Geneva Protocol I, *supra* note 51, art. 75.3). The ICRC asserts a generally applicable procedural safeguard of a “[r]ight to information about the reasons for internment/administrative detention.” ICRC Guidelines, *supra* note 30, at 384.

²¹⁸ BP, *supra* note 37, art. 16.2:

If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

See BP Americas, *supra* note 46, princ. V; see also La Grand (Germany v. U.S.), 2001 I.C.J. 466 (June 27); The Right to Information on Consular Assistance, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (Ser. A) No. 16 (Oct. 1 1999); ICRC Guidelines, *supra* note 30, at 385.

D. JUDICIAL CONTROL

The detention must be subject to prompt and effective judicial control,²¹⁹ at least where requested by the detainee. The detainee must be entitled to bring proceedings before a court to decide without delay on the lawfulness of her detention.²²⁰ This right is non-derogable.²²¹ There is

²¹⁹ ACHR, *supra* note 41, art. 7.5 (“Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released . . .”); BP, *supra* note 37, arts. 4 (“Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”), 11.1 (“A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority”), 11.3 (“A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”); BP Americas, *supra* note 46, princ. V (“Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law.”).

²²⁰ ICCPR, *supra* note 28, art. 9.4 (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”). This provision, “i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.” HRC GC 8, *supra* note 111, ¶ 1. Provisions similar to ICCPR art. 9.4 include ACHR, *supra* note 41, art. 7.6; ADHR, *supra* note 43, art. XXV; ECHR, *supra* note 39, art. 5.4 (“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided.”); BP, *supra* note 37, arts. 11.1 (“A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.”), 32.1 (“A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.”). The ACPHR, *supra* note 47, is less explicit but does provide generally in Article 7.1(a) that every individual has the “right to an appeal to competent national organs against acts of violating his fundamental rights . . .”

²²¹ HRC GC 29, *supra* note 80, ¶ 16 (“In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.”). ACHR, *supra* note 41, art. 27.2 lists, in addition to other non-derogable rights such as the right to life and to humane treatment, “the judicial guarantees essential for the protection of such rights.” The Inter-American Court of Human Rights identifies habeas corpus as one of those “non-derogable judicial guarantees.” Adv Op. OC-9/87, Habeas Corpus in Emergency Situations, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987).

The ICRC derives from IHL the procedural safeguards that, “[a] person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention,” and “[r]eview of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body.” ICRC Guidelines, *supra* note 30, at 385-86. In State Parties to IHRL treaties that make judicial review of detention non-derogable, these IHL rules allowing review by an independent and impartial administrative body should yield to the “more favourable” IHRL

arguably a gap in protection by means of judicial control, insofar as IHRL treaties do not expressly mandate periodic judicial review of detention. However, they may reasonably be interpreted to require periodic judicial review.²²²

E. FAIR JUDICIAL HEARING ON DETENTION

The hearing in which a detainee contests the lawfulness of his detention must be fair and public, before an independent and impartial tribunal established by law.²²³ A fair hearing affording due process of law must, at minimum, give a security detainee “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”²²⁴ Arguably it must also ensure the right to counsel for the detainee.²²⁵

requirement of judicial review. Geneva Protocol I, *supra* note 51, art. 75.8. This also reflects the fact that the IHL option of a “court or administrative board,” Geneva IV, *supra* note 49, art. 43, adopted in 1949, was meant to allow “sufficient flexibility to take into account the usage in different States.” ICRC COMMENTARY, *supra* note 75, *Commentary on Geneva IV*, ¶ 260. Once States subsequently became parties to the ICCPR (entered into force in 1976), ECHR (entered into force in 1953), and ACHR (entered into force in 1978), their “usage” incorporated the more demanding IHRL requirement of judicial review. There remains the exception of *force majeure*: where by reason of armed conflict, courts are not open and functioning, administrative review necessarily takes the place of judicial review, until the courts reopen. *See Ex parte Milligan*, 71 U.S. 2 (1866).

²²² *See* BP, *supra* note 37, art. 11.3 (“A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”); BP Americas, *supra* note 46, princ. VI (periodic judicial control); *Report on Terrorism and Human Rights*, *supra* note 149, ¶ 124 (“Detention in such circumstances must also be subject to supervisory judicial control without delay and, in instances when the state has justified continuing detention, at reasonable intervals.”). Pejic asserts the procedural safeguard, “[a]n internee/administrative detainee has the right to periodical review of the lawfulness of continued detention.” Pejic, *supra* note 30, at 388 (citing Geneva IV, *supra* note 49, arts. 43, 78).

²²³ ICCPR, *supra* note 28, art. 14.1; ECHR, *supra* note 39, art. 6.1; ACHR, *supra* note 41, art. 8.1; ACHPR, *supra* note 47, art. 7.1; BP Americas, *supra* note 46, princ. V. Pejic would add the procedural safeguard that “[a]n internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person.” Pejic, *supra* note 30, at 389. However, she acknowledges that “neither humanitarian nor human rights treaty law expressly mention” this right. *Id.* The present writer therefore does not include it in the IHRL consensus of instruments, even as amplified by IHL.

²²⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). Although this requirement was stated as a matter of due process of law under the U.S. Constitution, the IHRL ban on “arbitrary” detentions, as noted in Part V.b, *supra*, has a procedural dimension and incorporates the concept of due process of law. Accord BP Americas, *supra* note 46, princ. V. *See also* *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (per curiam), and 253, 262-76 (Traxler, J., concurring) (4th Cir. 2008) (en banc) (remanding habeas petition brought by alleged enemy combatant for further proceedings in which government must present best available evidence and allow detainee to confront and question witnesses against him, unless government can show that such additional process would be impractical, unduly burdensome or would harm

Beyond the foregoing procedural requirements, the U.N. Body of Principles envisions an additional safeguard: “In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.”²²⁶

In international armed conflict, the International Committee of the Red Cross (ICRC) is entitled to visit all places where protected persons are interned or detained, and to interview them. Such visits may not be prohibited “except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.”²²⁷ Protected persons entitled to such visits include all who “find themselves, in case of a conflict or occupation, in the hands of a Party . . . of which they are not nationals.”²²⁸ Thus, if a State detains its own nationals on security grounds, the detainees are not entitled to Red Cross visits. Nor are nationals of neutral or co-belligerent States entitled to Red Cross visits, so long as their countries maintain “normal diplomatic relations” with the detaining State.²²⁹

national security, and requiring government on remand to bear burden of proof), *petition for cert. filed*, Sept. 19, 2008.

²²⁵ BP Americas, *supra* note 46, princ.. V; BP, *supra* note 37, art. 17 (“1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. 2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.”).

The Inter-American Court of Human Rights has advised that the circumstances of a case “—its significance, its legal character, and its context in a particular legal system—are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.” Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/990, 1990 Inter-Am. Ct. H.R. (ser. A) No. 11, ¶ 28 (Aug. 10, 1990). Few circumstances could be more significant for a detainee than a hearing on whether he may lawfully be detained indefinitely. Thus, the right to counsel is arguably an essential element of a fair hearing. See *Hamdi*, 542 U.S. at 539 (plurality opinion); *id.* at 540, 553 (Souter and Ginsburg, JJ., concurring in part and dissenting in part).

The ICRC asserts the procedural safeguard, “An internee/administrative detainee should be allowed to have legal assistance.” ICRC Guidelines, *supra* note 30, at 388.

²²⁶ BP, *supra* note 37, art. 29.1; accord BP Americas, *supra* note 46, princ. XXIV (requiring regular institutional inspections).

²²⁷ Geneva IV, *supra* note 49, art. 143.

²²⁸ *Id.* art. 4.

²²⁹ *Id.*

Although IHL provides no similar right in non-international armed conflict, nonetheless the ICRC's "right of access in these situations is widely recognized."²³⁰

VII. HUMANE TREATMENT OF SECURITY DETAINEES AND COMPENSATION FOR UNLAWFUL DETENTION

The treatment of the detainee must be humane and must not subject her to torture or to cruel, inhuman or degrading treatment or punishment.²³¹ Humane treatment includes regular access to medical care.²³² Detainees unlawfully detained have a right to be compensated.²³³

VIII. CONCLUSION

Because of the difficulties in relying exclusively on criminal prosecution to confront the threat of terrorism, the United States, United Kingdom and other States have grappled with developing systems of preventive detention of suspected terrorists for security purposes. These systems have not distinguished themselves as exemplars of the rule of law. If prolonged or indefinite security detention is to be permitted, far greater attention must be paid to the substantive and procedural safeguards of international human rights and humanitarian law.

Except in the member states of the Council of Europe, where security detention is allowed, if at all, only by derogation from the right to liberty, IHRL allows security detention, provided it is not arbitrary or discriminatory, is based on grounds and procedures previously established by law that meet minimum procedural requirements, does not entail inhuman treatment of detainees, and is no more restrictive of liberty or long-lasting than required to meet the exigencies of security. In addition, unlawfully detained persons have a right to be compensated. Security

²³⁰ ICRC Guidelines, *supra* note 30, at 391.

²³¹ CAT, *supra* note 29, arts. 2.1, 2.2, 16.1; ICCPR, *supra* note 28, arts. 7, 10.1; ECHR, *supra* note, 39, art. 3; ACHR, *supra* note 41, art. 5; ADHR, *supra* note 43, arts. I, XXV; ACHPR, *supra* note 47, art. 5; BP, *supra* note 37, arts. 1, 6; BP Americas, *supra* note 46, princ. I; Geneva IV, *supra* note 49, Common Article 3.1 (a), (c), art. 27.

²³² BP, *supra* note 37, art. 24; BP Americas, *supra* note 46, princs. IX.3, X. The ICRC asserts, "An internee/administrative detainee has the right to the medical care and attention required by his or her condition." ICRC Guidelines, *supra* note 30, at 390 (citing Geneva IV, *supra* note 49, art. 81 (medical attention as required by the detainees' state of health); and Geneva Protocol II, *supra* note 54, art. 5.1(b) (internees must be afforded "safeguards" as regards health "to the same extent as the local civilian population"))).

²³³ ICCPR, *supra* note 28, art. 9.5; ECHR, *supra* note 39, art. 5.5; *see also* BP, *supra* note 37, art. 35.1 ("Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.").

detention must also comply with other provisions of international law where applicable, in particular IHL, which imposes similar requirements, with the important addition that IHL generally prohibits detention of foreign nationals in international armed conflict unless “absolutely necessary” or “necessary, for imperative reasons of security.”

IHRL would do well to follow the European model, which permits security detention, if at all, only by derogation.²³⁴ That approach makes clear that security detention is an extraordinary device to be used (if at all) only in exceptional circumstances. The formalities of having to declare and defend states of emergency²³⁵ in order to derogate also ensure that conscious, visible attention by government officials, lawmakers and judges will focus on whether there is truly a need for security detention in a given situation and, later, on whether the exigencies truly continue.

Under a derogation framework, this visible attention may be focused at three distinct stages: when the legislature authorizes and designs a system of preventive detention; when the executive formally invokes it in an emergency; and when the independent judiciary considers, on a case-by-case basis, whether preventive detention of a particular suspected terrorist is warranted.

Whether security detention is done under the European model, allowing it only by derogation if at all, or is authorized without derogation as currently allowed by IHRL outside Europe, two central questions merit further consideration. First, what is the evidentiary basis required to justify security detention? Given the fundamental liberty interests at stake in a prolonged detention, the standard for preventive detention should be no less than a preponderance of the evidence.

Second, should security detention outside the context of armed conflict be allowed at all? Even taking into account that criminal justice systems

²³⁴ Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, at 540, 564, 568, 573, 577 (2004) (Scalia and Stevens, JJ., dissenting) (arguing that indefinite wartime executive detention of citizens accused of being enemy combatants is not permitted unless the writ of habeas corpus is suspended; in order to detain a citizen, the government must either pursue criminal prosecution or suspend the writ). In contrast, the Court has held that foreign citizens who fought against the U.S. in Afghanistan may be detained for the duration of that particular conflict, but has not to date addressed whether the President has constitutional authority to detain foreign citizens captured elsewhere as enemy combatants. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240-41 (2008).

²³⁵ E.g., ICCPR, *supra* note 28, art. 4.3:

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

encounter extreme difficulties in coping with terrorism, is preventive detention always, or ever, necessary? Might not a system of alternative restraints suffice, including house arrest, electronic ankle bracelets and the other devices used in recent years in Britain? Acknowledging that some suspects have managed to escape those restraints, can the devices be fine-tuned to be more efficient?

If security detention is to be allowed, it must be only with the greatest caution and restraint. Granting executive or military officials authority, on the basis of secret and often flawed intelligence information and subject only to limited judicial review, to deprive persons of their liberty based on grounds of security alone, is dangerous to liberty and to the rule of law. In many countries political dissidents may be deemed security threats. Even in democracies under the rule of law, zealous officials may be too quick to conclude that someone is a security threat on the basis of shaky intelligence information. If security detention is not prohibited altogether, its use must be kept to an absolute minimum, and subjected to rigorous and redundant procedural safeguards.

As a plurality of the United States Supreme Court recently warned:

[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.²³⁶

²³⁶ *Hamdi*, 542 U.S. at 530.