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INTERNATIONAL HUMAN RIGHTS LAW AND SECURITY DETENTION

Doug Cassel*

This article analyzes the grounds, procedures, and conditions required by International Human Rights Law for preventive detention of suspected terrorists as threats to security. Such detention is generally permitted, provided 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 the detainee is not mistreated and is compensated for any unlawful detention. In Europe, however, preventive detention for security purposes is generally not permitted. If allowed at all, it is permitted only when a State in time of national emergency formally derogates from the right to liberty under the European Convention on Human Rights. The article concludes that if preventive detention for security purposes is to be allowed at all, its use must be kept to an absolute minimum, and the European model should be followed, allowing detention only by formal derogation during national emergency, and then only to the extent and for the time strictly required.

INTRODUCTION

[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 breach¹

Although written a quarter century ago and limited to one treaty—the International Covenant on Civil and Political Rights—these words of the Human Rights Committee capture most of what might now be described as the “consensus” of international human rights law (IHRL) instruments with regard to constraints on security detention.²

* Professor of Law and Director of the Center for Civil and Human Rights, Notre Dame Law School.

¹ U.N. Human Rights Committee, *General Comment No. 8: Right to Liberty and Security of Persons*, ¶ 4, U.N. Doc. HRI/GEN/1/Rev.7 (June 30, 1982) [hereinafter HRC GC 8].

² International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368, Dec. 16, 1966 [hereinafter ICCPR].

By “security detention,” I refer to detention of persons detained preventively as threats to security.³ I thus exclude detention for purposes of criminal prosecution (which would trigger additional international rights, such as the right to speedy trial or release).⁴ All elements of the “consensus” of norms outlined below also apply to detention for purposes of deportation or expulsion on security grounds (although, under both international and domestic law, additional requirements apply to immigration-related detentions).⁵

In most cases, the “consensus” of norms in IHRL instruments applicable to security detentions may represent customary international law. However, this “consensus” does not consider the extent of state practice and *opinio juris* to determine whether all elements of the consensus amount to customary law.

Where security detention is permitted—outside Europe—the consensus of IHRL instruments is that security detention must comply with the following requirements:

- Grounds. The detention must not be arbitrary and must be based on grounds previously established by law.
- Procedures. The detention must be based on procedures previously established by law and:
 - Must be subject to prompt and effective judicial control, at least on the initiative of the detainee;
 - Must inform the detainee of the reasons for his detention and, if he is foreign, of his right to communicate with his consulate for assistance;
 - Must not be *incommunicado* for more than a few days;
 - Must be registered; and
 - Must afford the detainee a fair judicial hearing on the lawfulness of his detention.
- Extent. The detention must be proportional; it must be no more restrictive or prolonged than strictly required by the exigencies of the security situation.

³ This excludes persons detained for interrogation as possible material witnesses in connection with criminal proceedings, which in the US are governed by statute. *See generally* U.S. v. Awadallah, 349 F.3d 42 (2d Cir. 2003); 18 U.S.C. § 3144 (2007). It also excludes persons detained exclusively or primarily for purposes of interrogation for intelligence purposes. Such detention probably qualifies as “arbitrary” and thus is not permitted by IHRL. *See* U.N. Commission on Human Rights, *Situation of detainees at Guantanamo Bay*, ¶¶ 20, 23, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

⁴ ICCPR, *supra* note 2, at art. 14.

⁵ ICCPR, *supra* note 2, at art. 13.

- Equality. The detention must be non-discriminatory, including as between citizens and foreigners.
- Treatment of Detainee. Must be humane and with access to regular medical evaluation and treatment.
- Compensation. The detainee must have a right to be compensated for unlawful detention.
- Other International Law. The detention must comply with all other applicable requirements of international law, including, in armed conflict, International Humanitarian Law (IHL).

Provided these requirements are satisfied, IHRL (outside Europe) permits security detention. Inside Europe, security detention is not permitted except, if at all, by derogation from the European Convention on Human Rights. This state of the law merits further reflection: is security detention really necessary? Should there be, at least, higher threshold standards required to justify it?

Additional gaps in current IHRL include the level and quality of information or evidence required to justify security detention; the need for explicit requirements for periodic administrative and judicial review; and the lack of clarity, uniformity, and certainty in existing IHRL requirements.

I derive the elements of this IHRL consensus on security detention from the following instruments:

- International Covenant on Civil and Political Rights (ICCPR),⁶ joined by 162 States Parties;⁷
- Universal Declaration of Human Rights⁸ (UDHR) (largely evidence of customary international law);⁹
- United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment (CAT),¹⁰ joined by 145 States Parties;¹¹

⁶ ICCPR, *supra* note 2.

⁷ See Office of the United Nations High Commissioner for Human Rights, *Ratification Table: International Covenant on Civil and Political Rights* (updated Sept. 23, 2008), <http://www2.ohchr.org/english/bodies/ratification/4.htm>.

⁸ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/180 (Dec. 12, 1948) [hereinafter UDHR].

⁹ See Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 394–96 (1985) (Universal Declaration of Human Rights, or at least some of its provisions including right to liberty and freedom from arbitrary detention, widely regarded as customary international law).

¹⁰ Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR, 93rd plen. mtg., (Dec. 10, 1984).

- United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment¹² (arguably evidence of customary international law);¹³ and
- Regional instruments:
 - European Convention on Human Rights (ECHR),¹⁴ joined by 47 States Parties;¹⁵
 - American Convention on Human Rights (ACHR),¹⁶ joined by 24 States Parties;¹⁷
 - American Declaration of the Rights and Duties of Man (ADHR),¹⁸ an “authoritative interpretation” of the human rights commitments in the Charter of the Organization of American States (OAS),¹⁹ used by the Inter-American Commission on Human Rights as the yardstick to monitor all American States that are not parties to the ACHR;²⁰ and

¹¹ See Office of the United Nations High Commissioner for Human Rights, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (updated Oct. 2, 2007), <http://www2.ohchr.org/english/bodies/ratification/9.htm>.

¹² United Nations Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR 76th plen. mtg., (Dec. 9, 1988) [hereinafter Body of Principles].

¹³ Many provisions of the Body of Principles appear in numerous IHRL instruments as well, including those discussed in this article.

¹⁴ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 232 [hereinafter ECHR].

¹⁵ See Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (updated Nov. 4, 2008), <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=4/112008&CL=ENG>.

¹⁶ American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

¹⁷ See B-32: *American Convention on Human Rights “Pact of San Jose, Puerto Rico,”* <http://www.oas.org/juridico/English/sigs/b-32.html> (last visited Mar. 4, 2008).

¹⁸ American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser.L/V/II.23, doc. 21 rev. 6 (adopted by the Ninth International Conference of American States, Bogota, Colombia, May 2, 1948) [hereinafter ADHR].

¹⁹ Charter of the Organization of American States, Apr. 30, 1948, 1952 U.N.T.S. 48; 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, Inter-Am. C.H.R. (ser. A) No. 10, ¶ 43 (July 14, 1989), available at http://www1.umn.edu/humanrts/iachr/b_11_4j.htm.

²⁰ See Statute of the Inter-American Commission on Human Rights, art. 19, Oct. 1979, available at <http://www.cidh.org/basicos/English/Basic17.Statute%20of%20the%20Commission.htm>. In March 2008, after this article was completed, the Commission adopted new guidelines on detentions, which are not incorporated into the analysis in this article, but which are consistent with it. *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).

o African Charter of Human and Peoples' Rights (ACHPR),²¹
joined by 53 States Parties.²²

This IHRL consensus applies in both peace and war (although in war it may be modified by the *lex specialis* of IHL).²³ Also, despite objections by the U.S.²⁴ and Israel,²⁵ the IHRL consensus also governs a State's extraterritorial detentions of persons within the effective custody and control of the State.²⁶ This does not extend, however, to extraterritorial detentions carried out by state forces acting for the United Nations under a Chapter VII Security Council mandate.²⁷

GROUNDINGS FOR SECURITY DETENTION

A. *Everywhere but Europe*

Outside Europe, the IHRL consensus on the grounds for security detention can be stated in two simple points. First, the detention must not be arbitrary.²⁸ Second, the detention must be on grounds previously established

²¹ African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 218 [hereinafter ACHPR].

²² See *OAU/AU Treaties, Conventions, Protocols, Charters*, <http://www.africa-union.org/root/AU/Documents/Treaties/treaties.htm> (last visited Sept. 10, 2008).

²³ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 137, ¶ 106 (July 9, 2004), available at <http://www.icjij.org/docket/files/131/1671.pdf> [hereinafter ICJ Wall].

²⁴ Brief of Respondent at 38–39, *Rasul v. Bush*, 124 S. Ct. 1286 (2004); United States Report to UN Human Rights Committee on Compliance with International Covenant on Civil and Political Rights (1995); Annex I: *Territorial Application of the International Covenant on Civil and Political Rights*.

²⁵ See ICJ Wall, *supra* note 23, ¶ 110.

²⁶ See *id.* ¶ 111; 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*].

²⁷ See *Behrami v. France*, EUR. Ct. H.R., App. No. 71412/01, ¶ 144–52 (2007), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62605&sessionID=1033379&skin=hudoc-en&attachmen t=true>.

²⁸ ICCPR, *supra* note 2, at art. 9(1); UDHR, *supra* note 8, ¶ 9; ACHR, *supra* note 16, at art. 6; ADHR, *supra* note 18, at art. 25 (“No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law”). Although protection against arbitrary detention is not made explicit in Article 5 of the ECHR, it is doubtless implicit. *E.g.*, *Aksoy v. Turkey* 1996-VI Eur. Ct. H.R. 2261, 2282 (“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 minimize the risk of arbitrariness and to ensure the rule of law.”).

by law.²⁹ An early formulation by the Human Rights Committee, quoted at the outset of this article, explicitly contemplates security detention, albeit subject to conditions:

[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 breach³⁰

A recent report by the Inter-American Commission on Human Rights similarly recognizes that deprivation of liberty may be justified in connection with the “administration of state authority” outside the criminal justice context, “where measures of this nature are strictly necessary.”³¹

Generally, under IHRL, the question is not whether security detention is permitted, but on what grounds, pursuant to what procedures, and under what conditions such detention would be acceptable.

A notable gap in current IHRL is the absence of a standard for the extent or quality of evidence needed to justify a security detention. The requirement that the detention not be “arbitrary” means that there must be some reason or evidentiary basis for the detention. But how much? Should the legal standard be “reasonable suspicion”? Or “some evidence”? Or “probable cause”? Something else? What about the evidentiary basis? If a “some evidence” standard is too low,³² how much more should be required?

And should the standard be the same for the initial arrest and the subsequent, possibly prolonged detention? As the detention extends beyond a brief period—months to years—the deprivation of liberty correspondingly becomes more serious. Should the standard for continued detention therefore be higher than for initial detention?

²⁹ ICCPR, *supra* note 2, at art. 9(1); ACHR, *supra* note 16, at art. 7(2) (stating “[n]o 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 21, at art. 6 (“No one may be deprived of his freedom except for reasons . . . previously laid down by law.”), ADHR, *supra* note 18, at art. 25 (“No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.”).

³⁰ HRC GC 8, *supra* note 1, ¶ 4.

³¹ Report on Terrorism and Human Rights, OEA/Ser.L/V/VII.116, doc. 5, rev. 1, corr. 22, ¶ 124 (2002), available at <http://cidh.org/Terrorism/Eng/part.d.htm> [hereinafter Report on Terrorism and Human Rights].

³² *Hamdi v. Rumsfeld*, 542 U.S. 509, 537 (2004) (stating “some evidence” standard is “inadequate”; it is a “standard of review, not a standard of proof”).

B. Europe

In Europe the picture is more complicated. ECHR Article 5, which guarantees the right to liberty, prohibits security detention. But can security detention be permitted 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 5.³³ More than four decades later, however, the British Law Lords interpreted the ECHR, and the jurisprudence of the European Court, to rule that a British security detention law enacted by derogation from Article 5 failed to meet the tests of proportionality and non-discrimination required of derogations, and was thus incompatible with the ECHR.³⁴ In light of the recent British ruling, 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 surveyed here, the ECHR enumerates an exclusive list of permissible grounds for detention. Article 5(1) provides that “[n]o one shall be deprived of his liberty save in the following cases”³⁵ It then lists six grounds.³⁶ Of the six grounds, however, only two are plausibly relevant to security detention. However, neither was intended, or has been interpreted, to permit security detention.

One of these provisions 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.³⁷ Article 5.1(b) 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.”³⁸

³³ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 62 (1961).

³⁴ *See A v. Secretary of State for the Home Department*, [2004] UKHL 56 (appeal taken from England and Wales) (permitting “the appeals, quash[ing] the derogation order, and declar[ing] section 23 of the 2001 Act incompatible with the right to liberty in article 5(1) of the European Convention”).

³⁵ ECHR, *supra* note 14, at art. 5.1(c)

³⁶ *See id.* (showing that the six grounds include conviction by a court, non-compliance with court order or to secure fulfillment of a legal obligation, reasonable suspicion of crime or when reasonably necessary to prevent a crime or flight following crime, detention of a minor for educational or juvenile justice purposes, detention on medical or drug-related grounds or on grounds of incompetence or vagrancy, and immigration-related detentions).

³⁷ DAVID HARRIS, MICHAEL O’BOYLE & CHRIS WARBRICK, *THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 112–13 (Butterworths 1995).

³⁸ *Id.* at 113 (citing *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 51).

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.”³⁹

In the 1961 *Lawless* judgment, the European Court of Human Rights considered the detention of an IRA activist for five months under an Irish statute, activated only in emergencies, that authorized a Minister of State to order an arrest and 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.”⁴⁰ The Minister of Justice ordered Lawless detained under this statute because Lawless was, “in his opinion, engaged in activities prejudicial to the security of the State.”⁴¹

Considering whether Lawless’s detention was justified by Article 5.1(c) of the ECHR, the Court ruled that it was not.⁴² Harris et al. explain that even though the language of Article 5.1(c)

at 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.’ Ruling that the wording ‘for the purpose of bringing him before the competent legal authority’ applied to all three of the limbs of Article 5(1)(c), the 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.’ This was because the detention of an interned person under the statute was not effected with the purpose of initiating a criminal prosecution.⁴³

In this judgment, signed by René Cassin, the Court repudiated security detention in strong terms. The Court warned that if its restrictive construction of Article 5.1(c) were incorrect,

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 without its being possible to regard his arrest or detention as a breach of the Convention; whereas such an assumption, with all

³⁹ HARRIS ET AL., *supra* note 37, at 117.

⁴⁰ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 34.

⁴¹ *Id.* at 39.

⁴² *Id.* at 46–53.

⁴³ HARRIS ET AL., *supra* note 37, at 117 (citation omitted).

its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention; . . .⁴⁴

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 States a means of preventing a concrete and specified offence.”⁴⁵ Thus, while Article 5.1(c) may authorize “preventive detention” for purposes of criminal law enforcement in regard to a particular crime, it is not relevant to “security detention” in the sense used here, *i.e.*, detention for purposes of security or security-related interrogation, not 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.⁴⁶

The substantive standard for derogation from the ECHR appears in Article 15(1):

[i]n 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.⁴⁷

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.”⁴⁸

The Court noted that some members of the European Commission of Human Rights believed the security detention was not necessary because the Irish government instead could have utilized the alternatives of: (1) ordinary criminal prosecution; (2) prosecution before special criminal courts or before military courts; and (3) sealing the border between Ireland and Northern Ireland.

⁴⁴ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 52.

⁴⁵ *Guzzardi v. Italy*, 39 Eur. Ct. H.R. (ser. A) at 38 (1980).

⁴⁶ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 54–62.

⁴⁷ ECHR, *supra* note 14, at art. 15.1.

⁴⁸ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 57.

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 criminal prosecution, no matter the forum. Sealing the border would have imposed "extremely serious repercussions on the population as a whole."⁴⁹

The Court also noted that the Irish security detention law had a number of "safeguards designed to prevent abuses in the operation of the system of administrative detention."⁵⁰

- 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 Act, a government commitment which the European Court considered to be legally binding (and which in fact led to the release of Lawless after he gave such an undertaking.)⁵¹

The Court concluded that the security detention appeared to be a measure strictly required by the exigencies of the situation.⁵²

In more recent cases of derogations from the right to liberty in order to combat terrorism, the Court has taken a more exacting approach. In *Brannigan and McBride v. U.K.* (1993),⁵³ the Court upheld British deten-

⁴⁹ *Id.* at 58.

⁵⁰ *Id.*

⁵¹ *Id.* at 41-42.

⁵² *Id.* at 59.

⁵³ *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 38 (1993). The British statute there did not purport to authorize security detention in the sense used in this article, *i.e.*, detention 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.* at 38-40. 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.

tions under derogation of terrorists in Northern Ireland for periods of up to seven days without judicial supervision. 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 solicitor within 48 hours, his right to inform a friend or relative of his detention, and his right to have access to a doctor.⁵⁴

The implications of *Brannigan*—exacting scrutiny by the European Court of whether derogations from the right to liberty are “strictly required” by the exigencies—came to roost in *Aksoy v. Turkey* (1996).⁵⁵ In *Aksoy*, Turkey had derogated from ECHR Article 5 in order to detain terrorism suspects. The Court found that a detention of 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.” Moreover, the Government failed to adduce any “detailed reasons as to why the fight against terrorism . . . rendered judicial intervention impracticable.”⁵⁶ Thus, while the Court in *Lawless* had upheld a security detention under derogation of five months, in *Aksoy* it was unwilling to uphold a detention under derogation of fourteen days without judicial supervision.⁵⁷

In addition to the European Court, national courts interpreting the ECHR now strictly enforce the restrictions on derogations from the right to liberty. After 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.⁵⁸

The House of Lords considered this scheme in light of the derogation provisions of the ECHR,⁵⁹ which they considered to be to the same

⁵⁴ *Id.* at 55.

⁵⁵ *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, 2269. Like *Brannigan*, *Aksoy* involved extended police detention with a view toward possible criminal prosecution. The detention was thus not, strictly speaking, a “security detention” in the sense used in this article. *Id.* However, as explained in regard to *Brannigan*, nothing in *Aksoy* suggests that the European Court would have allowed a longer detention, or one with fewer procedural safeguards, if the detention had been a pure security detention, with no prospect of criminal prosecution. *See supra* note 53.

⁵⁶ *Id.* ¶ 78.

⁵⁷ *See also* *Demir and Others v. Turkey*, 1998-VI Eur. Ct. H.R. 2640 [hereinafter *Demir*] (16–23 days incommunicado detention without judicial supervision not justified under derogation from Article 5); *Nuray Sen v. Turkey*, Eur. Ct. H.R., Judgment of June 17, 2003, ¶ 28 (eleven days detention without judicial intervention not justified under derogation from Article 5).

⁵⁸ *A and Others v. Secretary of State*, [2004] UKHL 56, ¶ 11.

⁵⁹ *Id.* ¶¶ 10, 16.

effect as those of the ICPR with regard to discrimination.⁶⁰ Even though the new scheme had even more procedural safeguards than those in place in *Lawless*,⁶¹ the Law Lords adjudged that the legislation was both disproportionate and discriminatory, and hence incompatible with the ECHR.⁶² Pursuant to the Human Rights Act, the Court so advised the government.⁶³

The core of the problem was discrimination: foreign citizens suspected of international terrorism could be detained indefinitely, whereas British citizens could not. If that were the only problem, the Court might

⁶⁰ *Id.* ¶ 47 (“The United Kingdom did not derogate from article 14 of the European Convention (or from art 26 of the ICCPR, which corresponds to it.”); *Id.* ¶ 63 (“The Attorney General . . . accepted that article 14 of the European Convention and article 26 of the ICCPR are to the same effect.”); *Id.* ¶ 68 (“To do so was a violation of article 14. It was also a violation of article 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.”); *Id.* ¶ 69(4) (“[A]rticle 4(1) of the ICCPR, in requiring that a measure introduced in derogation from Covenant obligations must not discriminate, does not include nationality, national origin or ‘other status’ among the forbidden grounds of discrimination: . . . However, by article 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, article 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 articles 2 and 26 but the United Kingdom has not done so. If, therefore, as I have concluded, section 23 discriminates against the appellants on grounds of their nationality or immigration status, there is a breach of articles 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.”). Article 4(1) of the ICCPR provides that, “[i]n 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.” ICCPR at art. 4(1).

⁶¹ As Lord Walker, dissenting, explained,

the 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 Part 4 [on security detentions], should not be used to encroach on human rights any more than is strictly necessary.

A and Others v. Secretary of State, [2004] UKHL 56, ¶ 217.

⁶² *A and Others v. Secretary of State*, [2004] UKHL 56, ¶¶ 43, 67, 72.

⁶³ *Id.* ¶ 72.

simply have advised the government that it needed to provide equal treatment. But the Court went further, suggesting that restrictions on liberty short of detention should suffice. It noted that when one of the security prisoners was released on bail,

it was on condition (among other things) that 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. 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.⁶⁴

When the legislation was subsequently revised, it incorporated conditions of this nature. 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 28 days, to allow for indefinite security detention.⁶⁵

Whether indefinite security detention under a derogation could secure judicial approval in Europe today, as opposed to in 1961 when *Lawless* was decided, is thus open to some doubt. Technological change, in the form of electronic ankle bracelets and the like, may (or may not) have tipped the balance since *Lawless* away from security detention under derogation.

PROCEDURES FOR SECURITY DETENTION

Where security detention is allowed at all, the procedures for its use must be previously established by law.⁶⁶ They must also include the following procedural safeguards:

⁶⁴ *Id.* ¶ 35.

⁶⁵ See Mark Townsend & Jamie Doward, *Lock Terror Suspects up Indefinitely Say Police*, THE OBSERVER, July 15, 2007, available at <http://www.guardian.co.uk/uk/2007/jul/15/humanrights.terrorism>; Sarah Lyall, *British Intelligence Chief Sharpens Intelligence Warning*, N.Y. TIMES, Nov. 6, 2007, at A3. By early August 2008, however, even a more modest government proposal to extend the twenty-eight day detention period to forty-two days faced significant opposition in Parliament, and its prospects of passage seemed doubtful. Alan Travis, *Terrorism: Lords say 42-day law will put fair trials at risk*, GUARDIAN (London), Aug. 5, 2008, at 4.

⁶⁶ ICCPR, *supra* note 2, at 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 16, at art.

•Judicial Control. The detention must be subject to prompt and effective judicial control,⁶⁷ at least on the initiative of the detainee. The detainee must be entitled to take proceedings before a court to decide without delay on the lawfulness of detention.⁶⁸ This right is non-derogable.⁶⁹ There is arguably a gap in protection by means of judi-

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 21, at art. 6 (“No one shall be deprived of his freedom except for . . . conditions previously laid down by law.”); ADHR, *supra* note 18, at art. 25 (“No person may be deprived of his liberty except . . . according to the procedures established by pre-existing law.”); Body of Principles, *supra* note 12, at principle 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.”). Although as noted in the preceding text, the ECHR does not allow security detention except, perhaps, by derogation. The ECHR states generally, “[n]o one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law.” ECHR, *supra* note 14, at art. 5.1. 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. *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 62 (1961).

⁶⁷ ACHR, *supra* note 16, at 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 . . .”); Body of Principles, *supra* note 12, at principle 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.”); Body of Principles, *supra* note 12, at principle 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.”); Body of Principles, *supra* note 12, at principle 11(3) (“A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”).

⁶⁸ See ICCPR, *supra* note 2, at 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 1, ¶ 1. Provisions similar to ICCPR art. 9(4) include ACHR art. 7(6), ADHR art. 25, and ECHR art. 5(4). See also Body of Principles, *supra* note 12, at principle 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.”); Body of Principles, *supra* note 12, at principle 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 ACHPR is less explicit but does provide generally that every individual has the “right to an appeal to competent national organs against acts of violating his fundamental rights . . .” ACHPR, *supra* note 21, at 7(1).

⁶⁹ U.N. Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter HRC GC 29] (“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 16, at

cial control, insofar as IHRL treaties do not expressly mandate periodic judicial review of detention, or right to counsel. However, they may reasonably be interpreted to require periodic judicial review.⁷⁰

- Notice of Reasons and Consular Rights. The detaining authorities must inform the detainee of the reasons for her detention⁷¹ and, if she is foreign, of her right to communicate with her consulate for assistance.⁷²

- Communications. The detention must not be *incommunicado* for more than a few days.⁷³ The prisoner should be entitled to communicate with family and counsel.⁷⁴

art. 27(2) (listing, 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.” *Habeas Corpus in Emergency Situations*, Inter-Am. C.H.R., Advisory Opinion, OC-9/87 (Jan. 30, 1987).

⁷⁰ See Body of Principles, *supra* note 12, at principle 11(3) (“A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”); See Report on Terrorism and Human Rights, *supra* note 31, ¶ 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.”).

⁷¹ ICCPR, *supra* note 3, at art. 9(2) (“Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest”); see also HRC GC 8, *supra* note 1, ¶ 1 (showing that 9(2) is applicable to all deprivations of liberty); ACHR, *supra* note 18, at art. 7(4) (“Anyone who is detained shall be informed promptly of the reasons for his detention.”); Body of Principles, *supra* note 12, at principle 10 (“Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest”).

⁷² Body of Principles, *supra* note 12, at principle 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 also *La Grand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 515 (June 27); *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, 1999 Inter-Am. C.H.R. (ser. A) No. 16 (Oct. 1, 1999).

⁷³ Body of Principles, *supra* note 12, at principle 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: *Id.* at principle 16(4) (“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.”); *Id.* at principle 18(3) (“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.”). See also *Velásquez Rodríguez v. Honduras*, Inter-Am. C.H.R. (ser. C) No. 4, ¶ 187 (July 29,

- Registration. The detention must be registered.⁷⁵ There must be no “prisoners without a name in cells without a number.”⁷⁶
- Fair Judicial Hearing. The hearing in which a detainee contests the lawfulness of his detention must be fair and presumptively public, before an independent and impartial tribunal established by law.⁷⁷ A fair hearing affording due process of law must, at minimum, afford 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.”⁷⁸ Arguably it must also ensure the right to counsel for the detainee.⁷⁹

1988) (“The 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.”).

⁷⁴ Body of Principles, *supra* note 12, at principle 19 (stating that “[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”).

⁷⁵ “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 status as norms of general international law.” HRC GC 29, *supra* note 69, ¶ 13(b). The Body of Principles 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.” Body of Principles, *supra* note 12, at principle 12.

⁷⁶ See JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (Toby Talbot trans., 1982).

⁷⁷ ICCPR, *supra* note 2, at art. 14(1); ECHR, *supra* note 14, at art. 6(1); ACHR, *supra* note 18, at art. 18(1); ACHPR, *supra* note 21, at art. 7(1).

⁷⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); see also *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (per curiam), 262–76 (Traxler, J., concurring) (4th Cir. 2008) (en banc) (remanding habeas petition brought by alleged terrorist detained as 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 national security, and requiring government on remand to bear burden of proof), *cert. filed*, Sept. 19, 2008.

⁷⁹ Body of Principles, *supra* note 12, at principle 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 has advised that the circumstances of a case such as “its significance, its legal character, and its context in a particular legal system

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."⁸⁰

EXTENT OF SECURITY DETENTION

The detention must be proportional; it must be no more restrictive or prolonged than strictly required by the exigencies of the security situation. If this is true of security detention by derogation from the right to liberty,⁸¹ *a fortiori* it must apply as well to security detention where there has been no derogation.

EQUAL TREATMENT OF SECURITY DETAINEES

Any security detention must be non-discriminatory,⁸² including as between citizens and foreigners.⁸³

HUMANE TREATMENT OF SECURITY DETAINEES

The treatment of the detainee must be humane and must not subject him to torture or to cruel, inhuman or degrading treatment or punishment.⁸⁴ Humane treatment includes regular access to medical care.⁸⁵

—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, 1990 Inter-Am. C.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.

⁸⁰ Body of Principles, *supra* note 12, at principle 29(1).

⁸¹ *See* A v. Secretary of State for the Home Department, [2004] UKHL 56, ¶¶ 30–44; *see also* HRC GC 29, *supra* note 69, ¶ 4 (noting that the proportionality limitation applies to the "duration, geographical coverage and material scope of the state of emergency and any measures of derogation").

⁸² ICCPR, *supra* note 2, at arts. 2(1), 26; ACHR, *supra* note 16, at arts. 1(1), 24; ADHR, *supra* note 18, at art. 2; ACHPR, *supra* note 21, at art. 20; Body of Principles, *supra* note 12, at principle 5(1).

⁸³ *See* A v. Secretary of State for the Home Department, [2004] UKHL 56, ¶¶ 45–69; *see also* HRC GC 29, *supra* note 69, ¶ 8.

⁸⁴ ICCPR, *supra* note 2, at arts. 7, 10(1); ECHR, *supra* note 14, at art. 3; ACHR, *supra* note 16, at art. 5; ADHR, *supra* note 18, at arts. 1, 25; ACHPR, *supra* note 21, at art. 20; Body of Principles, *supra* note 12, at principles 1, 6.

⁸⁵ Body of Principles, *supra* note 12, at principle 24.

COMPENSATION FOR UNLAWFUL DETENTION

Detainees unlawfully detained have a right to be compensated.⁸⁶

OTHER INTERNATIONAL LAW

Since other provisions of international law must be complied with even under derogation,⁸⁷ the same requirement applies to security detention generally. The principal body of law that may thus be applicable is International Humanitarian Law, to the extent security detention is used in the context of armed conflict. In such cases both IHRL and the *lex specialis* of IHL apply.⁸⁸ The specific modalities by which both bodies of law may be applied are beyond the scope of this survey of IHRL.

CONCLUSION

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 subject to certain conditions. Under IHRL, security detention is allowed provided that it is neither arbitrary nor 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, and the detention must also comply with other provisions of international law where applicable, in particular with IHL.

IHRL would do well to follow the European model, which permits security detention, if at all, only by derogation. That approach makes clear that security detention is an extraordinary device to be used only in exceptional circumstances. The formalities of having to declare and defend states of emergency 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.

⁸⁶ ICCPR, *supra* note 2, at art. 9(5); ACHR, *supra* note 16; ECHR, *supra* note 14, at art. 5(5); *see also* Body of Principles, *supra* note 12, at principle 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.”).

⁸⁷ ICCPR, *supra* note 2, at art. 4(1); ECHR, *supra* note 14, at art. 15(1); ACHR, *supra* note 17, at art. 27(1). In contrast, the ACHPR has no derogation provision. *See* ACHPR, *supra* note 21.

⁸⁸ *See* ICJ Wall, *supra* note 23, ¶ 106.

Whether security detention is done under the European model—only by derogation (if at all)—or is authorized without derogation, as currently allowed by IHRL generally, two central questions merit further consideration. First, what is the legal standard and evidentiary basis required to justify security detention? Given the fundamental liberty interests at stake in a prolonged detention, one might suggest a fairly high standard both as to the law and as to the evidentiary basis. Second, should security detention be allowed at all? Even if one takes the view that the criminal justice systems cannot cope with all security threats, is imprisonment always—or ever—necessary? Might a system of alternative restraints, including house arrest, electronic ankle bracelets and the other devices used in recent years in Britain, suffice? Acknowledging that some suspects have nonetheless managed to escape those restraints, can the devices be fine-tuned to be more efficient?

If security detention is to be allowed at all, it must be only with the greatest caution and restraint. Granting executive officials authority, on the basis of secret intelligence information and subject only to limited judicial review, to deprive persons of their liberty based on grounds of “security,” 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, on the basis of shaky intelligence information, that someone is a security threat. If security detention is not prohibited altogether, its use must be kept to an absolute minimum, and subjected to rigorous and redundant procedural safeguards.