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International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

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Chapter IX IHRL

Inherent to the concept of operational detention are a number of subjects that each find protection in IHRL. It not merely affects a person's liberty and security, but pertains to the safeguards that must be afforded to a detainee in the criminal or administrative process underlying his detention, his treatment in detention, and his transfer to another authority. This chapter aims to further examine the substantive content of the requirements that may be distilled from the IHRL-based norms relating to these subjects. These concern the substantive requirements of a sufficient legal basis and of strict necessity and proportionality as well as a number of procedural requirements. In addition, attention will be had to the fair trial guarantees; requirements pertaining to the treatment and conditions of detention; and requirements pertaining to the extra-territorial transfer of individuals deprived of their liberty. These will be dealt with in paragraph 2. Paragraph 1 will briefly address the notion of 'arbitrariness' central the prohibition of arbitrary deprivation of liberty, which forms the center of the present examination.

1. 'Arbitrary'?

As noted, Article 9 ICCPR and Article 7 ACHR each prohibit the *arbitrary* deprivation of liberty. In *Mukong v. Cameroon*, the UNHRC concluded that "[t]he drafting history [...] confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of *inappropriateness, injustice, lack of predictability* and *due process of law*." (1994d)¹⁷⁵⁸ The term 'arbitrary' is absent in Article 5 ECHR, which instead lists the grounds on which deprivation of liberty may take place. Nonetheless, in view of Article 5 ECHR, the ECtHR has opined that "the expressions 'lawful' and 'in accordance with a procedure prescribed by law' in Article 5 § 1 stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and *not arbitrary* [...]"¹⁷⁵⁹ It may therefore be concluded that the lawfulness of a deprivation of liberty under IHRL is subject to the determination of whether the deprivation of liberty was arbitrary or not.

2. Normative Substance of the Requirements of (Non-)Arbitrary Deprivation of Liberty

2.1. The Requirement of a Sufficient Legal Basis

A first substantive requirement for lawful deprivation of life is the requirement of a sufficient legal basis. It follows from the universal principle of *legality*, underpinning law as a whole. It entails that an individual may not be deprived of his personal and physical liberty

¹⁷⁵⁸ (1994d), *Womah Mukong v. Cameroon*, *Comm. No. 458/1991 of 21 July 1994*; also Nowak (2005), §§ 29-30.

¹⁷⁵⁹ (1998j), *Steel and Others v. the United Kingdom*, *App. No. 24838/94, Judgment of 23 September 1998*, § 54; (1981d), *X v. the United Kingdom*, *App. No. 7215/75, Judgment 5 November 1981*, § 43; (1996a), *Aksoy v. Turkey*, *App. No. 21987/93, Judgment of 18 December 1996*, § 76.

except on the grounds serving a legitimate aim (*substantive* aspect) and under the conditions (*procedural* aspect) set forth, *firstly*, in an accessible, foreseeable and certain domestic law, and *secondly*, in IHRL.¹⁷⁶⁰

In relation to domestic law, the ECtHR has held that

[i]t is essential that the applicable national law meet the standard of ‘lawfulness’ set by the Convention, which requires that all law, whether written or unwritten, be *sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail.*”¹⁷⁶¹

It follows that a legal basis for deprivation of liberty may not be secret or unpublished. Thus, the requirement of a sufficient legal basis is “[...] violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.”¹⁷⁶² The requirement of a valid *ground* for deprivation of liberty under IHRL concerns not only the initial reason for such deprivation, but also the reason for *continued* deprivation of liberty. The absence of a valid ground violates the principle of legality and renders the deprivation of liberty arbitrary.¹⁷⁶³

While the normative framework of IHRL prohibits the deprivation of liberty as a general rule, it is undisputed and generally recognized that the deprivation of liberty for reasons related to *criminal justice*, i.e. following an arrest, during the pre-trial and resulting from a conviction for the violation of a State’s penal codes, is lawful. Strict safeguards, however, regulate such detention. Thus, in the context of an insurgency, the members of an insurgency movement, or other persons otherwise affiliated with the insurgency may be deprived of their liberty as criminal detainees, provided that there is a sufficient legal basis in domestic law that permits such detention.

The legal basis for *security detention* within the ICCPR, ACHR and ECHR, however, is less certain. Indeed, neither the ICCPR, nor the ACHR provides an explicit basis for security detention. On the other hand, neither instrument explicitly rules out the possibility for security detention as an exception to the prohibition of arbitrary deprivation of liberty. In the absence of specifically listed grounds for deprivation of liberty, the language of the relevant provisions of the ICCPR and the ACHR suggests that, in principle, the deprivation of liberty may serve *any* aim, as long as it takes place “on such grounds and in accordance with such procedure as are established by law.”¹⁷⁶⁴ In relation to the ICCPR, the permissibility of security detention in terms of serving a legitimate aim may also be concluded from the fact that the UNHRC seems to acknowledge security detention – as a form of preventive detention – as a possibility in its General Comment 8,

¹⁷⁶⁰ Principle IV, IACiHR Principles. See also Article 9(1) ICCPR; Article 7(2) ACHR; Article XXV ADHR; Article 5(1) ECHR; Principles 9 and 12, UN Body of Principles. Also: Shah (2010), 308.

¹⁷⁶¹ (1998j), *Steel and Others v. the United Kingdom*, App. No. 24838/94, Judgment of 23 September 1998, § 54.

¹⁷⁶² (1997g), *C. McLawrence v. Jamaica*, Comm. No. 702/1996 of 18 July 1997, § 5.5

¹⁷⁶³ (1984a), *Ann Maria Garcia Lanzá de Netto v. Uruguay*, Comm. No. 8/1977, U.N. Doc. CCPR/C/OP/1; (1995c), *Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 60/91 (1995); (1980d), *William Torres Ramirez v. Uruguay*, Comm. No. R. 1/4 of 23 July 1980.

¹⁷⁶⁴ Article 9(1) ICCPR; Article 7(3) ACHR. See also Article XXV ADHR; Article 9 UDHR. This is further corroborated by the HRC, which in its General Comment 8 states that “paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.” Human Rights Committee (1982b), § 1. Also: Cassel (2009), 6.

[...] *if so-called preventive detention is used, for reasons of public security*, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.”¹⁷⁶⁵

However, to date, the UNHRC has not enunciated whether derogation from Article 9(1) ICCPR is required in order to render the internment for security reasons lawful.

Similarly, the IACiHR has explicitly addressed the issue of security detention. Principle III(2) of the IACiHR Principles and Best Practices for example states that

The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments. [...]

Preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society.¹⁷⁶⁶

As concluded by Cassel, generally, under the ICCPR and ACHR, “[...], 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.”¹⁷⁶⁷

Case law relating to the detention by the US of individuals in Guantanamo Bay indicates that, despite the absence of an explicit prohibition thereto, detention may not take place for just any purpose. As concluded by the UN Chairperson of the Working Group on Arbitrary Detentions and the UN Special Rapporteur on the Independence of Judges and Lawyers, “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 from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaida network.”¹⁷⁶⁸ This conclusion contributed to the overall 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.”¹⁷⁶⁹

The situation regarding security detention under the ECHR is yet again different. As noted, Article 5 ECHR specifically and exhaustively lists the grounds for deprivation of liberty. The restrictive list of Article 5 ECHR implies that, in principle, the deprivation of liberty on other grounds than those listed is unlawful under IHRL, even if this ground can be found in a State’s domestic law. While there is no doubt that insurgents may be arrested and detained for reasons of criminal justice, the limited approach clearly has some influence on the lawfulness of security detentions of insurgents. In the absence of a specific ground listed in Article 5 ECHR permitting security detention, such detention may arguably follow from the interpretation of any of the grounds listed in Article 5 ECHR. In that respect, only Article 5(1)(b) and (c) ECHR seem to be suitable candidates. On closer inspection, however, it

¹⁷⁶⁵ Human Rights Committee (1982b), § 4 (emphasis added).

¹⁷⁶⁶ Principle III(2), IACiHR Principles and Best Practices; IACiHR (2002), § 124.

¹⁷⁶⁷ Cassel (2009), 6.

¹⁷⁶⁸ United Nations Chairperson of the Working Group on Arbitrary Detentions et al. (2006), § 23.

¹⁷⁶⁹ United Nations Chairperson of the Working Group on Arbitrary Detentions et al. (2006), § 20.

must be concluded that these alternatives were not intended, and to date have not been reasonably interpreted to allow for security detention.¹⁷⁷⁰ Both will briefly be addressed.

Firstly, Article 5(1)(b) ECHR permits detention “in order to secure the fulfillment of any obligation prescribed by law.” However, as explained by the ECtHR in *Engel v. the Netherlands*, these words

concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration [...]. It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.¹⁷⁷¹

Examples of such “specific and concrete obligations” are the duty to perform military service, or the duty to file a tax form.¹⁷⁷² Article 5(1)(b) ECHR does not cover “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.”¹⁷⁷³

In turn, Article 5(1)(c) ECHR refers to “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.*” The majority opinion among scholars appears to be that this provision can be applied in a criminal law-context only.¹⁷⁷⁴ As concluded by Harris, O’Boyle and Warbrick:

[...] at first sight, Article 5(1)(c) could be read as authorizing a general power of preventive detention [...]. This 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.¹⁷⁷⁵

To open up Article 5(1)(c) to detention for security reasons would be tantamount to authorizing the temporally unlimited detention of anyone suspected of committing a criminal offence in the (near) future based on an *executive decision*. “Such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention.”¹⁷⁷⁶

In *Guzzardi v. Italy*, in relation to the detention of a suspected member of the Italian *maffia*, the ECtHR points at the difference between preventive detention for security reasons and

¹⁷⁷⁰ (1961b), *Lawless v. Ireland*, App. No. 332/57, Judgment of 1 July 1961 (Merits), §§ 8-15; (1980a), *Guzzardi v. Italy*, App. No. 7367/76, ECtHR (6 November 1980), §§ 101-102. See also Harris, O’Boyle & Warbrick (1995), 113 and 117.

¹⁷⁷¹ (1976b), *Engel and others v. The Netherlands*, App. Nos. 5100/71; 5101/71; 5102/71; 5102/72, Judgment of 8 June 1976 (Merits), § 69.

¹⁷⁷² Harris, O’Boyle & Warbrick (1995), 112-113.

¹⁷⁷³ Harris, O’Boyle & Warbrick (1995), 113, note 3.

¹⁷⁷⁴ Harris, O’Boyle & Warbrick (1995), 112-113.

¹⁷⁷⁵ Harris, O’Boyle & Warbrick (1995), 181, citing (1961b), *Lawless v. Ireland*, App. No. 332/57, Judgment of 1 July 1961 (Merits), §§ 51-53. However: Sassòli (2009), 448, contending that it appears difficult to draw this conclusion from the jurisprudence of the ECtHR, which in *Lawless v. England obiter dicta* points at a contradictory conclusion.

¹⁷⁷⁶ (1961b), *Lawless v. Ireland*, App. No. 332/57, Judgment of 1 July 1961 (Merits), § 14.

preventive detention for purposes of criminal prosecution, barring the former from its scope *ratione materiae*:

In any event, the phrase under examination is not adapted to 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 specific offence. This can be seen both from the use of the singular (“an offence”, “celle-ci” in the French text; see the Matznetter judgment of 10 November 1969, Series A no. 10, pp. 40 and 43, separate opinions of Mr. Balladore Pallieri and Mr. Zekia) and from the object of Article 5 (art. 5), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see the above-mentioned Winterwerp judgment, p. 16, par. 37).¹⁷⁷⁷

In *Jecius v. Lithuania*, the ECtHR came to a similar conclusion and ruled out the preventive detention of individuals based on Article 5(1)(c):

The Government stated that the applicant’s preventive detention was compatible with Article 5 § 1 (c) of the Convention as [...] the Code of Criminal Procedure had permitted detention with a view to preventing the commission of banditry, criminal association and terrorizing a person. [...] The Court observes that a person may be deprived of his liberty only for the purposes specified in Article 5 § 1. A person may be detained under Article 5 § 1 (c) *only in the context of criminal proceedings*, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence [...]. The Court considers therefore that preventive detention of the kind found in the present case is not permitted by Article 5 § 1 (c).¹⁷⁷⁸

Shortly after the attacks of 9/11, the UK adopted an immigration law authorizing the preventive detention of suspected terrorists who were non-UK nationals and who could not be transferred to their States of origin or elsewhere for fear that they may suffer torture. The UK Government argued that such detention was justified under Article 5(1)(c) ECHR as they were immigration measures. The ECtHR, however, held that the detention found no basis in Article 5(1). In its view, the detention measures were not taken with a view to transfer as such transfer was not foreseeable in the first place.¹⁷⁷⁹

The above is not to imply that security detention under the ECHR is unlawful under any circumstances. The limited list of Article 5 ECHR may be circumvented in two ways.

Firstly, Article 5 ECHR may be derogated from in times of emergency, provided such derogation itself is lawful. In other words, a State may circumvent the exhaustive list of legitimate aims in Article 5(1) ECHR via derogation. The extent to which derogation is possible, however, is subject to limitations, as was discussed in Part A. In fact, in the case of *Al-Jedda v. The United Kingdom*, the ECtHR held that, for security detention to be lawful, derogation is always required, even when the security detention is required for imperative reasons of security as mandated by LOAC.¹⁷⁸⁰

Secondly, it follows from the case of *Al-Jedda* that security detention does not constitute a violation of Article 5 ECHR when it is required as an obligation by the UNSC.¹⁷⁸¹

¹⁷⁷⁷ (1980b), *Guzzardi v. Italy*, App. No. 7367/76, Judgment of 6 November 1980, § 102.

¹⁷⁷⁸ (2000i), *Jecius v. Lithuania*, App. No. 34578/97, Judgment of 31 July 2000.

¹⁷⁷⁹ (2009a), *A. and Others v. United Kingdom*, App. No. 3455/05, Judgment of 19 February 2009, 29.

¹⁷⁸⁰ (2011a), *Al-Jedda v. United Kingdom*, App. No. 27021/08, Judgment of 7 July 2011.

¹⁷⁸¹ (2011a), *Al-Jedda v. United Kingdom*, App. No. 27021/08, Judgment of 7 July 2011.

2.2. The Requirements of Strict Necessity and Proportionality

The conventional texts all express the presumption that everyone has the right to liberty and security of the person, and that deviations from this presumption are permissible only in exceptional circumstances. It follows therefore that, for a deprivation of liberty to be lawful, the State must demonstrate that, in view of the concrete circumstances at hand, the measure leading to the deprivation of liberty is strictly required to attain a recognized legitimate objective.¹⁷⁸² More specifically, it may be argued that any deprivation of liberty must comply with the elements of *qualitative*, *quantitative* and *temporal* necessity.

In *qualitative* terms, the deprivation of liberty is always an *exceptional* measure,¹⁷⁸³ and must *firstly* serve, and be proportionate to, a legitimate aim. For example, according to Article 5(1)(c) ECHR a person may be deprived of his liberty “[...] for the purpose of bringing him before the competent legal authority on 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.” The necessity for deprivation of liberty follows from the individual’s risk of flight; the risk of an interference with the course of justice; the need to prevent crime; or the need to preserve public order. However, the necessity for a deprivation of liberty under Article 5(1)(c) ECHR is limited to criminal offences only, and may, as noted, not extend to preventive deprivation of liberty for reasons of security.¹⁷⁸⁴ Pre-trial detention therefore cannot be applied as a “general rule”.¹⁷⁸⁵ Similarly, deprivation of liberty may not result from mere convenience, or be used as a pretext to attain another goal,¹⁷⁸⁶ or simply find no basis whatsoever in, for example, a criminal offence.¹⁷⁸⁷

Secondly, qualitative necessity demands that there must be a *causal relation* between, on the one hand, the attainable legitimate objective of the deprivation of liberty, and, on the other hand, the *necessity* to deprive the individual of his liberty. Analogous to its meaning in relation to the deprivation of life, this aspect of qualitative necessity means that the deprivation of liberty must be ‘strictly unavoidable’ in the sense that less harmful alternatives remain ineffective or without any promise of achieving the legitimate purpose. In other words, the non-use of available, less harmful alternatives may render the deprivation of liberty arbitrary.¹⁷⁸⁸

¹⁷⁸² (1997a), *A. v Australia*, *Comm. No. 560/93 of 3 April 1997*, § 9.2; (1995d), *Garcia v. Peru*, *Case 11.006*, *Decision of 17 February 1995*, § 47.

¹⁷⁸³ (2000c), *Baumgartner v. Germany*, *Comm. No. 960/2000*, § 9.4.

¹⁷⁸⁴ (1994d), *Womah Mukong v. Cameroon*, *Comm. No. 458/1991 of 21 July 1994*, § 9.8. As stated by the IACiHR Principles, “[i]t shall only be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice, provided that the competent authority examines the facts and demonstrates that the aforesaid requirements have been met in the concrete case.” See also Nowak (2005), 233; Cassel (2008), 825; Principle III.2, IACiHR Principles.

¹⁷⁸⁵ Article 9(3) ICCPR; Principle III.2, IACiHR Principles.

¹⁷⁸⁶ (1989a), *Ciulla v. Italy*, *App. No. 11152/84*, *Judgment of 22 February 1989*.

¹⁷⁸⁷ (1989b), *Lukanov v. Bulgaria*, *App. No. 21915/93*, *Judgment of 29 November 1989*.

¹⁷⁸⁸ For example, the deprivation of liberty on the basis of Article 5(1) (e), which permits the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of un-sound mind, alcoholics or drug addicts or vagrants, is arbitrary when such person cannot “be considered as occasionally dangerous for public safety” or “that their own interests may necessitate their detention.” (1980b), *Guzzardi v. Italy*, *App. No. 7367/76*, *Judgment of 6 November 1980*, § 98.

The *quantitative* test of necessity demands that the interference with the liberty and security of the person is strictly proportionate to the legitimate aim pursued.¹⁷⁸⁹ In other words, it requires an assessment of whether the deprivation of liberty is more harmful to the liberty and security of the person than the legitimate objective of the operation necessitates. For example, a deprivation of liberty must take place on the basis of an individual decision taken in a specific case, and may not take place on a discriminatory basis (i.e. by focusing only on person's because of their sex, religion, ethnic background, *et cetera*). The deprivation of liberty of a whole group of individuals as a collective measure – for example because of their suspected membership to an insurgency movement – is disproportionate, even in times of emergency.

Finally, the requirement of strict necessity involves a *temporal* aspect. This aspect embodies one of the most fundamental aspects of the deprivation of liberty and implies that the deprivation of liberty is unlawful when, at the very moment of its application, it is not yet or no longer strictly necessary to achieve the desired purpose.¹⁷⁹⁰ Thus, a deprivation of liberty may not be applied in the anticipation of a necessity that is merely *presumed* to become manifest. IHRL requires the manifestation of a *concrete and specific* necessity, only *in response* to which force may be applied. Similarly, deprivation of liberty may no longer be applied when the necessity has subsided, partially or totally. It protects individuals against indefinite detention and is an aspect of the right to liberty and security of the person that is non-derogable. It is a responsibility of the detaining State to demonstrate the continued necessity to detain an individual. However, the detainee has the right to challenge the grounds for his detention before an independent court or authority. This right of *habeas corpus* will be discussed in more detail below.

While relevant to any form of deprivation of liberty, the requirement of strict necessity is particularly relevant to security detention, which is generally agreed to be permissible as an exceptional measure only, short of less harmful alternatives and requiring a continuing assessment of the threat posed by the insurgent to the security.

2.3. Requirements Pertaining to Procedural Safeguards

The mere fact that a State complies with its substantive obligations for lawful deprivation of liberty does not imply that the deprivation of liberty cannot be otherwise arbitrary. IHRL provides the individual with an important set of procedural guarantees that imposes upon the State commensurate obligations. These will be addressed below.

¹⁷⁸⁹ Human Rights Committee (1982b), §§ 1-4. (1990d), *Van Alphen v. Netherlands*, *Comm. No. 305/1988 of 15 August 1990*, § 5.8; (1999k), *Spakmo v. Norway*, *Comm.No. 631/1995*, UN Doc A/55/40 (vol. II), § 6.3; (1997a), *A. v Australia*, *Comm. No. 560/93 of 3 April 1997*, § 9.1; (1995d), *Garcia v. Peru*, *Case 11.006, Decision of 17 February 1995*, § 47.

¹⁷⁹⁰ Principle III(1), IACiHR Principles: “As a general rule, the deprivation of liberty of persons shall be applied for the minimum *necessary* period” (emphasis added); United Nations (2003b), § 60; IACiHR (1977), Section II, Part I. Also: Cassel (2009), 2.

2.3.1. The Requirement of Registration of the Detention in an Officially Recognized Place of Detention

Any person detained must be registered and held in an *officially recognized* place of detention.¹⁷⁹¹ Secret detention is prohibited. Thus, States are required to record the reasons for the arrest, 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; the identity of the law enforcement officials concerned; and the precise information concerning the place of custody. The denial, or refusal to deny or confirm, or the active concealment of the fact that an individual is detained amounts to *unacknowledged* detention, which is prohibited under international law and may amount to cruel and inhumane treatment.¹⁷⁹² In addition, these records of detention must be actively communicated to the detained person, his family, or his counsel, if any, in the form prescribed by law.¹⁷⁹³ Non-compliance with this aspect of the requirement of registration amounts to *unannounced* detention.

2.3.2. The Requirement to Grant a Detainee the Right to Communicate with the Outside World

Detaining States are required to permit the detainee to communicate with the outside world, i.e. family, friends, independent lawyers, the judiciary or doctors.¹⁷⁹⁴ While communication may be denied for a few days, States are generally prohibited from subjecting detainees to prolonged *incommunicado* detentions, save some exceptions.¹⁷⁹⁵ It has been acknowledged that prolonged deprivation of communication may amount to torture or cruel or inhuman treatment. As held by the IACtHR, in *Velasquez Rodríguez v. Honduras*:

[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.¹⁷⁹⁶

¹⁷⁹¹ Principles 12 and 16, UN Body of Principles; Principle IX, IACiHR Principles. See also Art. 10 (1) UN Declaration on the Protection of All Persons from Enforced Disappearance, and Principle 6, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by UN Economic and Social Council.

¹⁷⁹² Principle III.1 IACiHR Principles: “The law shall prohibit, in all circumstances, [...] secret deprivation of liberty since [it] [...] constitute[s] cruel and inhuman treatment.”

¹⁷⁹³ See also Principles 12(1)(b) and (d) of the UN Body of Principles.

¹⁷⁹⁴ Principles III.1 and XVIII IACiHR Principles

¹⁷⁹⁵ Principles 15, 16(4) and 18(3) UN Body of Principles

¹⁷⁹⁶ (1988e), *Velasquez Rodríguez v. Honduras, Judgment of 29 July 1988*, § 187. See also (1994a), *El-Megreisi v. Libyan Arab Jamahiriyah, Comm. No. 440/1990 of 23 March 1994*, § 5.4: “Mohammed El-Megreisi was detained incommunicado for more than three years, until April 1992, when he was allowed a visit by his wife, and that after that date he has again been detained incommunicado and in a secret location. Having regard to these facts, the Committee finds that Mr. Mohammed Bashir El-Megreisi, by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.” See also (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 August 2003)*, § 13: “the use of prolonged detention without any access to a lawyer or other persons of the outside world violates Articles of the Covenant (Arts. 7, 9, 10 and 14, para. 3 (b))”.

2.3.3. The Requirement of Prompt Notification of Reasons of Arrest and Detention and Access to Consular Rights.

Detaining States are under an obligation to notify detainees of the reasons for their arrest and detention.¹⁷⁹⁷ This obligation embraces both criminal detentions and security detentions, as confirmed by HRC, in General Comment 8.¹⁷⁹⁸ As explained by Shah, “this elementary safeguard exists to ensure that individuals know why they are being detained, which serves both to reduce the distress of being incarcerated, as well as allowing detainees to challenge the reasons for their detention.”¹⁷⁹⁹ It may therefore be said to constitute an element of the obligation of humane treatment, “as a person’s uncertainty about the reasons for his or her detention is known in practice to constitute a source of acute psychological stress.”¹⁸⁰⁰

The reasons for arrest must be given in a language the individual understands and contain sufficiently detailed information to indicate why the individual is being detained, so the individual can take immediate steps to challenge, and request a decision on the lawfulness of his security detention.¹⁸⁰¹ Thus, the mere statement that an individual has breached State security is insufficient, as the UNHRC held in *Ilombe and Shandwe v. Democratic Republic of Congo*.¹⁸⁰² In relation to foreign detainees, the detaining State is obliged to notify the detainee of his right to consular communication.¹⁸⁰³

The reasons for arrest must be provided *promptly*, i.e. within reasonable period of time after the moment of arrest, though not necessarily immediately thereafter.¹⁸⁰⁴ Seven hours is considered reasonable;¹⁸⁰⁵ seven days, however, is not.¹⁸⁰⁶

2.3.4. The Requirement to Provide a Person Deprived of Liberty with an Opportunity to Challenge the Lawfulness of Detention (*Habeas Corpus*)

A requirement of controversy in relation to security detention in particular is the granting of *habeas corpus*, which entails that a detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.¹⁸⁰⁷

As explained by Kālin:

The right to *habeas corpus*, i.e. the right to “take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” must be “real and not merely formal”, i.e. effective. This means that, “court review of the lawfulness of detention under Article 9, paragraph 4 [...] must include the possibility of ordering release, [and] is not limited to mere compliance of the detention

¹⁷⁹⁷ Article 9(2) ICCPR; Article 7(4) ACHR; Article 5(2) ECHR, Principle 10, UN Basic Principles; Principle V, IACiHR Principles.

¹⁷⁹⁸ Human Rights Committee (1982b), § 1.

¹⁷⁹⁹ Shah (2010), 309.

¹⁸⁰⁰ Pejic (2005), 384.

¹⁸⁰¹ Pejic (2005), 384.

¹⁸⁰² (2006c), *Ilombe and Shandwe v. Democratic Republic of Congo*, Comm. No. 1177/2003 of 17 March 2006.

¹⁸⁰³ Principle 16(2), UN Body of Principles; Principle V, IACiHR Principles.

¹⁸⁰⁴ Principle 14, UN Body of Principles;

¹⁸⁰⁵ (1990c), *Fox, Campbell and Hartley v. United Kingdom*, App. Nos. 12244/86, 12245/86 and 12383/86, Decision of 30 August 1990, § 42.

¹⁸⁰⁶ (1996i), *Peter Grant v. Jamaica*, Comm. No. 597/1994 of 22 March 1996, § 8.1.

¹⁸⁰⁷ Articles 9(4) ICCPR; 5(4) ECHR; 7(6) jo. 25 ACHR; 7(1)(a) ACHPR; Principle 32(1) of the UN Body of Principles; Article V, IACiHR Principles; Human Rights Committee (1982b), § 1 (emphasis added).

with domestic law.”¹⁸⁰⁸ In this regard, the Committee told Columbia that legislation allowing the security forces to carry out arrests without judicial order or to detain them in administrative detention without access to a court would violate Articles 9, 14 and 17.¹⁸⁰⁹ Sri Lanka was criticized that “the Prevention of Terrorism Act (PTA) remains in force and that several of its provisions are incompatible with the Covenant (Arts. 4, 9 and 14)” including provisions allowing “arrest without a warrant and permit[ing] detention for an initial period of 72 hours without the person being produced before the court [...], and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence”.¹⁸¹⁰

It thus follows that the right to *habeas corpus* is violated when detainees are held *incommunicado*.¹⁸¹¹ Also, the right of *habeas corpus* is subject to the principle of *equality of arms*, i.e. the detainee “must be allowed access to a lawyer and to appear in court to argue his or her case on equal terms with the prosecuting or other authorities; this right also implies that the detained person must have access to all relevant information concerning his or her case.”¹⁸¹² The lawfulness of the detention must be determined by an *independent and impartial court*, and not by a representative of the executive branch, such as a government minister.¹⁸¹³

IHRL does not explicitly demand a period for judicial review. However, it may be interpreted to require judicial review on a periodic basis.¹⁸¹⁴ It has however been argued that “if the circumstances surrounding the detention have not changed, or the detention has only been for a short period of time, then there is no requirement of periodic review.”¹⁸¹⁵

While conventional IHRL does not prohibit derogation from the right to *habeas corpus*, (quasi-)judicial human rights bodies such as the HRC,¹⁸¹⁶ organizations such as the ICRC,¹⁸¹⁷ as well as legal experts¹⁸¹⁸ have claimed its non-derogability. At least in so far IHRL mandates this, the right to *habeas corpus* must be granted to all insurgents in operational detention.

¹⁸⁰⁸ (1997a), *A. v Australia*, *Comm. No. 560/93 of 3 April 1997*, § 9.5.

¹⁸⁰⁹ (2004e), *Concluding observations on Columbia's Fifth Periodic Report*, *CCPR/CO/80/COL (25 March 2004)*, § 9.

¹⁸¹⁰ (2003c), *Concluding Observations on Sri Lanka's Combined Fourth and Fifth Periodic Reports*, *CCPR/CO/79/LKA (1 December 2003)*, § 13.

¹⁸¹¹ (1982c), *H. G. Dermit on behalf of G. I. and H. H. Dermit Barbato*, *Comm. No. 84/1981, (21 October 1982)*, *UN doc. GAOR, A/38/40*, § 10.

¹⁸¹² United Nations (2003a), 207-208.

¹⁸¹³ United Nations (2003a), 199; (1999a), *Amnesty International and Others v. Sudan*, *Comm. Nos. 48/90, 50/91, 52/91 and 89/93, Decision, 26th Session, Kigali, 1–15 November 1999*, § 60; (1999g), *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, *Comm. Nos. 143/95 and 159/96, 26th Session, Kigali, 1–15 November 1999*, §§ 31 and 34; (1961b), *Lawless v. Ireland*, *App. No. 332/57, Judgment of 1 July 1961 (Merits)*, § 14; (1978b), *Ireland v. the United Kingdom*, *Case No. 5310/71, Judgment of 18 January 1978*, §§ 199-200.

¹⁸¹⁴ (1998b), *Assenov and Others v. Bulgaria*, *App.No. 24760/94, Judgment of 28 October 1998*, § 162, in which it was held that Article 5(4) “requires that a person detained on remand must be able to take proceedings *at reasonable intervals* to challenge the lawfulness of his detention” and, “in view of the assumption under the Convention that such detention is to be of strictly limited duration, [...] *periodic review at short intervals is called for [...]*”.

¹⁸¹⁵ Shah (2010), 311.

¹⁸¹⁶ Human Rights Committee (2001c), 16; (1987b), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, *Advisory Opinion OC-8/87, January 30, 1987*; (1987d), *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, *Advisory Opinion OC-9/87, October 6, 1987*.

¹⁸¹⁷ ICRC (2008d).

¹⁸¹⁸ Cassel (2008), 829 and footnotes 130-132 (concerning the non-derogability of *habeas corpus*).

2.3.5. The Requirement of Compensation for Unlawful Detention

In the finding of an unlawful deprivation of liberty, the detaining State is under an obligation to compensate for the damages incurred as a result of the detention.¹⁸¹⁹

2.4. Additional Procedural Requirements for Criminal Detainees

In addition to the general procedural requirements set out above, two procedural requirements specific to criminal detainees follow from Article 9(3) ICCPR and Article 5(3) ECHR, to be precise:

- the right be brought promptly before a judge or other officer authorized by law to exercise judicial power;¹⁸²⁰
- the right to trial within a reasonable time or to release pending trial.¹⁸²¹

2.5. Requirements Pertaining to Fair Trial Rights

Other fundamental guarantees to be granted to detainees are fair trial guarantees, “aimed at the proper administration of justice.”¹⁸²² The right to a fair trial is acknowledged widely throughout the relevant frameworks of IHRL.¹⁸²³

Some fair trial guarantees, and their commensurate requirements, enjoy general application, and thus apply to both criminal and security detainees. These include the right of all persons to be treated equally before the courts and tribunals (more specifically the right of all persons to equal access to a court of first instance¹⁸²⁴ and the right of equality of arms and treatment without discrimination)¹⁸²⁵ and the right of all persons to a fair and public hearing by a competent, independent and impartial tribunal established by law¹⁸²⁶ (to include the

¹⁸¹⁹ Article 9(5) ICCPR; Article 7(5) ACHR; Article 5(5) ECHR; Article 35(1) UN Body of Principles.

¹⁸²⁰ Article 9(4) ICCPR; Article 7(6) ACHR; Article 18 ADHR; Article 7 AfCHPR; Principle 32 UN Basic Principles; Principles 4 and 11(3) UN Body of Principles. The initiative lies with the State, and the fulfillment of this requirement is thus not subject to a request for judicial review by the arrested individual. While ‘promptly’ does not mean ‘immediately,’ any delays must be explained and may in no case exceed a few days. See Human Rights Committee (1982b), § 2; (2004b), *Abdumalik Nazarov v. Uzbekistan*, *Comm. No. 911/2000*, holding that five days delay is too long, and (1988b), *Brogan & others v. UK*, *App. No. 11209/84, 11234/84/11266/84, Judgment of 29 November 1988*, holding that a delay of four days and six hours is too long.

¹⁸²¹ Article 9(3) ICCPR; Article 7(5) ACHR; Article 5(3) ECHR. Generally, individuals must be released, unless their prolonged detention is required “to ensure the presence of the accused at the trial, to avert interference with witnesses and other evidence, or the commission of other offences.” ((1992c), *W.B.E. v. The Netherlands*, *Comm. No. 432/1990 of 23 October 1992*, § 6.3). The element of ‘reasonable’ is contextual, depending on the complexity of the case, the conduct of the accused and the efficiency of the national authorities. See Shah (2010), 313.

¹⁸²² Human Rights Committee (1984), § 1.

¹⁸²³ Articles 10 and 11 UDHR; Article 14 ICCPR; Articles 8 and 9 ACHR; Articles 6 and 7 ECHR.

¹⁸²⁴ Human Rights Committee (2004b), § 9: “access to administration of justice must be effectively guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice.”

¹⁸²⁵ Equality of arms involves the obligation to ensure that all parties have the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage of either party. Neither may trials take place on a discriminatory basis.

¹⁸²⁶ While not mentioned in Articles 14(2) ICCPR, Article 6(2) ECHR; Article 8(2) as non-derogable, it is recognized to be of peremptory nature by the IACiHR, see IACiHR (2002), §§ 245 and 247. The term “independent” refers to a court’s ability to make decisions free from influence from any other branch of government, particularly the executive branch. For relevant case-law, see for example (1988a), *Belilos v. Switzerland*, *App. No. 10328/83*, *Judgment of 29 April 1988*, § 64. Impartiality refers to both subjective (no

right to be tried in one's presence;¹⁸²⁷ the right to be tried without undue delay;¹⁸²⁸ the right to public proceedings).¹⁸²⁹

In addition to the general fair trial guarantees, IHRL recognizes a number of fair trial guarantees specifically designed to protect criminal detainees. These include, but are not limited to:

- the right of the accused to be presumed innocent;¹⁸³⁰
- the right to adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;¹⁸³¹
- the right to be tried without undue delay;¹⁸³²
- the right to defend oneself in person or through legal assistance of one's own choosing; the right to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;¹⁸³³
- the right to call and examine witnesses;¹⁸³⁴
- the right to the free assistance of an interpreter;¹⁸³⁵

bias or prejudice from judges) and objective (ability of the court to offer guarantees to remove doubts as to their impartiality) impartiality. See, for example, (1997i), *Findlay v. United Kingdom*, App. No. 22107/93, Judgment of 25 February 1997, § 73.

¹⁸²⁷ This is a derogable right. A hearing *in absentia* is permissible provided the State has given effective notice of the hearing and the accused chooses not to appear. See for example (1990b), *Daniel Monguya Mbenge v. Zaire*, Comm. No. 16/1977 of 25 March 1983. The right to be present in person is also required in appeal proceedings if the appeal hears questions of both fact and law, and not only of law. See (1988c), *Ekebatani v. Sweden*, App. No. 10563/83, Judgment of 26 May 1988, § 31; (1992b), *Karttunen v. Finland*, Comm. No. 387/1989 of 5 November 1992.

¹⁸²⁸ Article 14(3)(c) ICCPR; Article 5(3) and 6(1) ECHR; Article 8(1) ACHR; Principle 38, UN Body of Principles; Article 47 EU Charter of Fundamental Rights. This right is derogable in case of emergency. As held by the IACiHR, such delay must be subject to judicial review and may not be indefinite. (2002h), *Report on Terrorism and Human Rights* (22 October 2002), §§ 253 and 262(c).

¹⁸²⁹ Article 14(1) ICCPR; Article 6(1) ECHR; Article 8(5) ACHR. See also Articles 10-11 UDHR; Article XXVI ADHR; Article 47(2) EU Charter of Fundamental Rights. This right entails, firstly, that the proceedings must be conducted publically and orally, and secondly, that the judgments must be made available to the public. See also: Human Rights Committee (2004b), § 29.

¹⁸³⁰ Human Rights Committee (1984), § 7; (2000f), *Gridin v. Russia*, Comm. No. 770/1997 of 20 July 2000, § 8.3; (1995a), *Allenet de Ribemont v. France*, App. No. 15175/89, Judgment of 10 February 1995, § 41. It is a duty of the State to prove the charge beyond reasonable doubt. The accused has the benefit of the doubt. This right is derogable, see Articles 14(2) ICCPR, Article 6(2) ECHR; Article 8(2) ACHR. For views to the contrary, see Human Rights Committee (2001c), §§ 11 and 16; IACiHR (2002), §§ 245 and 247.

¹⁸³¹ Article 14(3) ICCPR; Article 6(3)(c) ECHR; Article 8(2)(e) ACHR; Principle 18(2), UN Body of Principles.

¹⁸³² Article 14(3)(c) ICCPR.

¹⁸³³ The access to legal counsel must be ensured in the pre-trial stage and at all crucial stages of the proceedings. (1991c), *Little v. Jamaica*, Comm. No. 283/1988 of 1 November 1991, §§ 8.3-8.4; (2000a), *Averill v. United Kingdom*, App. No. 36408/97, Judgment of 6 June 2000, §§ 57-61; (1989c), *Resolution No. 29/89, Case 10.198, Nicaragua* (29 September 1989), OEA/Ser.L/V/II.77 rev.1, doc. 7, *Annual Report of the Inter-American Commission on Human Rights, (1989-1990), third statement and Conclusions*, § 2. The access to legal counsel must in principle be free of charges. See Articles 14(3) ICCPR; Article 6(3)(c) ECHR; Article 8(2)(e) ACHR.

¹⁸³⁴ Article 14(3)(e) ICCPR; Article 6(3)(d) ECHR; Article 8(2)(f) ACHR. This right is derogable according to the relevant derogation clauses within the ICCPR, ECHR and ACHR. However, the HRC and the IACiHR view the right as non-derogable. Human Rights Committee (2001c), §§ 11 and 16; IACiHR (2002), §§ 247, 251, 261(c)(iv) and 262(b).

¹⁸³⁵ Article 14(3)(f) ICCPR; Article 6(3)(e) ECHR; Article 8(2)(a) ACHR.

- the right of the accused not to be compelled to testify against oneself or confess guilt.¹⁸³⁶
- the right to be informed of available remedies and of their time-limits¹⁸³⁷
- the freedom of double jeopardy (*ne bis in idem*);¹⁸³⁸

Of the abovementioned guarantees, the right to counsel warrants particular attention in light of security detainees. The texts of the relevant treaty instruments suggest that this requirement is limited to criminal detainees only.¹⁸³⁹ ‘Soft law’ documents, however, extend the right to counsel to *all* detainees.¹⁸⁴⁰ This would imply that insurgents detained as security detainees also have a right to counsel. As stated by Cassel: “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.”¹⁸⁴¹ This seems to be corroborated by the HRC, which in its General Comment 20 on Article 7 ICCPR holds that “the protection of *the* detainee also requires that prompt and regular access be given to [...] lawyers [...]” This view seems to have been shared by the US District Court in the case of *Padilla v. Rumsfeld*. The US Government argued that security detainees do not have a right to counsel for fear that the presence of a counsel would disrupt the necessary “atmosphere of dependency and trust between the subject and the interrogator.”¹⁸⁴² The court rejected the US Government’s argument, not as “wrong”, but as “unconvincing” and therefore “speculative”,¹⁸⁴³ and could therefore not bar Padilla’s right to counsel.

2.6. Requirements Pertaining to the Treatment of Detainees

The requirements pertaining to the treatment of detainees can be separated in two categories: (1) treatment in the narrow sense (*stricto sensu*) and (2) material conditions. Both will be discussed below.

¹⁸³⁶ Article 14(3)(g) ICCPR; Article 8(2)(g) ACHR; Principle 21, UN Body of Principles. It is not expressly mentioned in the ECHR, but recognized by the ECtHR in its case-law. See (1993b), *Funke v. France*, App. No. 10828/84, Judgment of 25 February, 1993, § 44; (1996d), *John Murray v. United Kingdom*, App. No. 18731/91, Judgment of 8 February 1996, § 47; (2000m), *Quinn v. Ireland*, App.No. 36887/97, Judgment of 21 December 2000, § 47. While a fundamental right in IHRL and international criminal law, it is not mentioned as a non-derogable right in Articles 14(2) ICCPR, Article 6(2) ECHR; Article 8(2) ACHR. However, the IACiHR views it as a preemptory right. IACiHR (2002), §§ 247 and 261(c)(iii). Evidence obtained in violation if this right may not be used in a court of law. See Article 15 CAT; (2000d), *Coëme and Others v. Belgium*, App. No. 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, Judgment, 22 June 2000, § 128.

¹⁸³⁷ Article 14(5) ICCPR; Article 2(1) of Protocol 7 to the ECHR; Article 8(2)(h) ACHR; Article 7(1)(a) ACHPR. While not listed as non-derogable, the IACtHR considers it as such. IACiHR (2002), §§ 261(c)(v).

¹⁸³⁸ Article 14(7) ICCPR; Article 8(4) ACHR; Article 4, Protocol 7 to the ECHR; Article 50 EU Charter of Fundamental Rights.

¹⁸³⁹ Article 14(3)(d) ICCPR; Article 8(2)(4) ACHR ; Article 6(3)(c) ECHR.

¹⁸⁴⁰ For example, see Principles 17 and 18, UN Body of Principles; Principle V, IACiHR Principles and Best Practices.

¹⁸⁴¹ Cassel (2008), 840, footnote 225.

¹⁸⁴² As explained by the Director of the Defense Intelligence Agency, Admiral Jacoby in his testimony in (2003l), *Padilla v. Rumsfeld*, 243 F. Supp. 2d, 49: “Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. [...] 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.”

¹⁸⁴³ (2003l), *Padilla v. Rumsfeld*, 243 F. Supp. 2d, 53.

2.6.1. Treatment in Narrow Sense

Detaining States are under an obligation to treat all detainees with humanity and with respect for the inherent dignity of the human person.¹⁸⁴⁴ Both concepts – humanity and human dignity – are difficult to define and constitute broad notions. Clearly, it includes aspects related to the physical and mental health of detainees, but it also extends to the general vulnerability of detainees whilst in the hands and mercy of the detaining authority. As noted by Pejic,

[i]t is not possible to translate the obligation to respect the dignity of detained persons into a definitive list of concrete measures and safeguards that must be implemented in a detention setting, given that human dignity means different things to different people and that its constituent elements are dependent, among other things, on a person's cultural and religious background.¹⁸⁴⁵

Nonetheless, States have a positive obligation to ensure the freedom of detainees from

[a]ny hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.¹⁸⁴⁶

A principle requirement, highlighted here, is that under no circumstances may detainees be subjected to torture¹⁸⁴⁷ or to cruel, inhuman or degrading treatment or punishment.¹⁸⁴⁸ The distinction between the two prohibitions remains unclear, and has been interpreted differently by for example the HRC and¹⁸⁴⁹ the ECtHR.¹⁸⁵⁰

The prohibition of torture is a rule of *jus cogens*;¹⁸⁵¹ the prohibition of cruel, inhuman, or degrading treatment or punishment is not. Nonetheless, the prohibition of torture and other forms of cruel, inhumane and degrading treatment or punishment was, is and remains abso-

¹⁸⁴⁴ Article 10 ICCPR; Article 5 ACHR; implicitly: Articles 2, 3, and 4 ECHR.

¹⁸⁴⁵ Pejic (2011), 215.

¹⁸⁴⁶ Human Rights Committee (2001a), § 3

¹⁸⁴⁷ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 1 describes torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

¹⁸⁴⁸ Article 7 ICCPR; Article 5(2) IACHR; the Inter-American Convention to Prevent and Punish Torture, entered into force 28 February 1987; Article 3 ECHR; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/C(2002) 1 (Part 1) – Strasbourg, 26.XI.1987 (Text amended according to the provisions of Protocols no 1 (ETS No. 151) and no. 2 (ETS No. 152), entered into force 1 March 2002.

¹⁸⁴⁹ Human Rights Committee (2004c), § 4, basing the distinction on the nature, purpose, and severity of the treatment applied.

¹⁸⁵⁰ Available case-law suggests a distinction based on the intensity of the inflicted pain and suffering, torture being to most severe form. See (1978b), *Ireland v. the United Kingdom, Case No. 5310/71, Judgment of 18 January 1978*, § 167-168.

¹⁸⁵¹ (1998n), *The Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment of 10 December 1998*, § 153-157; (2001a), *Al-Adsani v. the United Kingdom, App. No. 35763, Judgment of 21 November 2001*, 60-61; Rodley (1999), 74.

lute in nature and scope and is non-derogable, despite recent attempts¹⁸⁵² to formulate a more restrictive prohibition, to invoke torture as a lawful means to extract information believed critical in so-called ‘ticking bomb’-scenario’s,¹⁸⁵³ or to evade responsibility for violation of the prohibition by ‘outsourcing’ torture by transferring detainees to other States.¹⁸⁵⁴

2.6.2. Treatment in Terms of Material Conditions

Measures and safeguards pertaining to the conditions of detention include, *inter alia*, rules on the following subjects: physical and mental integrity; dignity and respect; safety; food and drinking water; hygiene and clothing; personal belongings; accommodation; medical care; humanitarian relief; religion; open air and exercise; the treatment of women and minors; work and recruitment; family contact; discipline and punishment; transfer; records; public curiosity; death; complaint mechanisms; release; foreigners; and oversight.¹⁸⁵⁵ The failure of States to comply with the minimum measures and safeguards set out above in itself may amount to torture or cruel, inhumane and degrading treatment or punishment.¹⁸⁵⁶

2.7. Requirements Pertaining the Transfer of Individuals Deprived of Their Liberty

The transfer of detainees is subject to the principle of *non-refoulement*.¹⁸⁵⁷ IHRL prohibits the

¹⁸⁵² The US Government reinterpreted the definition of torture in Article 1 to those cases where “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.” Examples of permissible acts were listed, to include “(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, (10) the waterboard.” See Bybee (2002b). The practice of ‘waterboarding’, admitted to by the CIA, drew particular attention and has been revoked by the Obama Administration by The White House (2009a).

¹⁸⁵³ In support: A. Dershowitz, *The Torture Warrant: a Response to Professor Strauss*, 48 New York Law School Review (2004) 275, 275-294; A. Dershowitz, *Tortured Reasoning*, in: *Torture*, (S. Levinson ed., 2004) Start Page, 257-280; O. Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 Minnesota Law Review (2004) 1481, 1481-; Eric A. Posner, *Torture, Terrorism and Interrogation*, in: *Torture*, (S. Levinson ed., 2004) Start Page, 291-298. Rejecting: Rodley (2006); Rodley (1999), 182-183; Shue (2005); Nowak (2006). In general: Association for the Prevention of Torture (2007); Ginbar (2008). For a general analysis of ‘ticking time bomb-scenario’s’ and detention, see Ruys & Heyndrickx (2006).

¹⁸⁵⁴ Priest & Gellman (26 December 2002), *U.S. Decries Abuse but Defends Interrogations*; Van Natta Jr. (9 March 2003), *Questioning Terror Suspects in a Dark and Surreal World*.

¹⁸⁵⁵ For the precise rules on these subjects, see the principal soft-law documents referred to in this chapter.

¹⁸⁵⁶ For a discussion of relevant case-law, see Ruys & Heyndrickx (2006), 123-126.

¹⁸⁵⁷ On the principle of non-refoulement, see Gillard (2008); Lauterpacht & Bethlehem (2003); Droege (2008b). This principle is firmly rooted in refugee law (see Article 33, 1951 Refugee Convention; Article 2(3), OAU Convention governing the Specific Aspects of Refugee Problems in Africa. See also Goodwin-Gill & McAdam (2007)); LOAC (Article 12(2) GC III; Article 45(3) GC IV) and extradition treaties. It is explicitly mentioned in Article 3 CAT, Article 22(8) ACHR, Article 13(4) Inter-American Convention to Prevent and Punish Torture, Article 16 International Convention for the Protection of All Persons from Enforced Disappearance, and Article 19(2) of the Charter of Fundamental Rights of the European Union. In addition, the principle of *non-refoulement* has been recognized to be an implicit part of the ICCPR (via Article 7) (Human Rights Committee (2004c), § 12; UNHRC (2004), § 9; (1991a), *Chitlat Ng v. Canada*, *Comm. No. 469/1991 of 5 November 1991*, § 14.1; (1991b), *Kindler v. Canada*, *Comm. No. 470/1991 of 18 November 1993*, § 6.2.) and the ECHR ((1989d), *Soering v. the United Kingdom*, *App. No. 14038/88*, *Judgment of 7 July 1989*, § 91; (1990a), *Cruz Varas and Others v. Sweden*, *App. No. 15576/89*, *Judgment of 29 August 1990*, §§ 69-70; (1991d), *Vilvarajab and Others v. United Kingdom*, *App. No. 13163/87*,

transfer of persons to States where there is a real risk of violation of certain fundamental human rights, such as the prohibition from torture, or other forms of cruel, inhuman or degrading treatment or punishment. It also prohibits transfers where a person faces the risk of imposition or execution of the death penalty, also when such trial was in accordance with the necessary requirements,¹⁸⁵⁸ and even if the detaining State has reserved the right to impose the death penalty in times of war.¹⁸⁵⁹ More generally, transfer is prohibited if it is foreseen that a person will be exposed to a flagrantly unfair trial.¹⁸⁶⁰ The prohibition of *non-refoulement* also applies to subsequent transfers, i.e. the transfer of an already transferred individual from State B to a third State C.¹⁸⁶¹

The generally accepted threshold to determine the risk to ill-treatment or deprivation of liberty resulting from the transfer must “assessed on grounds that go beyond mere theory or suspicion” but does not have to be “highly probable.”¹⁸⁶² As held by the ECtHR in *Saadi v. Italy*, “[i]n order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bear-

13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991, §§ 102-110; (1996b), *Chahal v. United Kingdom*, App. No. 22414/93, Judgment of 15 November 1996, § 74).

¹⁸⁵⁸ (2010b), *Al-Saadoon and Mufilbi v. the United Kingdom*, App. No. 61498/08, Judgment of 2 March 2010, §§ 123, 142-143.

¹⁸⁵⁹ Article 2(1) ICCPR offers States the possibility to make a reservation to permit “[...] the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.” Such a reservation is not possible under the European human rights system. Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty in All Circumstances forbids States to do so. See also Article 19 of the Charter of Fundamental Rights of the European Union.

¹⁸⁶⁰ (1989d), *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989, § 113 (“The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”); (1992a), *Drożdż and Janousek v. France*, App. No. 12747/87, Judgment of 26 June 1992, § 110 (“The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice”). The HCR, in Human Rights Committee (2004a), § 12, has adopted general standards: “article 2 [...] entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.” See also the United Nations Model Treaty on Extradition, Annex to UN General Assembly resolution 45/116, 14 December 1990, article 3(f) (listing a violation of minimum fair trial guarantees as laid down in article 14 ICCPR as a mandatory ground for refusing extradition).

¹⁸⁶¹ (2000n), *T.I. v. the United Kingdom*, App. No. 43844/98, Admissibility Decision of 7 March 2000, 15; Committee Against Torture (1997), § 2.

¹⁸⁶² Committee Against Torture (1997), § 6. See also Human Rights Committee (2004c), § 12 (“must not expose individuals to the danger”); UNHRC (2004), § 9 (“substantial grounds for believing that there is a real risk of irreparable harm”); (1991a), *Chitat Ng v. Canada*, Comm. No. 469/1991 of 5 November 1991, § 14.1 (“to a real risk”); (1989d), *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989, § 91 (“when substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk”); (1991d), *Vihvarajah and Others v. United Kingdom*, App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991, §§ 102-110; (1996b), *Chahal v. United Kingdom*, App. No. 22414/93, Judgment of 15 November 1996, § 74 and 80. While different language is used, ‘[i]n practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Right Committee, the European Court of Human Rights, and the Committee against Torture [...] have all indicated in one form or another that, whenever an issue of refoulement arises, the circumstances surrounding the case will be subjected to rigorous scrutiny.’ Lauterpacht & Bethlehem (2003), § 247.

ing in mind the general situation there and his personal circumstances.”¹⁸⁶³ In addition, “[...] the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion.”¹⁸⁶⁴

It remains unclear whether transfer would be prohibited in cases other than those where there is a risk of torture or inhuman or degrading treatment or punishment, or where such transfer would not be in accordance with the State’s law.¹⁸⁶⁵

Finally, the principle of *non-refoulement* also implies a number of post-transfer obligations, to include the obligation to make reparations for transfers violating international law;¹⁸⁶⁶ the obligation to remain informed regarding the well-being and the location of transferred individuals; and an obligation to investigate allegations of mistreatment.

3. Observations

The purpose of this chapter was to conclude upon the permissible scope for operational detention of insurgents by examining the normative substance of the valid norms of IHRL. As is the case in regards of targeting, the question of whether an operational detention is lawful is subject to the compliance by a State with a body of strict substantive and procedural requirements.

The general premise underlying this framework is that is to be applied in situations of peace, where a State is in a position to establish and maintain a functioning criminal justice system, in which policy, public prosecutors, defence lawyers and judges can adequately operate. In that respect, the framework is reflective of a presumption that the government exercises control over territory, objects or persons – as the very concept of law enforcement already suggests.

In view of the permissible scope for the operational detention of insurgents on the basis of IHRL, it may be observed that the *criminal detention* of individuals – as a species of operational detention of relevance in counterinsurgency operations – is a typical measure of law enforcement that has a thorough legal basis in IHRL and is regulated by specific norms, the meaning of which has been strengthened by the case-law of international and domestic (quasi-)judicial bodies. While there can be no doubt that criminal detention is permitted, the applicability of these requirements in armed conflicts situations raises questions as to their feasibility, particularly in areas of ongoing hostilities where effective control over territory is absent or under strain. In addition, from an operational perspective, the requirements of criminal detention – when to be carried by counterinsurgent forces (trained to fight) – are likely to severely impact military operations.

Turning to *security detention* of insurgents, it must be immediately concluded that, unlike criminal detention, an explicit legal basis is missing in IHRL. Nonetheless, the overall conclusion must be that security detention is not altogether prohibited. It is recognized as an extraordinary measure that is to be applied exceptionally and (presumably) only when preceded by a lawful derogation. This forces States to carefully consider and continuously

¹⁸⁶³ (2008i), *Saadi v. Italy*, App. No. 37201/06, Grand Chamber, Judgment (28 February 2008), § 130; (1991d), *Vilvarajah and Others v. United Kingdom*, App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991, § 108.

¹⁸⁶⁴ (2008i), *Saadi v. Italy*, App. No. 37201/06, Grand Chamber, Judgment (28 February 2008), § 133.

¹⁸⁶⁵ UCIHL (2004), 40.

¹⁸⁶⁶ As noted by Gillard, “Although this obligation is unquestionable, actual practice indicating the form reparation should take is limited and consists principally of the findings and recommendations of human rights courts and other supervisory bodies.” Gillard (2008), 741.

scrutinize security detention at the stage of legislation; when the executive branch as a measure of emergency invokes it; and when the judiciary considers its necessity on a case-by-case basis.¹⁸⁶⁷

More problematic is the fact that some of the elements characterizing security detention do not easily correspond with many of the criminal justice-requirements under IHRL. For example, as fair trial guarantees are to be offered to all detainees, some of these guarantees clearly aim at the clarification of events having taken place in the past, whereas security detention is future-focused. Also, public proceedings are warranted; a requirement that, in view of the classified intelligence often used to support the necessity for security detention conflicts with a State's security interests. A final example concerns a conflict with the *habeas corpus*-rule, which requires that an independent and impartial court determines the lawfulness of the detention, thus suggesting that an administrative decision constitutes a violation of the right to habeas corpus.

As derogation of these rights is generally considered to be prohibited, the question is raised whether they can be readily applied in times of armed conflict, particularly in areas of ongoing hostilities where effective control over territory is absent or under strain.

In view of the above, the next question is whether the valid norms of LOAC contain similar rules and requirements that more adequately reflect the needs in armed conflict. It is to this issue that our attention will now turn.

¹⁸⁶⁷ Cassel (2008), 851.